U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 25 2008

SRC 06 048 51062

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 Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as an evening manager. As required by statute, a Form 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 ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS,* 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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, 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 ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d). Here, the ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on

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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 by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

the ETA 750A is $18.40 per hour or $38,272 per year. Part B of the ETA 750, signed by the alien beneficiary on December 30, 2003, does not indicate that he has worked for the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on December 1, 2005, it is claimed that the petitioner was established on April 26, 2001, claims an annual gross income of $1,697,635, a net annual income of $42,036, and currently employs two workers.

In support of its continuing financial ability to pay the certified wage of $38,272 per year, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return, for 2001, 2002, 2003, and 2004. The returns indicate that the petitioner uses a standard calendar year to file its taxes. The 2001 return, however, covers the period from the petitioner's incorporation to December 31, 2001. The returns contain the following information relevant to the petitioner's net income, current assets, current liabilities and net current assets:

	2001	2002	2003	2004
Net Income[2] (Form 1120)	$ 7,065	-$ 2,022	$14,461	$42,306
Current Assets (Sched. L)	$ 28,966	$ 38,729	$20,680	$31,061
Current Liabilities (Sched. L)	$ 717	$ 2,382	-$ 251	$ 2,327
Net Current Assets	$ 28,249	$ 36,347	$20,931	$28,734

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. 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. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. 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.

The petitioner also provided copies of its bank statements for the first eleven months of 2005, and all of 2002 and 2003, as well as copies of unaudited financial statements covering the first eleven months of 2005 and various periods in 2003. Further provided was a copy of the predecessor company's (unaudited) profit and loss statement covering the twelve months ending February 2000.

It is noted that a labor certification is valid only for the employer to which it is issued, unless a merger, reorganization, transfer, or acquisition occurs that creates an employer that may be considered a successor-in-interest to the original employer. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in

[2] For the purpose of this review, net income refers to the amount claimed on line 28 on Form 1120 (taxable income before net operating loss deduction and special deductions.

order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In this case, the record indicates that the petitioner, a successor-in-interest, acquired the business known as Kirby Food Mart from [redacted] Enterprises, Inc. whose president, [redacted], executed a bill of sale, dated November 1, 2001. The labor certification was originally sought by [redacted] Enterprises, Inc. d/b/a Kirby Food Mart. Thus, the petitioner must establish that [redacted] Enterprises, Inc. had the financial ability to pay the proffered wage until the date of acquisition by the petitioner. It is also noted that payroll records from December 31, 2005 that were submitted to the record, indicated that [redacted] worked for the petitioner during that year.

The director denied the petition on October 16, 2006. The director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage because neither its net income, nor the difference between its current assets and current liabilities as shown on the pertinent tax returns, was sufficient to cover the proposed wage offer.

On appeal, counsel submits a copy of the petitioner's 2005 corporate federal income tax return. It reflects that the petitioner reported $46,749 in net income, an amount sufficient to demonstrate its ability to pay the proffered salary of $38,272 for that year.

Counsel additionally provided copies of the petitioner's bank statements and tax returns submitted to the underlying record, as well as bank statements covering the first nine months of 2006.

On appeal, citing *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986) and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), counsel asserts that in the determination of the petitioner's ability to pay the proffered wage, the director failed to consider the additional evidence beyond the tax returns such as the copies of its financial statements and bank statements that had been submitted to the underlying record. Counsel also cites *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) and *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in contending that an expectation of an increase in revenue can also form a basis for a petition's approval including the theory that the addition of the beneficiary to its staff would contribute to a petitioner's ability to expand and generate income. Counsel also contends that loans from shareholders, which he states are "other current liabilities," reflected here as $43,588 in 2003 and $56,095 in 2002 on line 19 of Schedule L's of the petitioner's corporate tax returns should actually be viewed as discretionary funds available to the petitioner as needed.

The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and to evaluate the qualifications of a beneficiary for the job CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS,* 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes

the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Counsel's assertion as to the characterization of shareholder loans as available discretionary funds is not persuasive.[3] The amounts mentioned by counsel are not reflected as other current liabilities, which are shown on line 18 and are already included in the calculation of the petitioner's net current assets as discussed above. Shareholder loans are reflected as a longer term liability and accurately represent an obligation for which the corporate petitioner is liable. We decline to adopt counsel's argument that these amounts should somehow be added back as assets to the calculation of net current assets.

It is further noted that none of the financial statements submitted to the record were audited. According to the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. Even the court in *Elatos Restaurant Corp.*, as relied upon by counsel, did not contemplate that unaudited financial statements would be acceptable evidence of a petitioner's ability to pay the proffered wage. As the statements provided to the record are restricted to information based upon the representations of management, they are not probative of the petitioner's ability to pay the certified wage of $38,272 per year.

It is also noted that counsel's reliance on the petitioner's bank statements does not overcome the evidence reflected on the petitioner's tax returns. As noted by the director, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. Bank statements show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return such as Cash, reflected on line 1 of Schedule L.

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 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will

[3] Counsel cites a 2003 AAO case in support of this assertion. It is noted that 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).

be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record does not indicate that the petitioner has employed the beneficiary.

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 elect to provide either audited financial statements or annual reports if it considers its tax returns a poor reflection of its financial position, 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 established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*; *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989)); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105,(D. Mass. 2007). 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.

As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources. 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, a 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.

Similarly, we do not find that an approval based on *Matter of Sonegawa,* 12 I&N Dec. 612, is appropriate in this case. In *Sonegawa,* an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related 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 *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere and the fact that unlike the four years and eight months that the instant petitioner had been established at the time of the I-140 filing, the petitioner in *Sonegawa* had been in business for eleven years and had shown substantial potential for growth. In this case, the petitioner's 2001, 2002, and 2003 tax returns reflect insufficient net income or net current assets to

cover the proffered wage and do not represent a framework of profitable years analogous to the *Sonegawa* petitioner. No evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonegawa* has been submitted. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa.*

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase because the beneficiary's services as an evening manager will enable the petitioner to expand its operations, increase advertising campaigns and sales promotions, and offer additional goods and services. 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. Further, in this instance, although counsel provides a hypothesis of how the beneficiary's employment might positively affect the petitioner's business, no specific documentation has been provided to explain how the beneficiary's employment as an evening will significantly increase profits for the petitioner. Counsel's assertions 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). This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Although counsel's contention is correct that the petitioner demonstrated its ability to pay the proffered wage of $38,272 in 2004 and 2005 through its reported net income of $42,306 and $46,747, respectively, its ability to pay has not been demonstrated for the remaining relevant period.

In this case, the ability to pay for 2001 has not been established. No documentation pertinent to 2001, consisting of a federal tax return, annual report or audited financial statement relevant to [redacted] Enterprises, Inc. has been provided. The only evidence submitted related to this entity was the unaudited financial statement covering the twelve months ending February 2000. For the ability to pay the certified wage to be established, evidence demonstrating that the predecessor company could cover the proposed salary during the period of its ownership beginning at the priority date. Evidence relating to the current petitioner would only be pertinent to its ability to pay the proffered wage for approximately the last two months of 2001 after it acquired the business. Ordinarily, CIA does not prorate a proffered wage because it would be illogical to consider cumulative income as shown on a typical tax return towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date or date of acquisition (and only that period), such as monthly income statements or pay stubs, neither the predecessor nor the petitioner has provided such evidence.

In this matter, in 2002, neither the petitioner's net income of -$2,022, nor its net current assets of $36,347 demonstrates its ability to pay the proffered wage.

In 2003, neither the petitioner's net income of $14,461, nor its net current assets of $20,931 establishes its ability to pay the proffered wage in this year.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage beginning at the priority date.

Beyond the decision of the director, it is noted that the predecessor company of [redacted]nterprises, Inc. and the two employees listed within the 2005 payroll records contained in the record bear the same name as that of the beneficiary. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). If and when future proceedings may involve this petitioner and beneficiary, an advisory opinion from the DOL may be merited before making a decision on a preference petition. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986).

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 appeal is dismissed.