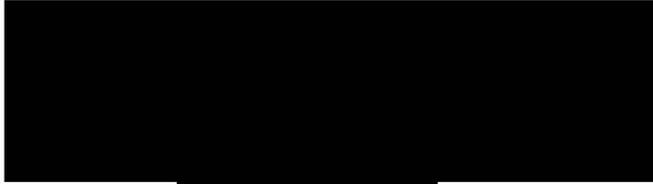


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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: OCT 17 2008
LIN 07 003 53352

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director (director), Nebraska Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an interior and exterior painting firm. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, an ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its 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.

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 for processing on April 13, 2001. The proffered wage as stated on Part A of the ETA 750 is \$12.00 per hour annualized to \$24,960 per year. Part B of the ETA 750, signed by the beneficiary on March 2, 2001, does not indicate that the petitioner had employed the beneficiary as of that date.

On Part 5 of the I-140, filed on October 2, 2006, the petitioner states that it was established on November 13, 1992 and currently employs three workers.

The petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2005 in support of its continuing ability to pay the proffered wage. The returns indicate that the petitioner files its taxes using a standard calendar year. The returns also contain the following information:

	2001	2002	2003	2004	2005
Net Income ¹	\$18,556	\$ 43,359	\$57,225	\$ 6,999	\$142,321
Current Assets	\$ 2	\$ 223	\$ 2,041	\$ 159	\$ 2,151
Current Liabilities	\$21,757	\$ 12,955	\$ 3,676	\$18,206	\$ 4,677
Net Current Assets	-\$21,755	-\$ 12,732	-\$ 1,635	-\$18,047	-\$ 2,526

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.² 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.

Following a review of the evidence submitted, the director denied the petition on April 27, 2007, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage. The director noted that the petitioner had filed another preference petition (LIN 06 168 52147) on May 17, 2006 in order to

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 the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23* (1997-2003) 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.). Because the petitioner had additional deductions shown on its Schedule K for 2001 through 2005, the petitioner's net income is found on Schedule K of its tax returns for 2001 through 2005.

² 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

sponsor another beneficiary identified as a painter. The certified wage of \$14.00 per hour is stated on the ETA 750, which amounts to \$29,120 per year. The priority date of the ETA 750 is also April 13, 2001. There is no evidence of employment or payment of compensation in the record of that case.

Where a petitioner files employment based petitions for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA 750 job offer to the beneficiary was realistic as of the respective 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).

On appeal, counsel asserts that the director should have issued a notice of intent to deny the petitioner prior to making his decision. We do not agree. The regulation at 8 C.F.R. § 103.2(b)(8) provides that if the record contains evidence of ineligibility, an application or petition shall be denied notwithstanding any lack of required initial evidence.

In denying the petition on April 27, 2007, the director noted that the petitioner had filed a petition for the other beneficiary with the same priority date. The director observed that the petitioner must establish its continuing ability to pay both beneficiaries' proffered wages as of April 13, 2001. The combined salaries of \$24,960 and \$29,120 amount to \$54,080. The director determined that although the petitioner established its ability to pay one beneficiary's salary in 2002 and both beneficiaries' salaries in 2003 and 2005, it had not demonstrated its ability to pay both the beneficiaries' salaries in 2001 or 2004 and had not provided any financial information supporting its ability to pay the certified wage for 2006 and continuing.

On appeal, the petitioner, through counsel, contends that the petitioner demonstrated its ability to pay the proffered wage and submits additional evidence in the form of Wage and Tax Statements (W-2s) issued by the petitioner to the beneficiary. Counsel initially suggests that Citizenship and Immigration Services (CIS) is precluded from reviewing the petitioner's ability to pay the proffered wage because the Department of Labor has approved the petitioner's application for labor certification. Counsel's contention is not persuasive. The financial viability of the employer to pay the certified wage is well within the province of CIS to investigate. As stated by the court in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (citing *Ubeda v. Palmer*, 539 F.Supp. 647, 649-650 (N.D. Ill. 1982), *aff'd mem.*, 703 F.2d 571 (7th Cir. 1983):

In Ubeda v. Palmer [citation omitted] the court concluded that the determination of a petitioning employer's financial viability is one to be made solely by the [CIS] and not the Secretary of Labor. In view of the agencies' current practice, which is given weight in determining the proper division of functions between the [CIS] and the DOL, *see Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983), we conclude likewise. . .

Counsel also suggests that the officer compensation represented on the petitioner's tax returns was discretionary and therefore should be added back to the corporate petitioner's income or net current assets to supplement its ability to pay the proffered wage. In this matter, we do not find this assertion to be persuasive.

It is observed that officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. There is also no first-hand evidence from the officer(s) that such compensation could have been foregone during the period given. Undocumented suggestions that the beneficiary would be assuming a portion of this compensation or that it may be considered funds available to pay the proffered wage are misplaced. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for the officer or other documentation to support such a claim. Also, there is no notarized, sworn statement in the record which attests to the claim that the beneficiary would assume any portion of such duties or compensation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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).

It is also noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Moreover, the officer compensation is not a significant sum in comparison with the funds that must be available to demonstrate the ability to pay.

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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period.

On appeal, counsel has submitted copies of Wage and Tax Statements (W-2s) issued by the petitioner to
They indicate the following:

Year	Wages
2002	\$16,055
2003	\$26,286
2004	\$27,330
2005	\$28,028
2006	\$27,860

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054 (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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

In this case, the W-2s indicate that the petitioner demonstrated its ability to pay the proffered wage of \$24,960 to the beneficiary through employment and payment of compensation in excess of the proposed wage offer in 2003 through 2006.

Based on wages paid to the beneficiary, the petitioner's ability to cover the proffered wage for both beneficiaries was demonstrated in 2002 because the \$43,359 net income reported in 2002 was sufficient to cover payment of the shortfall of \$8,905 resulting from a comparison of the beneficiary's wages of \$16,055 and the proffered wage of \$24,960, and the remaining \$34,454 in net income was enough to pay the proffered wage of \$29,120 to the other beneficiary.

In 2001, however, neither the petitioner's net income of \$18,556 nor its net current assets of -\$21,755 was sufficient to cover payment of either the beneficiary's wage offer of \$24,960 or the other beneficiary's proposed wages of \$29,120.

In the context of the financial information contained in the record, counsel maintains that the petitioner's case is similar to that described in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) where it was determined that the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. 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 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, as noted above, those factors have not shown to be present nor did the 2001 tax return or the record indicate that it represented an uncharacteristically unprofitable or difficult year. The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the evidence and argument presented on appeal, the AAO concludes that the petitioner has not sufficiently demonstrated its continuing ability to pay the proffered wage beginning on the visa priority date.

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

ORDER: The appeal is dismissed.