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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

[redacted]

FILE: LIN 04 015 52171 Office: NEBRASKA SERVICE CENTER Date: DEC 28 2007

IN RE: Petitioner:
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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The nature of the petitioner's business is coffee distribution. It seeks to employ the beneficiary permanently in the United States as a coffee inventory control/purchasing/accounting agent. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 AAO affirmed the director's decision.

The record shows that the motion is timely. 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.

Counsel submitted a brief on motion and additional evidence.[1]

As set forth in the director's denial dated August 18, 2004, and the decision of the AAO dated February 3, 2006, 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.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or documentary evidence.
8 C.F.R. § 103.5(a)(2).

The instant motion qualifies as a motion to reconsider as it does contend the decision was incorrect based on the evidence of record at the time of the initial decision and counsel has asserted case precedent in support of his contentions.

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

[1] Counsel has submitted evidence concerning a separate corporate entity, [redacted] The FEIN is obscured for privacy purposes), that is owned by the petitioner's owners as well as evidence of the petitioner's owners' personal assets. This evidence has no probative value concerning the ability of the petitioner to pay the proffered wage. 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."

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 U.S. Department of Labor. *See* 8 CFR § 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 U.S. Department of Labor and submitted with the instant petition. [redacted] 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $21.09 per hour ($43,867.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

Relevant evidence in the record includes the following: an explanatory letter from petitioner dated April 1, 2001; the petitioner's yearly profit and loss statements for 2001, 2002, 2003 and 2004; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for years 2000, 2001, 2002 and 2003; information concerning a provider of back office administrative services and a "PEO Client Detail Pay Register" dated March 17, 2004 and other payroll statements identifying [redacted]r as sales managers; a business plan dated November 15, 2003; the personal tax returns of the owners of the petitioner; unaudited financial statements of the petitioner;[2] a letter from the petitioner's accountant dated October 14, 2004 with exhibits; a letter from [redacted], the petitioner's payroll service; a prior non-precedent decision of the AAO;[3] a letter from counsel dated October 4, 2004; an excerpt of the minutes of a 1990 meeting of the American

[2] Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

[3] Counsel does not provide the published citation for the referenced AAO decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its 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).

Immigration Lawyers Association and the legacy INS; and other articles and information concerning the petitioner.

Counsel submitted the following documentary evidence on motion: a cover letter from counsel dated April 4, 2006; a letter from the petitioner dated April 3, 2006; the prior decision of the AAO dated February 3, 2006; and submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2001, 2002, 2003 and 2004; the IRS Forms 1120 for 2002 and 2003 for [redacted]; and the IRS Form 1120S for 2004 for [redacted].

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner (Federal Employer Identification Number, FEIN, [redacted][4] claimed to have been established in 1995 and to currently employ 14 workers. According to the tax returns in the record for 2001, 2002, 2003 and 2004, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that "[redacted]" has the ability to pay the proffered wage.

Counsel contends that the 2001, 2002, 2003 and 2004 federal tax returns are relevant but "unusual circumstances" can establish the ability to pay the proffered wage.

Counsel asserts that the totality of circumstances establishes the petitioner's ability to pay the proffered wage.

Counsel contends that that the beneficiary will perform the duties of and functions "normally performed by the owner Cindy Ledgard" because of business circumstances.

Counsel cites the following case precedent in support of his contentions: *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *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); *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986); *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), and *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989).

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 Sonegawa*, 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

[4] The FEIN is obscured for privacy purposes.
[5] It is not clear from counsel's brief whether he refers to the petitioner and [redacted], or just the petitioner. The latter corporation is a separate entity.

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 2001 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. 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 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. 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.) [redacted]

The petitioner's tax returns[6] demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $43,867.20 per year from the priority date:

> In 2001, the Form 1120S[7] stated a loss (Schedule K, Line 23) of <$90,944.00>.

[6] The personal tax returns of the petitioner's owners and other entities submitted have no probative value to show the ability to pay the proffered wage. Tax returns for tax years prior to the priority date have little probative value in determining the petitioner's ability to pay the proffered wage. In 2000, the petitioner's Form 1120S stated taxable income of $7,329.00.

- In 2002, the Form 1120S stated taxable income (Schedule K, Line 23) of $985.00.
- In 2003, the Form 1120S stated a loss (Schedule K, Line 23) of <$976.00>.
- In 2004, the Form 1120S stated taxable income (Schedule K, Line 23) of <$4,297.00>.

Therefore, for the years for which tax returns were submitted, the petitioner [redacted] did not have 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. We reject, however, counsel's idea 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, 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.[8] 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.

- The petitioner's net current assets during 2001 were <$45,239.00>.
- The petitioner's net current assets during 2002 were <$34,502.00>.
- The petitioner's net current assets during 2003 were <$24,048.00>.
- The petitioner's net current assets during 2004 were <$56,713.00>.

Therefore, for the years 2001, 2002, 2003 and 2004 the petitioner did not have sufficient net current assets to pay the proffered wage.

---

[7] 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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income, credits, deductions or other adjustments from sources other than from a trade or business, net income is found on Schedule K. As is found here, if the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, then in that case net income is found on line 23 of Schedule K for tax years 2001, 2002 and 2003. See Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005).

[8] 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.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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.

According to regulation,[9] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel had on the appeal originally filed in this matter asserted that the beneficiary would be replacing a current employee, [redacted] and certain duties of the owners who work in the business. Mr. [redacted] is not mentioned in the instant motion so that contention will not be discussed further.

In the instant motion, counsel asserted that the beneficiary "will perform the duties of and functions performed by the [redacted]." "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Counsel's contentions reflected in the appeal, and now in the instant motion, are inconsistent and prevent the AAO from reaching a determination concerning these two contentions.

Further, 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. Moreover, there is no evidence that the position or duties of [redacted] involve the same duties as those set forth in the Form ETA 750.

If Ms. [redacted] performed other kinds of work, then the beneficiary could not have replaced her. While counsel has stated that the beneficiary will assume some duties of [redacted], if these duties are outside the scope of the occupation listed in the labor certification they are not relevant, further, since there is no evidence that the owners are receiving wages, no impact can be asserted on the petitioner's future profitability. Proof of ability to pay begins on the priority date, that is April 27, 2001, when the petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor.

Counsel urged on appeal the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. A petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future.

Counsel asserts on appeal and asserts on motion that the totality of the circumstances including the facts that the petitioner in 2001 purchased a business that is now named [redacted] and [redacted] and that the petitioner purchased three additional retail stores in 2005, evidences the ability to pay the proffered wage. In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was unprofitable in 2001 and 2003 and slightly profitable in 2002 and 2004.

---

[9] 8 C.F.R. § 204.5(g)(2).

For the years 2001 through 2004, the taxable income for the petitioner increased then declined from <$90,944.00> in 2001 to $985.00 in 2002 and to <$976.00> in 2003. The total taxable loss for those years for which tax returns have been submitted is <$90,935.00>. The net current asset value for those years is negative. In 2001 it was <$45,239.00>; in 2002 it was <$34,502.00>; in 2003 it was <$24,048.00> and in 2004 was <$56,713.00>.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonegawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner. Counsel asserts that the purchase of a business in 2001 that is now named [redacted] and [redacted]s such an unusual and unique circumstance that caused the petitioner's profits to be depressed in 2001. However upon closer examination, the business purchased is a separate entity and profit center with its own tax return and income statement that cannot be included in the petitioner's assets. There is no independent objective evidence that the petitioner owns the second entity mentioned, or that the corporations report income on a consolidated basis. By the evidence presented, the petitioner has not proven its ability to pay the proffered wage.

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish 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 not met that burden.

ORDER: The motion to reopen is granted and the decision of the AAO dated August 18, 2006 is affirmed. The petition is denied.