



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED]
LIN 07 017 53963

Office: NEBRASKA SERVICE CENTER

Date: Dec 07, 2009

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)

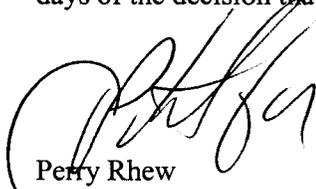
ON BEHALF OF PETITIONER:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner, is a private school. It seeks to employ the beneficiary permanently in the United States as a Montessori teacher. As required by statute, an ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner has had the continuing ability to pay the proffered wage.¹

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

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

¹ 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.

The petitioner must demonstrate that it has had the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 31, 2003. The proffered wage is set forth as \$21,321.04 per year. The beneficiary signed Part B of the Form ETA 750 on November 20, 2002, indicating that she had been employed full-time as a Montessori teacher by the petitioner since September 2002 to the present (date of signing).

Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on October 23, 2006, indicates that the petitioner was established on June 1, 1997, employs six workers, and claims a gross annual income of \$340,000.

In support of the petitioner's continuing ability to pay the proffered wage of \$21,321.04 per year, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2003, 2004, 2005, and 2006. They indicate that the corporate petitioner was incorporated on October 1, 2000 and files its tax returns using a standard calendar year. The tax returns contain the following information:

	2003	2004	2005	2006
Net Income ²	-\$ 963	\$7,487	\$4,824	-\$3,287
Current Assets	\$1,729	\$6,960	\$2,269	\$ 300
Current Liabilities	\$4,798	\$ 149	\$2,735	\$7,585
Net Current Assets	-\$3,069	-\$6,811	-\$ 466	-\$7,285

As set forth in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, United States Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ It represents a measure of liquidity during a

² Where an S Corporation's income is exclusively from a trade or business, United States Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2003), line 17e (2004-2005), and line 18 (2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on Schedule K for 2003-2006, the petitioner's net income is found on Schedule K of its tax return.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Additionally, the petitioner provided copies of the petitioner checking account statements covering the period from December 2004 to June 2007, as well as copies of Wage and Tax Statements (W-2s) issued by the petitioner to the beneficiary. The W-2s reflect the following compensation paid to the beneficiary:

Year	Amount	Difference from Proffered Wage of \$21,321.04
2003	\$13,726.79	-\$7,594.25
2004	\$16,550.61	-\$4,770.43
2005	\$20,138.55	-\$1,182.49
2006	\$19,127.30	-\$2,193.74

The director denied the petition on August 8, 2007. Although he determined that the petitioner had demonstrated its ability to pay the proffered wage in 2004 and 2005, he concluded that the petitioner had failed to demonstrate its ability to pay the proffered wage through either its net income or net current assets in 2003 or 2006.

On appeal, the petitioner, through counsel, asserts that the sole shareholder's assets and income should be considered when determining the corporate petitioner's ability to pay the proffered wage. Counsel submits a copy of the shareholder's individual income tax returns for 2003 and 2006, as well as a copies of two individual bank statements for January 2007 and June 2007. Counsel also asserts that the corporation paid the sole shareholder rent for the commercial building that she owns and that the sole shareholder could have used these funds to support the proffered wage, as well as amounts reflected as total assets and liabilities such as retained earnings as reflected as part of the 2003 federal tax return balance sheet found on Schedule L.

Counsel cites no legal authority compelling USCIS to evaluate the sole shareholder's personal assets in such a way in support of a corporate petitioner's ability to pay the proffered wage. As noted above, in addition to net income, USCIS will also review net current assets which represent the difference between current assets and current liabilities (payable in less than a year) as a method to

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.

determine whether a corporate petitioner has sufficient reasonably available liquid assets in order to pay the proffered wage during a given period.

The AAO declines to consider this sole shareholder's individual assets. The petitioner is a corporation. 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 *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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Moreover, it is additionally noted that the owner's individual tax returns for 2003 and 2006 show reported modest adjusted annual gross income of \$27,440 and \$25,840, respectively. These figures appear to be primarily derived from officer compensation and net rental income from the commercial building owned by the shareholder. There is no first-hand evidence in the record that such income could have been foregone during the period given, in addition to allowing for reasonable personal living expenses. Undocumented suggestions that the beneficiary would be assuming a portion of this compensation and these may be considered funds available to pay the proffered wage are misplaced. 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)).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 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 petitioner's net income of \$7,487 in 2004 could cover the shortfall of -\$4,770.43 resulting from a comparison between the beneficiary's actual wages and the proffered salary. In 2005, the petitioner's net income of \$4,824 could cover the difference of -\$1,182.49 between the beneficiary's actual wages and the proffered wage. However, the petitioner has sponsored a number of other workers. The petitioner must establish that it can pay all sponsored beneficiaries the proffered wage. Although it appears that sufficient funds were available to cover the difference(s) between the beneficiary's actual wages and the proffered wage in 2004 and 2005, this must be balanced against the petitioner's obligation to maintain its continuing ability to pay the certified wage(s) for multiple beneficiaries.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income 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. 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); *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 USCIS, 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.

Similarly, depreciation or other expenses will not be added back to a petitioner's net income. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] 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.” *Chi-Feng Chang* at 537 (emphasis added).

As noted above, USCIS as an alternative to the petitioner’s net income reported during a given period, USCIS will consider a petitioner’s net current assets as a readily available source of funds to pay the proffered wage. We reject, however, the idea the petitioner’s total assets should be 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. 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, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company’s net earnings since its inception, minus any payments to its stockholders. That is, this year’s retained earnings are last year’s retained earnings plus this year’s net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, USCIS looks at each particular year’s net income, rather than the cumulative total of the previous years’ net incomes represented by the line item of retained earnings. Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner’s continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner’s retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

In this case, in 2003, neither the petitioner’s -\$963 in net income, nor its -\$3,069 in net current assets as shown on its corporate tax return, was sufficient to pay the -\$7,594.25 difference between the beneficiary’s actual wage paid and the proffered wage in 2003. The petitioner failed to demonstrate its ability to pay the proffered salary in 2003.

Similarly, in 2006, neither the petitioner’s net income of -\$3,287, nor its net current assets of -\$7,285 was sufficient to cover the -\$2,193.74 difference between the wages paid to the beneficiary and the proffered salary of \$21,321.04.

Additionally, although the director states that the petitioner can pay the proffered wage in 2004 and 2005, as noted above, the petitioner has sponsored a number of other workers. The petitioner must establish that it can pay all sponsored beneficiaries the proffered wage. Therefore, while it appears that sufficient funds were available to cover the difference(s) between the beneficiary’s actual wages

and the proffered wage in 2004 and 2005, this must be balanced against the petitioner's obligation to maintain its continuing ability to pay the certified wage(s) for multiple beneficiaries.

It is noted that in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner's reasonable expectations of increasing business and increasing profits despite evidence of past small profits. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, 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).

Unlike the *Sonogawa* petitioner, this petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonogawa* are applicable. The corporate petitioner was formed slightly more than two years prior to filing the application for labor certification. Two out of the four years relevant to this adjudication, it has declared losses as net income and net current assets and has shown losses as net current assets in all four years. The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

Based on a review of the evidence in the record and the argument submitted on appeal, the petitioner has failed to establish its *continuing* ability to pay the proffered wage as of the priority date. 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 not been met.

ORDER: The appeal is dismissed.