

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

BS

JUN 22 2007

FILE:

EAC 05 181 51459

Office: VERMONT SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemand, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a general contracting and construction firm. It seeks to employ the beneficiary permanently in the United States as a construction carpenter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original February 13, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$13.29 per hour or \$27,643.20 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on appeal includes counsel's brief, a copy of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), a copy of *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), a copy of *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)), a copy of a statement, dated March 14, 2006, from [REDACTED] President, and Tim Siddons, Vice President, of the petitioner, copies of the petitioner's 2001 through 2005 Forms 1120S, U.S. Income Tax Returns from an S Corporation, and copies of the beneficiary's business' 2003 through 2005 Forms 1099-MISC, Miscellaneous Income. Other relevant evidence includes copies of the petitioner's 2001 through 2004 unaudited balance sheets and copies of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax Statements. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2005 Forms 1120S reflect ordinary incomes or net incomes from Schedule K of \$4,954, \$5,600, \$17,944, \$623 and \$1,449, respectively. The petitioner's 2001 through 2005 Forms 1120S also reflect net current assets of -\$31,155, -\$35,956, -\$38,223, -\$49,351, and -\$43,176, respectively.

The 2001 and 2002 Forms W-2, issued by the petitioner for the beneficiary, reflect wages earned by the beneficiary of \$9,932.64 in 2001 and \$5,310.47 in 2002.

The 2003 through 2005 Forms 1099-MISC, issued by the petitioner for the beneficiary's business, reflect wages paid to the beneficiary's business of \$37,996.00 in 2003, \$59,819.57 in 2004, and \$55,211.49 in 2005.

The petitioner's 2001 through 2004 unaudited balance sheets reflect net current assets of -\$3,605.34, -\$16,582.15, -\$18,849.45, and -\$29,976.72, respectively.<sup>2</sup>

The statements of [REDACTED] and [REDACTED] include the following:

[REDACTED] has a staff of 6 employees and over 25 part-time subcontractors.

[REDACTED] has been in continuous operation since 1986, a period of over 20 years.

[REDACTED] has never had an issue paying its employees' salaries or subcontractors' fees.

When [REDACTED] sells a job, it is sold based on a price structure which includes labor, materials, and profit for that job. [The beneficiary] receives the labor in the job based on predetermined rates. Therefore, [the beneficiary] should be considered as an income producer for the company rather than an overhead expense.

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

██████████ revenues have increased steadily from \$843,960 in 2001 to \$1,471,170 in 2005. Our company has realistic plans on continued growth, thereby increasing our ability to pay [the beneficiary's] salary.

From 2003 until the present, [the beneficiary] has served as a subcontractor to ██████████. During this period, ██████████ has provided all required materials for the job.

Each year, ██████████ pays substantially all of the company's profit as compensation to the two principal officers (i.e., us). This is confirmed by the fact that the company's officer compensation (line 7 of the Form 1120S) varies widely from year to year (as opposed to a salary), and parallels the company's annual revenues. Therefore, if we had employed [the beneficiary] at \$27,243 per year from 2001 until the present, we could simply have reduced the amount we would have paid out to ourselves at the end of the year by this additional amount. But in reality, the moneys spent on [the beneficiary's] labor generates its own profit making this unnecessary.

In summary, without question, ██████████ has been financially able to pay [the beneficiary] a salary of \$27,243 from April 27, 2001 until the present. In addition, our ability to generate a net profit on [the beneficiary's] full-time employment as well as our realistic plans for continued growth further supports our ability to pay [the beneficiary's] offered wage.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage of \$27,643.20 based on its longevity in the business, its substantial and steadily increasing revenues, officer's compensation, the income generated by the beneficiary, and the fees paid to the beneficiary's business.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claims to have been employed by the petitioner from June 2000 to the present. In addition, counsel has submitted Forms W-2, issued by the petitioner for the beneficiary, for the years 2001 and 2002. The Forms W-2 reflect wages earned by the beneficiary of \$9,932.64 in 2001 and \$5,310.47 in 2002. Furthermore, counsel had submitted Forms 1099-MISC, issued by the petitioner for the beneficiary's business, for the years 2003 through 2005. The Forms 1099-MISC reflect wages paid to the beneficiary's business of \$37,996.00 in 2003,

\$59,819.57 in 2004, and \$55,211.49 in 2005. Therefore, the petitioner has established that it employed and paid compensation to the beneficiary for work performed in the proffered position in 2001 through 2005.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$27,643.20 and the actual wages paid to the beneficiary. In 2001, the beneficiary was paid \$17,710.56 less than the proffered wage of \$27,643.20, and in 2002, the beneficiary was paid \$22,332.73 less than the proffered wage of \$27,643.20. In 2003 through 2005, the petitioner paid the beneficiary's business \$10,352.80, \$32,176.37, and \$27,568.29, respectively, more than the proffered wage of \$27,643.20. Therefore, the petitioner has established its ability to pay the proffered wage in 2003 through 2005.<sup>3</sup>

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from

---

<sup>3</sup> It is noted that the director in his denial stated that it was "impossible to determine from the miscellaneous income statements how much of the money went to the beneficiary and how much went to pay business expenses." The AAO is not concerned with the beneficiary's business expenses, only the amount paid to the beneficiary's business by the petitioner for work performed in the proffered position. That amount is obviously the moneys the petitioner had available to pay the beneficiary had the beneficiary been a regular employee, as the petitioner did, in fact, pay that amount to the beneficiary's business. In this case, the beneficiary's business was compensated more than the proffered wage of \$27,643.20 in 2003 through 2005.

its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

In the instant case, the petitioner's 2001 through 2005 net incomes from Schedule K were \$4,954, \$5,600, \$17,944, \$623, and \$1,449, respectively. The petitioner could not have paid the difference of \$17,710.56 in 2001 or \$22,332.73 in 2002 between the proffered wage of \$27,643.20 and the actual wages paid to the beneficiary of \$9,932.64 in 2001 and \$5,310.47 in 2002 from its net income in 2001 and 2002. The petitioner has previously established its ability to pay the proffered wage in 2003 through 2005 by paying the beneficiary's business more than the proffered wage of \$27,643.20.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2001 through 2005 were -\$31,155, -\$35,956, -\$38,223, -\$49,351 and -\$43,176, respectively. The petitioner could not have paid the difference of \$17,710.56 in 2001 or \$22,332.73 in 2002 between the proffered wage of \$27,643.20 and the actual wages paid to the beneficiary of \$9,932.64 in 2001 and \$5,310.47 in 2002 from its net current assets in 2001 and 2002 (the two years the petitioner had not previously established its ability to pay the proffered wage).

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$27,643.20 based on its longevity in the business, its substantial and steadily increasing revenues, officer's compensation, the income generated by the beneficiary, and the fees paid to the beneficiary's business. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

---

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In the instant case, the co-owners state:

When \_\_\_\_\_ sells a job, it is sold based on a price structure which includes labor, materials, and profit for that job. [The beneficiary] receives the labor in the job based on predetermined rates. Therefore, [the beneficiary] should be considered as an income producer for the company rather than an overhead expense.

While this may be true, it does not necessarily indicate that the petitioner will receive more jobs because of the employment of the beneficiary. Therefore, the AAO will not consider the probability of income generated by the beneficiary as proof of the petitioner's ability to pay the proffered wage.

Counsel and the co-owners claim that the petitioner's officers' compensation should be considered when determining the petitioner's ability to pay the proffered wage of \$27,643. The shareholders of an S corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S, U.S. Income Tax Return for an S Corporation. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that each co-owner holds fifty percent of the company's stock. According to the petitioner's 2001 through 2005 IRS Forms 1120S, the co-owners elected to pay themselves \$98,800, \$156,240, \$185,787, \$160,400 and \$156,000, respectively.

CIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In the present case, however, counsel is not suggesting that CIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their corporation. In presenting an analysis of the petitioner's Federal Tax Returns (Forms 1120S), counsel offers a compelling argument in regard to this issue. The tax returns show not only that the petitioner exercises a large degree of financial flexibility in setting employee salaries, but that the petitioner easily fulfills its salary obligations. Clearly, the petitioning entity is a profitable enterprise for its owners. Counsel asserts that the amount paid to the owners as officers' compensation is determined by the profitability of the corporation. None of these numbers represent fixed expenses. We concur with the arguments presented by counsel on appeal. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owners confirms that the job offer is realistic and that the proffered salary of \$27,643.20 can be paid by the petitioner.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter*

of *Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small “custom dress and boutique shop” on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary’s annual wage of \$6,240 was considerably in excess of the employer’s net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner’s simple net profit, including news articles, financial data, the petitioner’s reputation and clientele, the number of employees, future business plans, and explanations of the petitioner’s temporary financial difficulties. Despite the petitioner’s obviously inadequate net income, the Regional Commissioner looked beyond the petitioner’s uncharacteristic business loss and found that the petitioner’s expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner’s circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner’s ability to pay the proffered wage. In this case, in light of the petitioner’s long and continuing business presence (more than 20 years), since the petitioner has shown that it has paid total wages and compensation between \$144,128 and \$251,614 yearly, since the petitioner’s gross receipts have shown to be increasing each year, and since the proffered wage obligation after consideration of compensation already paid in the significant years is meager when compared to the petitioner’s continuous earnings of over \$1 million yearly, the AAO finds that the petitioner could pay the proffered wage in 2001 and continuing to the present.

In examining a petitioner’s ability to pay the proffered wage, the fundamental focus of the CIS’ determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner’s federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

**ORDER:** The director’s decision of February 13, 2006 is withdrawn. The petition is approved.