

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: NOV 03 2008
LIN 06 162 51219

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)

IN 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 Acting Director, Nebraska Service Center. The case is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a production job shop. It seeks to permanently employ the beneficiary in the United States as a mechanical engineer. 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, the petitioner through counsel contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

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 [Citizenship and Immigration Services (CIS)].

The petitioner must establish that it has 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 the employment system

of the Department of Labor. See 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 750 was accepted on May 1, 2000. The proffered wage as stated on Part A of the ETA 750 is \$63,170 per year. On Part B of the ETA 750, signed by the beneficiary on May 1, 2000, the beneficiary claims to have worked for the petitioner since February 2000.

On Part 5 of the I-140, which was filed on May 1, 2006, the petitioner states that it was established on July 1, 1992, currently employs fifty-three (53) workers, reports an annual gross income of \$1,510,513, and an annual net income of \$42,656.

In support of its continuing ability to pay the proffered wage of \$63,170 per year, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2000, 2001, 2002, 2003, 2004 and 2005. The returns indicate that the petitioner uses a standard calendar year to file its tax returns. They contained the following information:

	2000	2001	2002	2003	2004	2005
Net Income ¹	\$ 50,711	\$ 56,813	-\$ 149,108	-\$231,984	-\$ 86,765	\$ 42,656
Current Assets	\$ 281,916	\$288,339	\$ 213,910	\$174,624	\$178,696	\$ 271,078
Current Liabilities	\$ 218,901	\$264,216	\$ 301,898	\$525,740	\$577,497	\$ 649,783
Net Current Assets	\$ 63,015	\$ 24,123	-\$ 87,988	-\$351,116	-\$398,801	-\$ 378,705

The petitioner also supplied copies of Wage and Tax Statements (W-2s) that it issued to the beneficiary in 2000 through 2005. They indicate that the following compensation was paid to the beneficiary:

Year	Wages
2000	\$30,340
2001	\$35,520
2002	\$40,016.40
2003	\$37,042.40
2004	\$42,891.20
2005	\$51,110.40

¹ 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 Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2000-2003) and line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, the petitioner's net income is found on line 23 of Schedule K on its tax returns for 2000-2003 and line 17e for 2004-2005.

It is noted that in 2002 and 2003, the petitioner reported additional compensation paid to the beneficiary on the Internal Revenue Service (IRS) Form 1099-MISC, Miscellaneous Income, in the amounts of \$2,600 and \$5,200, respectively.

The director denied the petition on October 11, 2006. Following a review of the evidence submitted, including the additional compensation paid to the beneficiary in 2002 and 2003, the director determined that although the petitioner had established its ability to pay the full proffered wage in 2000, 2001 and in 2005, it had not demonstrated its financial ability to pay the proffered wage in 2002, 2003 or 2004.

On appeal,² counsel contends that the petitioner demonstrated its ability to pay the proffered wage. Counsel asserts that in view of the petitioner's record of over one million in gross sales since 1992 and its employment of over 50 workers, the director erred in failing to request additional evidence that would have offered the petitioner an additional opportunity to explain why the petition was eligible for approval. We do not find that the director was obliged to request additional evidence in this case and note that the regulation at 8 C.F.R. § 103.2(b)(8) permits the director to deny an application or petition if there is evidence of ineligibility in the record notwithstanding any lack of required initial evidence.

Addressing the years of 2002, 2003, and 2004 where the director found that the petitioner's ability to pay the proffered wage had not been established, counsel asserts that despite the prevailing wage having been raised by nearly double in 2002 by the DOL, the petitioner retained the ability to pay the proffered wage in that year. She also claims that the petitioner's figure of \$568,162 for total assets as reflected on Schedule L of the corporate tax return was the appropriate figure to examine as it indicates the amount of funds available to the company at the end of the year. Counsel further advocates adding back the deduction taken for depreciation on Schedule L as it is a non-cash item and does not reflect any real expenditure of funds. Counsel contends that the same rationale should be applied to 2003 and 2004. Counsel cites no legal authority for these propositions and in this matter, they are not convincing. The undocumented assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further support for considering only net income and only current assets balanced against current liabilities will be provided below.

It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* financial ability to pay the proffered wage beginning at the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth

² We accept the explanation of the petitioner's counsel relating to difficulty of paying the fee to file the appeal and consider it as timely filed. For future reference, it is noted that despite the director's erroneous advice pertinent to the form used to file the notice of appeal, it remains the petitioner's burden to follow the regulatory provisions governing the filing of an appeal to the AAO, which, in this case, should have been submitted on Form I-290B rather than the EOIR Form-29 used for appeals presented to the Board of Immigration Appeals. See C.F.R. § 103.3(2)(i).

in the alien labor certification that the DOL certified is clear. Further, it is noted that ETA 750 does not identify the original amount of the proffered wage, but does carry the DOL stamp signifying an amendment of this amount to \$63,170 along with what appear to be the initials of the petitioner's president, Boris Raslin. As set forth above, the priority date is May 1, 2000.

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 because his employment was less than full-time or because his wages were less than the proffered wage is not relevant to this calculation. Actual amounts will be considered if they are supported by the documentation contained in the record. 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. The record in this case indicates that even including consideration of the total compensation paid to the beneficiary in 2002 as \$42,616.40 and in 2003 as \$42,242.40, the shortfall(s) between the compensation paid to the beneficiary and the proffered wage in 2002, 2003 and 2004 may be reflected as follows:

2002	-\$20,553.60
2003	-\$20,927.60
2004	-\$20,278.80

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 supported by federal case law. *See 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.

Additionally, it is noted that depreciation will not be added back to a petitioner's net income or net current assets calculation. 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*, 719 F.Supp. at 536.

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. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Counsel additionally contends that the beneficiary's duties include the necessity to travel abroad in order to handle the function and installation of metal products ordered by the petitioner's foreign clients. She asserts

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.

that the beneficiary's current status prohibits him from traveling and that this requires the petitioner to hire more expensive foreign firms to perform these functions. Counsel points to the cost of labor deductions taken by the petitioner on line 3 of Schedule A of its 2002-2004 tax returns in the amount of \$516,565 in 2002; \$516,963 in 2003; and \$376,522 in 2004 as evidence of available funds to pay the beneficiary if he had been able to travel and perform these duties. We do not find these assertions to be persuasive or supported by the record. No evidence has been provided that identifies the person(s), duties, specific compensation, or that the beneficiary would have been available as a replacement. 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. Further, counsel fails to specify why the beneficiary was prohibited from travel. It is noted that CIS electronic records indicate that during the relevant period, the beneficiary has held valid nonimmigrant H-1B status, then subsequently filed an application to adjust status to lawful permanent residency. Moreover, the 2004 tax return provided to the record shows no cost of labor deduction taken by the petitioner on line 3 of Schedule A as asserted by counsel. Counsel's unsupported assertions do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 at 506.

Counsel asserts that the petitioner's ability to pay the certified wage may be based on the magnitude of its overall business operations, including over one million in gross sales and reporting over \$500,000 in salaries and wages in 2004. As legal authority, counsel incorrectly cites a decision by its receipt number to the Board of Immigration Appeals. Apparently this reference may be intended to cite a previous AAO or director's decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel also refers to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) as justifying the petition's approval. That case, however relates 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 petitioner had 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.

In this case, the petitioner's gross sales have ranged over a million dollars during the years 2002, 2003 and 2004. However, its net income has never been higher than \$56,813 reported in 2001, with significant losses of \$149,108, \$231,984 and \$86,765 reported in 2002 through 2004, respectively. The record fails to substantiate any unique, uncharacteristic losses or reputational factors that would apply in this case so as to justify the petition's approval. It cannot be concluded that these facts represent a framework of success such as that discussed in *Sonogawa*, or that the petitioner has demonstrated that such unusual circumstances exist in this case, which are analogous to the facts set forth in that case.

The clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is May 1, 2000. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

As referenced by the director, the petitioner established its ability to pay the proffered wage of \$63,170 in 2000 because either its net income of \$50,711 or its net current assets of \$63,015 could cover the \$32,830 difference between the wages paid to the beneficiary and the proffered wage.

In 2001, the petitioner established its ability to pay the proposed wage offer of \$63,170 because either its net income of \$56,813 or its net current assets of \$24,123 was sufficient to cover the shortfall of \$27,650 resulting from comparing the \$35,520 wages paid to the beneficiary and the proffered wage.

In 2005, the petitioner demonstrated its ability to pay the certified salary of \$63,170 because its net income of \$42,656 was sufficient to cover the difference of \$12,059.60 between the actual wages of \$51,110.40 paid to the beneficiary and the proffered salary of \$63,170.

In 2002, 2003 and 2004 the ability to pay the proposed wage offer was not established. In 2002, neither the petitioner's net income of -\$149,108 nor its net current assets of -\$87,988 was sufficient to cover the \$20,553.60 difference between the salary of \$40,016.40 paid to the beneficiary and the proffered wage.

In 2003, neither the petitioner's net income of -\$231,984 nor its net current assets of -\$351,116 was sufficient to pay the \$20,927.60 difference between the proffered wage of \$63,170 and the salary of \$37,042.40 paid to the beneficiary.

Similarly, in 2004, neither the petitioner's net income of -\$86,765 nor its net current assets of -\$398,801 was sufficient to cover the difference of \$20,278.80 resulting from a comparison of the certified wage of \$63,170 and the \$42,891.20 salary paid to the beneficiary.

In this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's *continuing* financial ability to pay the proffered salary beginning at the priority date.

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.