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

U.S. Citizenship and Immigration Services

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

B6

FILE: EAC 04 050 51006 Office: VERMONT SERVICE CENTER Date: SEP 06 2007

IN RE: Petitioner: [redacted]
Beneficiary:

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

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 Director, Vermont Service Center. A subsequent appeal was remanded to the director for further consideration and entry of a new decision. The visa petition is now before the Administrative Appeals Office (AAO) on certification. The director's decision will be withdrawn and the petition will be approved.

The petitioner is a residential construction business. It seeks to employ the beneficiary permanently in the United States as a cement mason. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

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 not available in the United States.

On December 4, 2006, after the visa petition was remanded to the director for further consideration and entry of a new decision, the director informed the petitioner of the remand and requested additional evidence of the petitioner's continuing ability to pay the proffered wage from the priority date of the visa petition. The director specifically requested the petitioner's 2003 through 2005 federal tax returns with all schedules and attachments. The director also requested copies of Forms W-2, Wage and Tax Statements, issued by the petitioner for the beneficiary, for the years 2000 and 2002 through 2005. The petitioner was afforded twelve weeks to submit the requested evidence and any additional evidence relevant to the petitioner's ability to pay the proffered wage. On July 17, 2007, the director denied the visa petition again stating that the petitioner had failed to respond to the director's request for evidence.[1] The director certified his decision to the AAO.

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. 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 demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment

[1] It is noted that on certification, counsel states that he did submit evidence in response to the director's request for evidence. The response was dated February 8, 2007.

system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is April 25, 2001. The proffered wage as stated on the Form ETA 750 is $17.00 per hour or $35,360 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon certification[2]. Relevant evidence submitted on certification includes counsel's brief, copies of the petitioner's 2000 and 2003 through 2005 Forms 1120, U.S. Corporation Income Tax Returns, for the fiscal years April 1 through March 31 each year, and copies of Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary, for the years 2000 and 2002 through 2005.

The petitioner's 2000 and 2003 through 2005 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of $28,553, $1,129, -$10,309, and $0, respectively. The petitioner's 2000 and 2003 through 2005 Forms 1120 also reflect net current assets of $19,352, $27,990, $11,972, and $9,577, respectively.[3]

The beneficiary's 2000 and 2002 through 2005 Forms W-2 reflect wages paid to the beneficiary by the petitioner of $23,389.25 in 2000, $24,520.25 in 2002, $22,764.50 in 2003, $24,993.75 in 2004, and $25,838.00 in 2005.[4]

---

[2] The submission of additional evidence on certification 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 certification. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3] It is noted that the petitioner had previously submitted its 2001 and 2002 tax returns. Those tax returns reflected taxable incomes before net operating loss deduction and special deductions or net incomes of -$11,044 and $27,279, respectively. Those tax returns also reflected net current assets of $9,852 and $34,944, respectively.

[4] It is noted that the petitioner had previously submitted a copy of the beneficiary's 2001 Form W-2 which showed the beneficiary earned $22,389.75 in 2001. It is also noted that in 2004, the beneficiary obtained a new social security number. It appears that the previous social security number belonged to someone else.

Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

On certification, counsel claims that the petitioner has established its ability to pay the proffered wage of $35,360 based on its net income, its net current assets, the wages paid to the beneficiary, and *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel also claims that the one year (2001) the petitioner failed to show its ability to pay the proffered wage was due to the terrorist attacks of September 11, 2001.

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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750, signed by the beneficiary on April 20, 2001, the beneficiary claims to have been employed by the petitioner from August 1997 to the present. In addition, counsel had submitted the beneficiary's 2000 through 2005 Forms W-2, issued by the petitioner on behalf of the beneficiary, showing that the beneficiary was paid wages by the petitioner of $23,389.25, $22,389.75, $24,520.25, $22,764.50, $24,993.75, and $25,838.00, respectively. Therefore, the petitioner has established that it employed the beneficiary in 2000 through 2005.

The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of $35,360 and the actual wages paid to the beneficiary in the pertinent years (2000 through 2005). Those differences would have been $11,970.75 in 2000, $12,970.25 in 2001, $10,839.75 in 2002, $12,595.50 in 2003, $10,366.25 in 2004, and $9,522 in 2005.

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at http://ssa-custhelp.ssa.gov (accessed on August 27, 2007).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone

...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *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* at 537.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate that its net incomes in 2000 through 2005 were $28,553, -$11,044, $27,279, $1,129, -$10,309 and $0, respectively. The petitioner could have paid the difference between the proffered wage of $35,360 and the actual wages paid the beneficiary in 2000 and 2002 from its net income, but not in 2001, and 2003 through 2005.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

[5] 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.

liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner's net current assets in 2000 through 2005 were $19,352, $9,852, $34,944, $27,990, $11,972 and $9,577, respectively. The petitioner could have paid the differences between the proffered wage of $35,360 and the actual wages paid to the beneficiary in 2000 and 2002 through 2005 from its net current assets, but not in 2001. Therefore, the petitioner has established its ability to pay the proffered wage of $35,360 in every year but 2001.

On certification, counsel contends that the petitioner has established its ability to pay the proffered wage of $35,360 based on its net income, its net current assets, the wages paid to the beneficiary, and *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel also claims that the one year (2001) the petitioner failed to show its ability to pay the proffered wage was due to the terrorist attacks of September 11, 2001.

Counsel advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.[6]

With regard to the events of September 11, 2001, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. 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)).

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a

[6] CIS will add the wages paid to the beneficiary along with the petitioner's net income **or** net current assets, but not with both when determining the petitioner's ability to pay the proffered wage of $35,360..

small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of $6,240 was considerably in excess of the employer's net profit of $280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a 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 that 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 to be relevant to the petitioner's ability to pay the proffered wage. In this case, in light of the petitioner's long and continuing business presence (more than 18 years), since the petitioner has shown that it has paid total wages to employees and subcontractors between $300,000 and $450,000 yearly, since the petitioner's gross receipts have shown to be increasing each year, and since the proffered wage obligation after consideration of compensation already paid in the significant years is meager when compared to the petitioner's continuous earnings of over approximately $1 million yearly, the AAO finds that the petitioner could pay the proffered wage in 2001 and continuing to the present.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on certification overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The director's decision of July 17, 2007 is withdrawn. The petition is approved.