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

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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 30 2007
EAC 04 171 54702

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 Acting Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the acting director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous decisions of the acting director and AAO will be withdrawn. The petition will be approved.

The petitioner was represented by counsel from the time it filed the petition in this matter through the appeal. With the instant motion, however, the petitioner submitted a Form G-28 Notice of Entry of Appearance recognizing a different attorney as its counsel. All representations will be considered but today's decision will be furnished only to the petitioner and its current counsel of record.

The petitioner is a concrete contractor. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a cement mason. The acting director determined that the petitioner had not established that it has had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

The record shows that the motion was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> *Requirements for motion to reconsider.* A motion to reconsider must 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 [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the acting director incorrectly applied the pertinent law.

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

The regulation at 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor (DOL). *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 2, 2003. The proffered wage as stated on the Form ETA 750 is $25 per hour, which equals $52,000 per year.

The petition in this matter was submitted on April 29, 2004. On the petition, the petitioner stated that it was established during 1998 and that it employs 15 workers. The petition states that the petitioner's gross annual income is $1,411,940. The space reserved for the petitioner to report its net annual income was left blank. On the Form ETA 750, Part B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Philadelphia, Pennsylvania.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

In the instant case the record contains (1) the 2001, 2002, 2003, 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) 2004 and 2005 Form W-2 Wage and Tax Statements, (3) 2001, 2002, and 2004 Form 1099 Miscellaneous Income statements, (4) the 2001 and 2002 joint Form 1040 U.S. Individual Income Tax Returns of the petitioner's majority owner and his wife, and (5) documents pertinent to the petitioner's owner's and owner's spouse's ownership of real property. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on November 2, 1998, and that it report taxes pursuant to cash convention accounting and the calendar year.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

During 2001 the petitioner declared a loss of $15,562 as its ordinary income. The petitioner's Schedule K, Line 23 Net Income was a loss of $16,062. At the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 tax return shows that it declared ordinary income of $25,447. The petitioner's Schedule K, Line 23 Net Income, however, was $0. At the end of that year the petitioner's current liabilities exceeded its current assets.

This office notes, however, that because the priority date of the visa petition is June 2, 2003, evidence of the petitioner's finances during previous years are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The acting director was obliged to consider evidence pertinent to 2001 and 2002 because the petitioner's tax returns for 2003 and later years were not yet due at the time the petition was filed and the acting director had no evidence pertinent to 2003 and later years. This office is not so bound and will restrict its inquiry to 2003 and later years.

The petitioner's 2003 tax return shows that it declared ordinary income of $165,950. The petitioner's Schedule K, Line 23 Net Income was $64,816. At the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2004 tax return shows that it declared ordinary income of $94,219. The petitioner's Schedule K, Line 23 Net Income was $41,222. At the end of that year the petitioner's current liabilities exceeded its current assets.

The 2004 and 2005 W-2 forms show that the petitioner paid the beneficiary wages of $11,650 and $60,474.50 during those years, respectively.

The Form 1099 Miscellaneous Income statements submitted show that the petitioner paid the beneficiary non-wage compensation of $15,456, $44,391.74, and $11,650 during 2001, 2002, and 2004 respectively. This office again notes that the petitioner's finances prior to 2003 are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The acting director denied the petition on September 27, 2004. On appeal, counsel argued that the petitioner's depreciation deductions should be added to its net profit in determining the funds it actually had available to pay the proffered wage. This office dismissed that appeal on April 4, 2006.

On the motion current counsel again argued that the petitioner's depreciation deductions represent funds available to it to pay additional wages.

Counsel asserted that this office should consider that the petitioner's owner could have reduced his own compensation or obtained a loan in order to pay the proffered wage. Counsel further asserted that the evidence shows that the petitioner's owner and owner's spouse own considerable real estate in Philadelphia, and could have used it to secure a loan.

Counsel further stated,

> Universally accepted and binding AAO precedent holds that [the petitioner's] ability to pay [the beneficiary's] proffered wage of $52,000 should not be denied simply because it had one unprofitable year during the pendency of [its visa petition.] *See Generally Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel also asserted that the priority date as stated in the decision of denial, June 2, 2003, is incorrect. Counsel provided a photocopy of a Form ETA 750 Labor Certification Application with information pertinent to this case on it. That application is stamped, "Received Phila Job Bank April 25, 2001." That application contains no indication that it was ever approved by the DOL.

However, the approved Form ETA 750 labor certification submitted with the instant visa petition, upon which the visa petition relies, is accompanied by a DOL cover letter stating that it was accepted for processing on June 2, 2003. The application itself is stamped, "Received Phila Job Bank June 2, 2003." A certification stamped on that application indicates that it was approved.

The provenance of the Form ETA 750 Labor Certification Application submitted on motion is unclear to this office. In any event, however, it is not the approved labor certification on which the instant petition relies and its submission date, therefore, is irrelevant. This office notes, however, that if it were the salient labor certification application, then the priority date of the instant petition would be April 26, 2001, and the petitioner would be obliged to show the ability to pay the proffered wage during 2001 and 2002, in addition to subsequent years. Prevailing on that point might not have favored the petitioner's interests.

Counsel's reading of *Sonegawa* is too broad. It does not state that a single unprofitable year can never form the basis for denial.

Matter of Sonegawa relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, 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 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 that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked

in determining the ability to pay the proffered wage. Here, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*.[2]

Although counsel provided a *Fortune* magazine article projecting appreciation of real estate and growth in the real estate market in Philadelphia for at least two years, this is insufficient to show that the finances of the instant petitioner will improve. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel urged that the petitioner's majority owner could have reduced his compensation as necessary to pay the proffered wage. Counsel provided no evidence, however, to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

Counsel also urged that the petitioner, or the petitioner's owners, could have borrowed money as necessary to pay the proffered wage. Available credit, however, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Further, the reliance of previous counsel on the income and assets of the petitioner's owner and owner's spouse was misplaced. The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), 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 with no legal obligation to pay the wage."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of

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[2] In his discussion of *Sonegawa*, counsel provided various reasons for the petitioner's poor performance during 2001 and 2002, asserting that they place the petitioner's poor performance within the ambit of *Sonegawa*. This office notes, again, that it is not concerned in the instant case with the petitioner's ability to pay the proffered wage during 2001 and 2002, but only with the petitioner's continuing ability to pay the proffered wage beginning on the priority date. This office will not address the arguments pertinent to 2001 and 2002.

a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to 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 are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985).[3] The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.[4] Counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it paid the beneficiary $15,456 during 2001, $44,391.74 during 2002, $50,600.67 during 2004,[5] and $60,474.50 during 2005. The petitioner did not submit any evidence pertinent to wages it may have paid to the beneficiary during 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant*

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[3] On appeal counsel asserted that *Chi-Feng Chang v. Thornburgh, Id.,* is not controlling on the issue of depreciation. Counsel misses the point. The case was only cited, in this context, for the proposition that no precedent exists permitting the petitioner to add its depreciation deduction to its net profit to show the ability to pay the proffered wage during a given year. Whether *Chi-Feng Chang* is controlling is unimportant to that point. If counsel wishes to challenge the assertion that no such precedent exists, he should cite to that precedent. Later in his discussion of the issue counsel appeared to argue merely that the issue is of first impression. In considering counsel's arguments pertinent to the nature of a depreciation deduction, this office is treating the issue as such.

[4] Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

[5] This is the sum of $11,650 shown on a 2004 W-2 form and $38,950.67 shown on a 2004 Form 1099.

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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[6] shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is $52,000 per year. The priority date is June 2, 2003.

During 2003 the petitioner declared net income of $64,816. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2003.

The petitioner has demonstrated that it paid the beneficiary $50,600.67 during 2004 and is obliged to show the ability to pay the remaining $1,399.33 balance of the proffered wage during that year. During that year the petitioner declared net income of $41,222. That amount is sufficient to show the ability to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

[6] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner paid the beneficiary $60,474.50 during 2005. That amount exceeds the annual amount of the proffered wage. The petitioner demonstrated the ability to pay the proffered wage during 2005.

The petition in this matter was submitted on April 29, 2004. On that date the petitioner's 2006 tax return was unavailable. No evidence of the petitioner's ability to pay the proffered wage during 2006 and later years was subsequently requested. For the purpose of today's decision, the petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2006 and later years.

The petitioner has demonstrated the ability to pay the proffered wage during each of the salient years. Therefore the petitioner had demonstrated its continuing ability to pay the proffered wage beginning on the priority date and has overcome the sole basis for denial of the visa petition.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The motion is granted. The AAO's decision of April 4, 2006 is withdrawn. The petition is approved.