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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 22 2008
WAC 06 041 52653

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an apartment complex. It seeks to employ the beneficiary permanently in the United States as a maintenance supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d). Here, the ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the ETA 750A is \$23.66 per hour annualized to \$49,212.80 per year. Part B of the ETA 750, signed by the alien beneficiary on April 27, 2001, indicates that he has worked for the petitioner since 1987.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on November 18, 2005, it is claimed that the petitioner was established in 1987, claims an annual gross income of \$256,109, a net annual income of \$20,218.86 and currently employs ten workers.

In support of its continuing financial ability to pay the certified wage of \$49,212.80 per year and in response to the director's request for additional evidence, the petitioner provided copies of its Form 1065, U.S. Return of Partnership Income for 2001, 2002, 2003, 2004 and 2005. They indicate that the petitioner, a domestic limited partnership,¹ uses a standard calendar year to report its income. The returns contain the following information relevant to the petitioner's net income, current assets, current liabilities and net current assets:

	2001	2002	2003	2004
Net Income ²	-\$ 964,632	-\$1,026,661	-\$1,087,101	-\$1,589,126
Current Assets (Sched. L)	\$ 651,065	\$ 637,539	\$ 505,221	\$ 817,814
Current Liabilities (Sched. L)	\$3,140,443	\$3,560,235	\$3,954,135	\$ 244,483
Net Current Assets	-\$2,489,378	-\$2,922,696	-\$3,448,914	\$ 573,331

	2005
Net Income	-\$362,492
Current Assets (Sched. L)	\$967,361
Current Liabilities (Sched. L)	\$267,222
Net Current Assets	\$700,139

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets.³ Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A

¹ A limited partnership is formed under a state limited partnership law and composed of at least one general partner and one or more limited partners. A general partner is a partner who is personally liable for partnership debts. See Instructions for Form 1065 (2007). <http://www.irs.gov/pub/irs-pdf/i1065.pdf>.

² For a partnership, where a partnership's income is exclusively from a trade or business, Citizenship and Immigration Services (CIS) considers net income to be the figure shown on Line 22 of the Form 1065. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of the Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>. In the instant case, the petitioner's Schedule K has relevant entries for additional income and deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

partnership's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 15 through 17. If the 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. As noted above, the petitioner's net current assets for 2004 and 2005 are sufficient to pay the proffered salary and establish its ability to pay for this period.

The relevant Wage and Tax Statements (W-2s) provided to the record show that the petitioner paid the beneficiary the following compensation:

Year	Wages
2001	\$22,500
2002	\$23,918
2003	\$24,534
2004	\$25,109

The director denied the petition on June 21, 2006. Although the director determined that the petitioner's tax returns indicated that its current assets exceeded its current liabilities by an amount sufficient to cover the proposed wage offer in 2004 and 2005, she concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage because neither its net income, nor the difference between its current assets and current liabilities as shown on the 2001, 2002 and 2003 returns, was sufficient to cover the shortfall resulting from a comparison of the actual wages paid to the beneficiary and the proposed wage offer of \$49,212.80.

On appeal, counsel additionally provides copies of the petitioner's audited financial statements prepared in 2001, 2002, and 2003 by the petitioner's accountant, [REDACTED]. The statements include an income statement, balance sheet and statement of cash flows. The audited financial statements for the years 2001 through 2003 reflect that in 2001 the petitioner's net loss was reported on the income statement as -\$711,677. As shown on the balance sheet, the shortfall between current assets and current liabilities was -\$2,827,362. In 2002, the petitioner's net loss is shown as -\$773,631 and its net current assets were -\$3,220,139. In 2003, its net loss is reported as -\$834,137 and its net current assets were -\$3,749,939. Counsel also submits a letter from [REDACTED] dated September 15, 2006. In this letter, she asserts that the petitioner is an ongoing concern and suggests that the focus of the analysis should be on the cash flow statements which reflect increases of operating cash in each year.

Counsel further provides a copy of the Form 990, Return of Organization Exempt from Income Tax filed in 2003 by the petitioner's general partner, [REDACTED], as well as a copy of an unsigned real estate appraisal report relating to the petitioner's own value as an apartment property as a 33 million dollar property.

Counsel also cites an unpublished AAO decision in support of his assertion that the petitioner has established its continuing ability to pay the proffered wage. It is noted that such cases may offer guidance to the review of a current petition under consideration, but they are not considered a binding precedent within the regulation(s)

at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must published in bound volumes or as interim decisions.

On appeal, citing *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), and [REDACTED]'s letter, counsel contends that the totality of the circumstances indicating the petitioner's value as a multi-million dollar real estate company including payroll costs in excess of \$200,000, payment of outside contractors of \$300,000 to \$500,000, and payment of management fees from \$180,000 to \$500,000 establishes its continuing ability to pay the proffered salary. Counsel also adopts [REDACTED]'s discussion in her letter referring to an adjustment in the figures reflected as current liabilities on Schedule L of the tax return, but which, according to counsel, do not conform to the CIS definition of current liabilities. According to counsel, CIS describes current liabilities as those items which are expected to require cash payments by the petitioner within one year. As related to the petitioner's tax returns, he refers to line 16 of Schedule L of the Form 1065, which is reserved for "mortgages, notes, bonds payable in less than 1 year." In 2001, this is reported as \$356,536, which is claimed to be interest owed on a rehabilitation loan, but because of lender agreements with the petitioner the full accruing interest of 10% was not paid during 2001-2003. Rather, the amounts were reduced to \$30,000 per year. So counsel asserts that because these amounts were not actually expected to require cash payments by the petitioner within one year, the \$356,536 reported on the tax return should be considered as \$30,000 in the calculation of net current assets.

Counsel cites no pertinent legal authority for the assertion that the petitioner's current liabilities should be reconfigured beyond what has actually been characterized by the petitioner on the pertinent lines of Schedule L and will not be considered persuasive. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record indicates that the shortfall between the actual wages paid to the beneficiary and the proffered wage during 2001, 2002 and 2003 may be reflected as follows:

2001	-\$21,712.80
2002	-\$25,294.80
2003	-\$24,678.80

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 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 (7th Cir. 1983); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. While recognizing counsel's assertion that the petitioner's statement of cash flows should be persuasive, it must be stated that cash flow is not a substitute for profit. What cash flows do not impart is the profit or loss sustained by the business during a given period and also the financial condition of a business at the end of a period. That information is contained in the respective income statement and balance sheet of the petitioner.

It is noted that depreciation will not be added back to a petitioner's net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng Chang* at 536.

As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources. Total assets include depreciable assets that the petitioner uses in its business. It is noted herein that the value of the petitioner's own real property upon which the apartments are located is not part of this consideration as they are long term assets and would not be converted to cash during the ordinary course of business and would not, therefore, become funds available to pay the proffered wage. Further, a 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.

Similarly, we do not find that an approval based on *Matter of Sonogawa*, 12 I&N Dec. 612, is appropriate in this case. In *Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner's tax returns for 2001, 2002 and 2003 contained in the record consistently reflect losses as net income and net current assets in each year and do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. No evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonogawa* have been submitted. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

In this matter, in 2001, neither the petitioner's net income of -\$964,632 nor its net current assets of -\$2,489,378 demonstrates its ability to pay the difference of \$21,712.80 between the proffered wage of \$49,212.80 and the actual wages of \$22,500 paid to the beneficiary.

In 2002, neither the petitioner's net income of -\$1,026,661, nor its net current assets of -\$2,922,696 establishes its ability to pay the shortfall of \$25,294.80 resulting from a comparison of actual wages paid to the beneficiary and the proffered wage.

Relevant to 2003, it is noted that on Form 990 line(s) 17 and 12, respectively, it shows that the general partner, [REDACTED]'s total expenses exceeded its total revenue by \$86,749. Counsel asserts that the cash amount of \$68,756 shown on line 45 of the balance sheet in Part IV of the return should be considered as sufficient to pay the proffered wage in that year. Although as a general matter, the petitioner's general partner's net income or net assets may be considered as supporting the petitioner's ability to pay the certified wage, it is not clearly evident on this return. The assets and liabilities are not clearly classified as current assets and liabilities. It is also noted that none of the pertinent schedules have been submitted with this return that might shed some light as to whether liabilities such as the \$501,304 in mortgages and other notes payable listed on line 64 b should also be included in this calculation. As the record currently stands, it may not be concluded that this Form 990 supports the petitioner's ability to pay the proffered wage in 2003.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.