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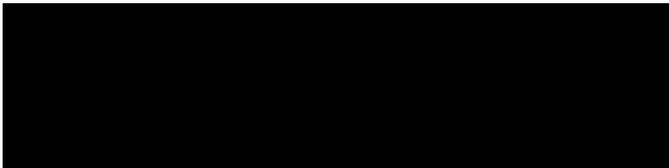
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U.S. Citizenship
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Services

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FILE: EAC 06 024 53002 Office: VERMONT SERVICE CENTER Date: NOV 25 2008

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:
[Redacted]

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.


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The director granted a subsequent Motion to Reopen and affirmed the previous decision of the director. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a moving and storage business. It seeks to employ the beneficiary permanently in the United States as a diesel mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly. The director granted a subsequent motion to reopen and affirmed the previous decision of the director.

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 August 14, 2006 and October 25, 2006 decisions, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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 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, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on May 2, 1997. The proffered wage as stated on the Form ETA 750 is \$18.70 per hour (\$38,896.00 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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.¹ On appeal, counsel submits a brief; the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for 1997 through 2004; the petitioner's combined compiled financial statements for 2005; an affidavit of the petitioner's sole shareholder; and the beneficiary's IRS Forms W-2, Wage and Tax Statement, issued by the petitioner for 2003, 2004 and 2005.² The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 16, 1997, the beneficiary claimed to have worked for the petitioner as a diesel mechanic from May 1989 to the date he signed the Form ETA 750B.

On appeal, counsel asserts that the totality of the petitioner's circumstances should be considered in the determination of the petitioner's ability to pay the proffered wage. Counsel states that in addition to the petitioner's net income, the wages the petitioner paid to its sole shareholder as officer compensation, its year-end cash balances, its depreciation expenses, the wages paid by the petitioner to the beneficiary, the petitioner's loans to its shareholders should also be considered in the determination of the petitioner's ability to pay the proffered wage. Further, counsel asserts that the petitioner's audited financial statements for 2005 show net current assets of \$102,541, which are sufficient to pay the proffered wage.³

¹ 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).

² The petitioner also submitted the beneficiary's IRS Form W-2 for 2002. However, the W-2 Form does not indicate that it was issued by the petitioner. No employer is listed on the beneficiary's Form W-2 for 2002.

³ 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 financial statements combine the balance sheets of several corporations. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [Citizenship and Immigration Services (CIS)] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the compiled financial statements submitted on appeal do not establish the petitioner's

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

In determining the petitioner's ability to pay the proffered wage 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 beneficiary's IRS Forms W-2 for 2003, 2004 and 2005 show compensation received from the petitioner, as shown in the table below.

- In 2003, the Form W-2 stated compensation of \$15,300.00.
- In 2004, the Form W-2 stated compensation of \$15,900.00.
- In 2005, the Form W-2 stated compensation of \$13,765.00.

Therefore, for the years 1997 through 2005, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2003, 2004 and 2005. Since the proffered wage is \$38,896.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid and the proffered wage, which is \$23,596.00, \$22,996.00 and \$25,131.00 in 2003, 2004 and 2005, respectively.⁴

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. 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

ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage for 2005.

⁴ Pursuant to a request for evidence (RFE) issued by the director on March 9, 2006, the petitioner was not requested to provide its 2005 tax return, annual report or audited financial statement, as such documents would not have been available at that time. Therefore, although the record closed on June 19, 2006, with receipt of the petitioner's response to the RFE, and at that time the petitioner's 2005 tax return, annual report or audited financial statement should have been available, such evidence is not required on appeal.

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 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 CIS 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's tax returns demonstrate its net income for 1997 through 2004, as shown in the table below.

- In 1997, the Form 1120S stated net income⁵ of \$70,815.00.
- In 1998, the Form 1120S stated net income of \$170,600.00.
- In 1999, the Form 1120S stated net income of \$74,303.00.
- In 2000, the Form 1120S stated net income of \$73,181.00.
- In 2001, the Form 1120S stated net income of -\$279,481.00.
- In 2002, the Form 1120S stated net income of \$214,541.00.
- In 2003, the Form 1120S stated net income of -\$267,363.00.
- In 2004, the Form 1120S stated net income of \$80,047.00.

Therefore, for the years 2001 and 2003, the petitioner did not have sufficient net income to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage. For the years 1997, 1998, 1999, 2000, 2002 and 2004, the petitioner had sufficient net income to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage.

⁵ 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) or line 17e (2004) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed October 20, 2008) (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 income shown on its Schedule K for 2000, 2001, and 2002, the petitioner's net income is found on Schedule K of its tax returns for 2000, 2001, and 2002. The petitioner's net incomes for 1997, 1998, 1999, 2003 and 2004 are shown on line 21 of page one of the petitioner's IRS Forms 1120S.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ 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 18.⁷ 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 and 2003, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -\$547,549.00.
- In 2003, the Form 1120S stated net current assets of -\$323,385.00.

Therefore, for the years 2001 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had 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.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel urges that the petitioner's Schedule L Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would likely be duplicative, at least in part. The petitioner's Schedule L Cash is included in the calculation of the petitioner's net current assets, which are considered separately from its net income.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the IRS Form 1120S, U.S. Income Tax Return for an S Corporation. For this reason, the petitioner's figures for compensation of officers may be considered as *additional financial resources* of the petitioner, in addition to its figures for ordinary income. The documentation presented here indicates that [REDACTED] holds 100% percent of the company's stock. However, according to the petitioner's tax returns, the petitioner paid no officer compensation in 2001 or 2003. Therefore, officer compensation is not available to establish the petitioner's ability to pay the proffered wage in 2001 or 2003.

CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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

⁶According 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.

⁷ Contrary to counsel's assertion, loans to shareholders are not current assets and, therefore, are not considered in the determination of the petitioner's ability to pay the proffered wage.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, CIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant matter, the petitioner has been in business since 1959. It paid salaries and wages of \$141,225; \$281,534; \$334,740; \$265,362; \$208,683; \$400,780; \$215,040; and \$68,055 in 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004, respectively, and paid costs of labor of \$425,955; \$502,744; \$630,138; \$683,547; \$590,937; \$394,990; \$658,098; and \$379,677 in 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004, respectively. The petitioner had gross receipts of \$2,442,712; \$3,650,455; \$4,815,577; \$4,678,784; \$4,600,660; \$4,446,241; \$3,838,487; and \$1,838,739 in 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004, respectively. The petitioner did not establish the occurrence of any uncharacteristic business expenditures or losses in 2001 or 2003,⁸ or the petitioner's reputation within its industry. Further, the petitioner asserts that it has employed the beneficiary since 1989 and, therefore, the beneficiary is not replacing a former employee or an outsourced service. Based on the longevity of the petitioner's business, its substantial wage and labor expenses, and its considerable gross receipts in each relevant year, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage.

The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

⁸ The petitioner's former counsel indicated that the petitioner's insurance premiums increased as a result of the events of September 11, 2001. However, counsel did not provide evidence to support this claim. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).