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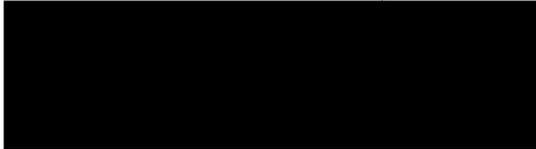
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: WAC 05 054 52644 Office: CALIFORNIA SERVICE CENTER Date: MAR 29 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

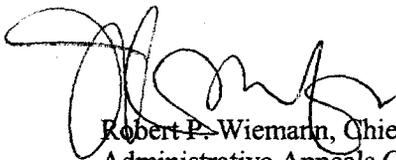
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** the Director, California Service Center, denied the preference visa petition and a subsequent motion to reopen. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a lodging manager. 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.

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 May 26, 2005 denial, 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 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 March 30, 2001. The proffered wage as stated on the Form ETA 750 is \$26.56 per hour or \$55,244.80 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

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which

appeal includes counsel's brief. Other Relevant evidence includes a copy of the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, copies of the petitioner's 2001 and 2002 Forms 1065, U.S. Partnership Return of Income, several bank statements for both owners, and copies of both owners' 2001 through 2003 Forms 1040, U.S. Individual Income Tax Returns. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2003 Form 1120S reflects an ordinary income or net income of \$1,309 and net current assets of -\$261,204.

The petitioner's 2001 and 2002 Forms 1065 reflect ordinary incomes or net incomes of \$38,174 and \$39,711<sup>2</sup>, respectively. The petitioner's 2001 and 2002 Forms 1065 also reflect net current assets of \$28,883 and \$7,782, respectively.

The owner's, [REDACTED] 2001 through 2003 Forms 1040 reflect adjusted gross incomes of \$214,453, \$141,579, and \$97,165, respectively. [REDACTED] supported a family of three during those years.

The owner's, [REDACTED] 2001 through 2003 Forms 1040 reflect adjusted gross incomes of \$26,414, \$52,513, and \$50,012, respectively. [REDACTED] supported a family of four during those years.

[REDACTED] provided statements from [REDACTED] showing ownership of mutual funds valued at \$166,169.63 as of December 2003 and valued at \$187,244.79 as of September 2004. [REDACTED] also submitted a bank statement showing his personal checking account containing funds of \$10,997.02 as of August 31, 2004.

The petitioner provided a bank statement for [REDACTED] showing its checking account having a balance of \$3,201.70 as of April 29, 2004.

[REDACTED] provided a statement from [REDACTED] that reflects certificate of deposits valued at \$100,267.88 as of September 30, 2004; a statement from [REDACTED] that reflects mutual funds of \$5,316.26 as of September 30, 2004; a statement from Scudder Investments that reflects funds valued at \$4,804.49 as of

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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> Where an S corporation's or partnership'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 or Form 1065. The instructions on the Form 1120S and Form 1065 state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation or partnership 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 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 and on lines 1 through 7 on Schedule K for Form 1065, 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, Schedule K for the petitioner's 2001 and 2002 Forms 1065 reflect net incomes of \$38,174 and \$39,711, respectively.

September 30, 2004; a personal savings account valued at \$3,128.79 as of September 30, 2004; a statement from Bank of America that reflects a personal savings account valued at \$39,037.91 as of September 30, 2004; a statement from Jackson National Insurance Company that reflects an ending balance of \$29,535.02 as of November 30, 2004; and a statement from Bank of America that reflects a personal checking account with an ending balance of \$1,462.54 as of November 17, 2004.

On appeal, counsel states:

Petitioner has no manager but contracts with sub contractors to perform most of the duties that the motel manager will perform such as: bookkeeping, as well as minor grounds keeping duties, and daily minor repair. Part of the duties are [sic] performed by the owners themselves. All of these expenses will immediately cease and the unused income will be applied to the beneficiary's salary upon his hiring.

Both partners of the corporation, [REDACTED] and [REDACTED] [sic], submitted copies of their personal tax returns, as well as their personal bank records, showing more than enough assets and income to pay the offered wages of \$55,000.

Proof of assets by the owners of the motel, the actual employers behind the corporate veil, which is enough to pay the offered salary suffices as proof of ability to pay the offered wages. There is enough income and assets and a willingness to be personally responsible by both partners.

The entire purpose of hiring the beneficiary is to have a full time person in charge of the hotel to improve quality of service and accordingly, increase volume and profitability.

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 March 26, 2001, the beneficiary does not claim the petitioner as a present or past employer. In addition, counsel has not provided any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary, demonstrating that the petitioner employed the beneficiary during the years 2001 through 2003. Therefore, the petitioner has not established that it employed the beneficiary in 2001 through 2003.

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.

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>3</sup> A corporation's and partnership'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 (15 through 17 for Form 1065). If a corporation's or partnership'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 2003 were \$28,883, \$7,782, and -\$261,204, respectively. The petitioner could not have paid the proffered wage of \$55,244.80 in 2001 through 2003 from its net current assets.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage of \$55,244.80 based on its owners' personal assets. However, in 2003, the petitioner filed its tax returns as an S Corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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<sup>3</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In 2001 and 2002, the petitioner filed its tax returns as a general partnership. A partnership consists of a general partner(s) and may also have limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment. The record of proceeding does not contain enough information regarding the general partners' personal expenses. However, a review of one of the partners' [REDACTED] 2001 and 2002 Forms 1040 demonstrates that even with substantial personal expenses, the partner would more than likely have sufficient funds to pay the differences of \$17,070.80 and \$15,533.80, respectively, between the net incomes of \$38,174 and \$39,711, respectively, and the proffered wage of \$55,244.80. [REDACTED] reported an adjusted gross income of \$214,453 in 2001 or \$197,382.20 more than the difference of \$17,070.80 between the net income of \$38,174 and the proffered wage of \$55,244.80. In 2002, [REDACTED] reported an adjusted gross income of \$141,579 or \$126,045.20 more than the difference of \$15,533.80 between the net income of \$39,711 and the proffered wage of \$55,244.80. Therefore, the AAO has determined that the petitioner has established its ability to pay the proffered wage in 2001 and 2002.

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 Sonogawa*, 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 Sonogawa*, 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, the petitioner has provided tax returns for the years 2001 through 2003. Since none of the tax returns establishes the petitioner's ability to pay the proffered wage, they are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth.<sup>4</sup> There is also no evidence of the petitioner's reputation throughout the

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<sup>4</sup> It is noted that the petitioner's 2001 through 2003 tax returns reflect \$0 salary and wages paid in each of those years and outside services of \$27,000 in 2001, \$22,041 in 2002, and \$12,000 in 2003. The gross receipts for those years were \$181,151 in 2001, \$168,607 in 2002, and \$40,288 in 2003. At no time during 2001 through 2003 did the monies paid for outside services equal or exceed the proffered wage of \$55,244.80.

industry. In order to utilize the owners' personal assets with regard to the petitioner's Forms 1065, the petitioner would need to supply the owners' personal monthly expenses. Provided that the owners successfully demonstrate that they possess sufficient funds to pay their monthly expenses, any additional available funds may be used to pay the wage of the beneficiary during 2001 and 2002.

The petitioner's 2001 tax return reflects an ordinary income or net income of \$38,174 and net current assets of \$28,883. The petitioner could not have paid the proffered wage of \$55,244.80 from either its net income or its net current assets in 2001. However, as explained above, a review of one of the partners' Form 1040 establishes that the petitioner had sufficient funds (based on the partner's adjusted gross income of \$214,453) to pay the difference of \$17,070.80 between the net income of \$38,174 and the proffered wage of \$55,244.80.

The petitioner's 2002 tax return reflects an ordinary income or net income of \$39,711 and net current assets of \$7,782. The petitioner could not have paid the proffered wage of \$55,244.80 from either its net income or its net current assets in 2002. However, as explained above, a review of one of the partners' Form 1040 establishes that the petitioner had sufficient funds (based on the partner's adjusted gross income of \$141,579) to pay the difference of \$15,533.80 between the net income of \$39,711 and the proffered wage of \$55,244.80.

The petitioner's 2003 tax return reflects an ordinary income or net income of \$1,309 and net current assets of -\$261,204. The petitioner could not pay the proffered wage of \$55,244.80 from either its net income or its net current assets in 2003. As the petitioner filed as an S Corporation in 2003, the owners' personal assets cannot be included when determining the petitioner's ability to pay the proffered wage.

The petitioner's 2004 and 2005 tax returns were also not submitted even though the returns should have been available when the appeal was filed on June 21, 2006. The petitioner must demonstrate a continuing ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). The petitioner is not precluded from submitting evidence on appeal and has the burden of proving eligibility for the benefit sought.

On appeal, counsel asserts that the beneficiary would replace the petitioner's sub contractors and that all those "expenses will immediately cease and the unused income will be applied to the beneficiary's salary upon his hiring." The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, the petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position.

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In addition, the petitioner's 2003 gross receipts of \$40,288 were less than the proffered wage of \$55,244.80. In 2001, the proffered wage of \$55,244.80 equaled approximately 30.5% of the petitioner's gross receipts of \$181,151, and in 2002, the proffered wage of \$55,244.80 equaled approximately 32.8% of the petitioner's gross receipts of \$168,607.

If those contractors performed other kinds of work, then the beneficiary could not have replaced him or her.<sup>5</sup> Therefore, the petition may not be approved.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not 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 not been met.

**ORDER:** The appeal is dismissed.

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<sup>5</sup> It is noted that the petitioner has failed to provide proof of any wages paid to either its employees or to its subcontractors in 2001 through 2003.