

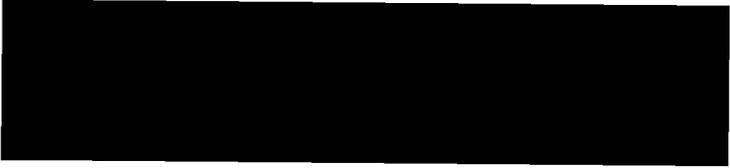


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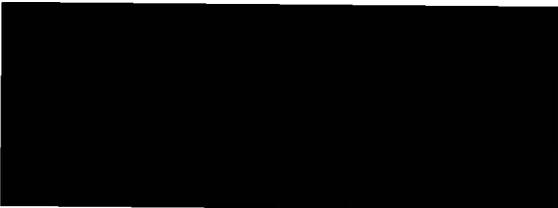
Date: **JUL 16 2008**

IN RE: Petitioner:
Beneficiary:



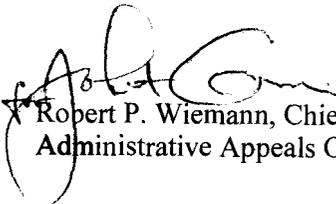
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Acting Director, Nebraska Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a healthcare company.¹ It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). 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.² The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 18, 2006 denial, the primary issue in this case is whether the petitioner has the ability to pay the proffered wage to the beneficiary 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.

On November 30, 2005, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse.³ Aliens who

¹ The petitioner identifies itself as a healthcare company on the Form I-140. In a cover letter that accompanied the I-140 petition dated November 28, 2005, the petitioner states that in 2003, it expanded its business operations to the recruitment of healthcare professionals from overseas. An Internet article originally printed in the *Democrat and Chronicle* in November 2003, in Rochester, New York, and included in the record identified the petitioner as a professional and technology services firm, advising utilities and energy companies on technology for customer service systems that also installed, supported and maintained the software and systems. The article also stated that the company used its recruitment background in 2003 to establish a new independent company to recruit nurses and other medical staff from overseas. The 2003 article quoted the petitioner's chief executive officer as saying with regard to the new business endeavor in the recruitment of health workers, "this will help us until the utility industry turns around." In correspondence between the petitioner and TLC Health Network dated February 7, 2006, Mr. [REDACTED] Director, Healthcare Practices, Blue Heron Consulting Corporation, listed two companies under his purview, Blue Heron Consulting Corporation and Blue Heron HealthPro LLC. The petitioner submitted federal tax returns for Blue Heron Consulting Corporation.

² The director also questions the nature of the job offer to the beneficiary, but does not deny the petition on that basis.

³ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification

will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has determined there are not sufficient U.S. workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of U.S. workers who are similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

- 1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
- 2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

The regulation 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 either 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 [CIS].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS on November 30, 2005. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$22 per hour (\$45,760 annually). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089, Application for Permanent Employment Certification, submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 9089 indicates a minimum educational requirement of a diploma in general nursing/associate's degree, with no experience required. Item 14 of Section H of the ETA Form 9089 indicates specific skills or requirements as follows: "Hold either a CGFNS certificate, a state license or pass the NCLEX-RN examination." The record indicates that the beneficiary has a baccalaureate degree in nursing from the Philippines, and a Commission on Graduates of Foreign Nursing Schools (CGFNS) certificate dated September 16, 2005.

applications for the permanent employment of aliens filed on or after that date. Therefore these regulations apply to this case because the filing date is November 30, 2005.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

On appeal, counsel submits a brief. Other relevant evidence in the record includes a letter from the petitioner to the beneficiary dated November 22, 2005, that indicated the beneficiary's first work assignment would be with TLC Health Network, Tri-County Memorial Hospital (Gowanda Campus), Cattaraugus County, New York, and that the petitioner would compensate the beneficiary at a rate of \$22 an hour plus a comprehensive employee benefit package.

The record also contains compiled financial statements for the petitioner for the years 2000 to 2004 prepared by Mr. [REDACTED], CPA, of Sardone, Robinson & Schnell, Rochester, New York.⁵ On the accountant's report, the accountant noted that as a privately held corporation, the petitioner is not required to prepare audited/certified financial statements, and in lieu of audited financial statements, the petitioner's owners hired an outside accounting firm to perform an independent review of the petitioner's bookkeeper's record and to prepare a compiled financial statement. The record also contains three business references from the following entities: [REDACTED], with the accounting firm named above, [REDACTED], of Scolaro, Shulman, Cohen, Lawler & Burstein, Syracuse, New York, and [REDACTED], of Bank of America, Rochester, New York. The documents prepared by the accounting firm included balance sheets, statements of income and retained earnings, as well as schedules of operating expenses.

The record also contains a "Comprehensive Master Services Agreement" between the petitioner and TLC Health Network, Gowanda, New York, dated July 12, 2004, pursuant to which TLC Health Network agrees to purchase healthcare personnel services from the petitioner.⁶ The petitioner also submitted a letter dated February 7, 2006, that described the designated rates to be paid to the petitioner for its services. The letter identified a permanent placement fee of \$9,000 per licensed registered nurse, after which the nurse became a

⁴ 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).

⁵ Another iteration of the petitioner's yearly financial statement is found in the record. In response to the director's request for further evidence (RFE) dated May 25, 2006, a document with a cover letter dated April 8, 2004, stated it was the petitioner's financial statement for 2002 and contained financial data as of December 31, 2001 and 2002. Mr. [REDACTED], of Sardone, Robinson and Schnell, also prepared this document. The figures contained in this document do not vary in the subsequent financial statement documents for the years 2000 to 2004.

⁶ The agreement pre-dates the filing of the petition in this case. It provides for the petitioner's provision of temporary supplemental labor, temporary to permanent supplemental labor, and direct permanent placement. It is not clear under which arrangement the beneficiary is covered in this case, but it is noted that the pertinent regulatory provisions at 20 C.F.R. § 656.3 provide that the intended employer applying for an alien labor certification must be the entity offering permanent full-time employment to the beneficiary. (*See, In Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968)). This would exclude an entity merely acting as an employment broker for the actual end-user employer.

TLC Health Network employee, and an hourly contract Placement Fee of \$45 per hour, in which the nurse employee remained a Blue Heron employee.

The record also contains the petitioner's compiled balance sheets for years ending December 31, 2003 and 2004. Submitted with the petitioner's compiled financial statements were the petitioner's IRS Forms 1120S for the tax years 1999, 2000, 2001, 2003, and 2004.

Included in the record are copies of three decisions: *Masonry Masters, Inc. v. Thornburgh*, 875 F. 2d 898 (D.C. Cir. 1989), *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986), as well as a copy of an interoffice memorandum written by William R. Yates, former Associate Director for Operations, CIS.⁷ The record also contains an Internet article dated November 9, 2003, from the website of the *Democrat and Chronicle* newspaper in Rochester, New York, that reviewed the 100 top businesses in the Rochester area.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1999 and to currently employ 42 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, signed by the beneficiary on October 20, 2005, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that director's decision was flawed as he had not cited a single decision from any superior court with regard to his findings. Counsel then states that oral argument is appropriate in the instant matter if CIS does not reopen the instant matter.

Counsel also states that the director's decision rested on his own summary conclusions of law and did not rely on the full body of case law from superior courts. Counsel points to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), *Elatos Restaurant v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986), and *Masonry Masters, Inc. v. Thornburgh*, 875 F. 2d 898 (D.C. Cir. 1989), as three relevant appellate decisions. Counsel notes that the director in his decision cited *Sonogawa* and *Masonry Masters, Inc.*, but did not cite *Elatos Restaurant v. Sava*. Counsel notes that from the director's denial it appears that CIS prefers to begin and end its analysis of the petitioner's ability to pay by looking at a petitioner's net income. Counsel states that the director failed to consider three other relevant factors, namely, the petitioner's additional financial documentary evidence; the petitioner's reputation; and the beneficiary's prospective employment as it relates to the petitioner's profitability.

With regard to the petitioner's reputation, counsel states that the instant petitioner has a reputation that at a minimum matches the petitioner in *Sonogawa*. Counsel notes that the petitioner has been cited as one of the "100 Bright Spots" in the Rochester, New York business community by the local press,⁸ and that it provides staff to credible well-established facilities such as TLC Health. Counsel also states that the petitioner provided several business references in its response to the director's RFE, including from one of the country's largest banks.⁹

⁷ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

⁸ The newspaper article taken from the Internet located in the record lists the petitioner as number five in its list of 100 top businesses.

⁹ Counsel appears to refer to the three references listed by the petitioner on its compiled financial statements that identify the petitioner's accountant, and possibly its attorney and its Bank of America account

With regard to additional financial evidence, counsel states that although the petitioner submitted a copy of its last three federal tax returns, the director did not mention this in his denial.¹⁰ Counsel provides the same graph provided in the petitioner's response to the director's RFE for the years 2003, 2004, and 2005 that listed items such as gross income, net income, net current assets, salaries to employees, non-salary expense, and what appears to be the percentage of non-salary expense to salary expense.¹¹ Counsel also notes that the petitioner in its response to the director's RFE also provided certified financial statements for the years 2001 to 2004. Counsel lists the current assets, current liabilities, net current assets, and retained earning for each of these four years, as indicated on the financial statements.

On appeal, counsel disagrees with the rejection by the director of the petitioner's financial statements. Counsel states that the purpose of certified independently produced financial statements is different from the purpose of federal corporate income tax returns. Counsel asserts that the purpose of federal income tax returns is to paint a picture that reduces the petitioner's tax burden while still complying with generally accepted accounting principles, while the certified independently produced financial statements show a different picture of the business including cash flows, in and out of the petitioner and other financial data that is not necessarily needed on the federal corporate tax returns.

Counsel asserts that the courts have recognized this difference in purpose between tax returns and financial statements, and have chided CIS when it has attempted to dismiss relevant evidence, such as the petitioner's independently-produced certified financial statements. Counsel states that the decision in *Elatos Restaurant v. Sava* deemed the ability to pay test as "income tax returns supplemented by financial statements." Counsel states that the federal district court ruling in *Elatos Restaurant* recognized that additional financial evidence such as certified independently produced financial statements were relevant and had to be considered when evaluating a decision. Counsel provides five reasons for why the certified financial statements are credible and concludes that CIS' failure to even consider the evidence of the certified financial statements was not proper. Counsel states that if the director had reviewed the petitioner's financial statements, it would have been apparent that the petitioner's long-standing past payment of salaries to employees make it likely that the petitioner would pay the beneficiary's proffered wage. Counsel also notes that the petitioner had over \$600,000 in retained earnings to use in the event it needed extra cash.

With regard to the impact of the beneficiary's employment on the petitioner's profitability, counsel notes the director refers to the findings of *Masonry Masters* as "primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage." Counsel notes that this interpretation is wrong as the decision says nothing about CIS' ability to determine the proffered wage. Counsel adds that CIS does not have the authority to determine the proffered wage, since the Department of Labor has jurisdiction over this area. Counsel states that the plain language of the court's decision is that legacy Immigration and Naturalization Service (INS), now CIS, has repeatedly failed to properly analyze cases under 8 C.F.R. § 204.5(g)(2). Counsel notes that the petitioner still exists, is a viable concern, and still pays its employees' wages. Counsel also states that the *Masonry Masters* decision also held that when the employer submitted

representative in Rochester, New York.

¹⁰ The petitioner in its response to the director's RFE submitted five tax returns to the record, namely, 1999, 2000, 2001, 2003, and 2004. Counsel did not submit the petitioner's federal tax return for tax year 2005, the year of the priority date.

¹¹ Counsel refers to non-salary to salary expense ratios in his brief. Therefore the AAO assumes that this last figure refers to either a percentage or ratio of non-salary to salary expenses.

evidence that showed the beneficiary would add a marginal increase to the petitioner's income, it was the job of CIS to present countervailing evidence to disprove this conclusion.

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel requests oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant oral argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

Counsel also asserts that the director's dismissal of the petitioner's certified financial statements in his analysis of the petitioner's ability to pay the proffered wage was not proper. Counsel's assertion is not persuasive. Counsel submitted the petitioner's compiled financial statements for tax years 2000, 2001, 2002, 2003, and 2004. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Further, the priority date in the instant case is November 30, 2005. Financial documentation submitted for years prior to the priority date has little probative value in the determination of the petitioner's ability to pay the proffered wage as of the priority date.

The AAO notes that with regard to counsel's comments on *Masonry Masters, Inc. v. Thornburgh*, 875 F. 2d 898 (D.C. Cir. 1989), the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). It is noted that the court in *Masonry Masters* was primarily concerned with the former INS' attempt to estimate the prevailing wage during a period where the wage had not been designated by the DOL. *Id.* at 684-685. The court's decision also included a criticism of the former INS' approach to analyzing the petitioner's ability to pay a proffered wage and its hope that the INS would reveal what its theory was. Moreover, the evidentiary guidelines regarding a petitioner's ability to pay that the court in *Masonry Masters* expressed concern about are encompassed in the current regulation set forth at 8 C.F.R. § 204.5(g)(2). While the beneficiary's projected assignment may represent possible future revenue, it does not establish the petitioner's continuing financial ability to pay the proffered wage beginning as of the priority date as required by the regulation at 8 C.F.R. § 204.5(g)(2).

Counsel, in the instant matter, has provided no further details or evidentiary documentation as to how the beneficiary's employment as a nurse will significantly increase profits for a company that up to tax year 2003, primarily recruited technology personnel. Counsel's assertion that the \$22 hourly rate paid to the beneficiary will be more than offset by the \$45 hourly rate paid to the petitioner does not take into consideration the additional expenses to be undertaken by the petitioner in recruiting the beneficiary and providing her with the stated employment benefits package. Thus, counsel's hypothesis with regard to the impact of the beneficiary's employment on the petitioner's profitability cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel on appeal states that the petitioner submitted its three latest federal income tax returns in response to the director's request for further evidence, but that the director ignored these documents. In fact, the petitioner submitted the petitioner's IRS Forms 1120S for tax years 1999 (from August to December 1999), 2000, 2001, 2003, and 2004. Although counsel referred to figures such as the petitioner 2005 net income in his letter to the director, the petitioner's 2005 tax return was not submitted in response to the director's RFE or on appeal. The director did refer to the petitioner's tax return and identified the one tax year in which the petitioner had sufficient net income and net current assets to pay the beneficiary's proffered wage. Further in these proceedings, the AAO will examine all of the petitioner's submitted tax returns to further explain its analysis of net income and net current assets.

Counsel includes retained earnings in his analysis of the petitioner's ability to pay the proffered wage. However, the AAO would not utilize this item in its analysis of the petitioner's ability to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

As stated previously, the newspaper article submitted to the record previously mentioned that an independent company had been set up for the petitioner's healthcare recruitment efforts, and in the correspondence with TLC Health Network, the petitioner's director identified himself as the director of both Blue Heron Consulting Corporation and Blue Heron HealthPro LLC. Thus, the record is not clear as to whether the petitioner should be submitting the instant I-140 petition, and its federal income tax returns to the record, if an independent company or affiliate is actually performing the petitioner's healthcare recruitment business operations. For illustrative purposes, the AAO will examine the income tax returns submitted to the record.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner 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. In the

instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2005 or subsequently.

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 reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Contrary to counsel's assertions on appeal, 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 (9th Cir. 1984)); 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that legacy INS, 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. The court in *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 Chang* at 537.

The petitioner submitted its federal income tax returns for tax years 1999, 2000, 2001, 2003 and 2004 in response to the director's RFE. The petitioner's federal corporate income tax returns for these tax years are not dispositive of the petitioner's ability to pay the proffered wage as of the priority date, November 30, 2005. Counsel failed to submit the petitioner's 2005 income tax return in response to the director's RFE or on appeal. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Therefore, for the year 2005, the petitioner has not established that it had sufficient net income to pay the 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, including real property that counsel asserts should be considered. 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.¹² 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. Counsel failed to submit the petitioner's 2005 income tax return in response to the director's RFE or on appeal. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Therefore, for the year 2005, the petitioner has not established that it had sufficient net current assets to pay the proffered wage.

Thus, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. Therefore the petitioner has not established its ability to pay the proffered wage.

Counsel asserts in his brief accompanying the appeal and in his response to the director's RFE, that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel refers to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and states that the petitioner has a business reputation at least as prominent as that of the petitioner in *Sonogawa*.

Matter of Sonogawa relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2005 was an uncharacteristically unprofitable year for the petitioner. The record indicates that the petitioner was a business technology consulting firm and that in 2003 it diversified its business operations into the recruitment of nurses and other health workers. This change of business operations would have been two years prior to the filing of the instant petition. Thus, the petitioner's business in the recruitment of health workers would have been of significantly less duration than the petitioner's involvement in tailoring and clothes making in *Sonogawa*. In fact, the CEO in the article submitted to the record appears to suggest that this line of business operations might be temporary until the technology side of the petitioner's business operations picked up. Such a

¹²According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

business plan does not appear analogous to the long term clothes tailoring and production operations undertaken by the petitioner in *Sonegawa*.

With regard to the petitioner's historical ability to pay the proffered wage within the context of totality of circumstances referred to in *Sonegawa*, the record provides the following information with regard to the petitioner's net income in the previous tax years 1999 to 2004:

- In 1999, the Form 1120S stated net income¹³ of -\$5,537.
- In 2000, the Form 1120S stated net income of -\$10,098.
- In 2001, the Form 1120S stated net income of -\$39,099.
- In 2003, the Form 1120S stated net income of \$319,347.
- In 2004, the Form 1120S stated net income of -\$207,288.

Therefore, only in 2003 would the petitioner have had sufficient net income to pay the beneficiary's proffered wage. However, the AAO notes that the petitioner, based on CIS computer records, submitted 97 I-140 immigrant visa petitions during the years 2003 to 2007.¹⁴ The petitioner would have had to establish its ability to pay the wages of all beneficiaries of pending applications as of the 2005 priority date. The record as presently constituted, does not reflect evidence of the petitioner having sufficient net income during the years 1999, 2000, 2001 and 2004 to pay one employee at the salary level offered to the beneficiary, much less multiple beneficiaries. Thus, the petitioner's historical record does not add any further weight to the analysis of the petitioner's totality of circumstances, as illustrated in *Sonegawa*.

With regard to the petitioner's ability to pay the proffered wage based on its net current assets in tax years 1999 to 2004, the record provides the following information:

- The petitioner's net current assets during 1999 were -\$8,835.
- The petitioner's net current assets during 2000 were -\$25,572.
- The petitioner's net current assets during 2001 were -\$68,411.
- The petitioner's net current assets during 2003 were \$161,701.
- The petitioner's net current assets during 2004 were -\$259,214.

The AAO notes that only in 2003 would the petitioner have had sufficient net current assets to pay the beneficiary's proffered wage. However, as stated previously, the record reflects multiple beneficiaries of I-

¹³ 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 IRS Form 1120S. However, where an S corporation 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, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments or interest income shown on its Schedule K for tax years 2001, 2003, and 2004, the petitioner's net income is found on Schedule K of the tax returns for these years. For tax year 1999, and 2000, the petitioner had no additional adjustment or interest income shown on Schedule K, so for these years, the petitioner's net income is taken from line 21 of page one of the petitioner's IRS Form 1120S.

¹⁴ The petitioner also submitted 23 I-129 non-immigrant petitions to CIS during the years 2000 to 2005.

140 petitions submitted by the petitioner to CIS during these years. The record does not establish that the petitioner had sufficient net income or net current assets to pay the wages of multiple beneficiaries. Again, the petitioner's historical record does not add any further weight to the analysis of the petitioner's totality of circumstances, as this concept is illustrated in *Sonegawa*. Finally, the AAO notes that the petitioner did not submit its 2002 tax return. Therefore the petitioner's historic record is also incomplete.

While the record contains the petitioner's contract with TLC Health, the record contains no evidence as to the numbers of nurses or other healthcare professionals either recruited or hired by the petitioner as of the initial year it started providing such services, continuing to the 2005 priority date. The record is not clear as to what part of the petitioner's revenue is actually provided by the recruitment of healthcare workers, and whether this secondary line of business operations was profitable at any point from the 2003-2004 initiation of health care recruitment to the 2005 priority date. Thus, the actual profitability of the petitioner's business operations in its secondary line of business either prior to and following the 2005 priority date has not been established.

Counsel asserts that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings, beyond stating that the petitioner would charge its clients \$45 an hour for its nursing staff, while paying its nursing employees \$22 an hour. Further, 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.

Counsel on appeal also draws attention to the petitioner's aggregate amounts of salaries paid to employees as evidence that the petitioner has the ability to pay the proffered wage. However, the petitioner has provided no further evidence to explain to whom these salaries or compensation were paid in terms of specific jobs either in technology consulting or the provision of nursing care, or to explain why these salaries or costs of labor support the payment of the additional salaries of more employees.

Counsel also does not address an issue raised by the director in his denial of the instant petition, namely, the additional costs involved in the recruitment and employment of healthcare workers. Such expenses could include recruitment costs, transportation of beneficiaries to the United States, costs of obtaining required licensure, and/or directly or indirectly financing healthcare and other employee compensation benefits. Furthermore the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase business for the petitioner.

Counsel on appeal and in the petitioner's response to the director's RFE also did not address the issue of multiple beneficiaries. In his RFE, the director noted that the petitioner had to provide evidence as to its ability to pay the proffered wage for all beneficiaries of any additional petitions filed by the petitioner with CIS. In the alternative, the director stated that the petitioner could indicate which of its petitions it wishes to pursue, if the petitioner was unable to establish its ability to pay all beneficiaries. In his decision, the director stated that the petitioner had filed five more petitions at the time the priority date for the instant petition was established.¹⁵ Thus, the petitioner has to establish its ability to pay the proffered wages for all beneficiaries

¹⁵ As stated previously, the AAO notes that CIS computer records indicate the petitioner has filed 97 I-140

for whom petitions were still pending as of the November 30, 2005 priority date. Counsel did not respond to the director's statement with regard to multiple beneficiaries in his response to the director's RFE, or on appeal. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Therefore, for this additional reason, the petition cannot be approved.

Further, beyond the decision of the director,¹⁶ it is noted that the notice of posting of the job opportunity failed to contain an accurate and complete address of the Department of Labor Certifying Officer location where individuals may provide documentary evidence bearing on the application for certification under 20 C.F.R. § 656.10(d)(3)(iii). According to the DOL's Frequently Asked Questions (FAQs) found online at <http://www.foreignlaborcert.doleta.gov/faqs.cfm> (Question 3 under Notice of Filing and Question 4 under How to File), the address of the DOL certifying officer for New York is located at:

United States Department of Labor
Employment and Training Administration
Atlanta National Processing Center
Harris Tower
233 Peachtree Street, N.E., Ste. 410
Atlanta, Georgia 30303

The petitioner's notice incorrectly lists an address in New York for the Certifying Officer. The posting notice does not meet the requirements of 20 C.F.R. § 656.10(d)(3)(iii).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner. The tax returns do not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

petitions and 23 I-129 non-immigrant petitions, primarily during the years 2004 and 2005.

¹⁶ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).