

PUBLIC COPY

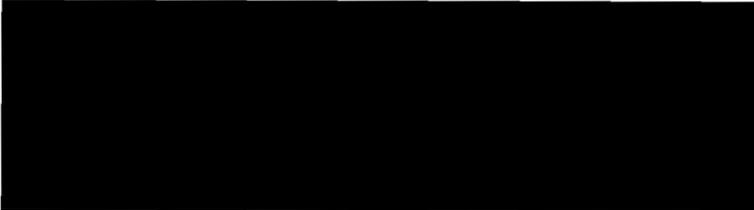
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

B6



FILE: WAC-02-283-50229 Office: CALIFORNIA SERVICE CENTER Date: JUN 16 2006

IN RE: Petitioner:
Beneficiary:



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:



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 Director, California Service Center, denied the petition and the Administrative Appeals Office (AAO) dismissed an appeal. The petitioner initiated litigation in the United States District Court of the Central District of California. The AAO is reopening the matter on its own motion, overturning its prior decision and replacing it with the foregoing.¹ The appeal will be sustained. The petition will be approved.

The petitioner is a cross-cultural market research, consulting and training organization. It seeks to employ the beneficiary permanently in the United States as a market research analyst I. 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. The AAO affirmed the director's decision.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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. As set forth in both the director's and the AAO's decisions, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.²

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. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 24, 1999. The proffered wage as stated on the Form ETA 750 is \$35,588.80 per year. On the Form ETA 750B, signed by the beneficiary on May 17, 1999, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1979, to currently employ 30 workers, and to have gross annual income of \$1.4 million. The record of proceeding reflects that the petitioner's fiscal year runs from October 1 through September 30.

¹ *See* 8 C.F.R. § 103.5(a)(5)(i).

² The director initially determined that the beneficiary was not qualified for the proffered position; however, the AAO overturned that portion of the director's decision.

The record of proceeding contains the following probative and relevant evidence: the petitioner's corporate tax returns for 1999, 2000, and 2001; two letters from the petitioner's tax counsel, dated February 3, 2003 and May 28, 2003 (February 3, 2003 or May 28, 2003 Tax Counsel Letter); a "Guarantee" signed by the petitioner's owner; and a copy of a quarterly wage report for the quarter ending June 30, 2002.

The petitioner's tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Gross receipts	\$1,421,098	\$1,393,333	\$1,203,048
Officer compensation	\$182,000	\$225,185	\$123,385
Salaries and wages	\$163,353	\$182,280	\$213,160
Direct costs ³	\$771,286	\$654,927	\$541,517
Net income ⁴	\$1,352	\$1,893	-\$1,199
Current Assets	\$23,773	\$64,299	\$116,872
Current Liabilities	\$77,713	\$150,387	\$173,931
Net current assets	-\$53,940	-\$86,099	-\$57,059 ⁵

As noted in the AAO's prior decision, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner 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. In the instant case, the petitioner did not establish that it employed or paid the beneficiary any wages.⁶ The AAO also concluded that the petitioner's net income and net current assets were lower than the proffered wage in every year and thus could not demonstrate its continuing ability to pay the proffered wage.⁷ The prior AAO adjudicator noted the petitioner's priority date year but failed

³ See statements to Line 26, Other Deductions, pertaining to independent contractor costs.

⁴ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

⁵ The AAO's prior decision miscalculated the net current assets.

⁶ The quarterly wage report did not contain the beneficiary's name.

⁷ If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

to note that the record of proceeding did not contain the petitioner's fiscal year tax return for the priority date year. The director also failed to note the omission. At this point in the proceedings, the AAO's motion will be limited to the evidence contained in the record of proceeding.

On behalf of the petitioner, counsel argued that the petitioner has a sole shareholder whose income could be adjusted in order to pay the proffered wage and that the petitioner's payroll and independent contractor expenses illustrates its continuing ability to pay the proffered wage. The assertions of counsel 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). 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)).

The record of proceeding contains a personal guarantee dated June 16, 2003 from the sole shareholder [REDACTED], Guarantor) that he would "personally guarantee [sic] payment of the proffered salary payable to [the beneficiary] by [the petitioner]." However, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite*

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537

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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If 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.

Investments, Ltd., 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

Although CIS has not set forth a numerical approach to analyzing a petitioning entity’s continuing ability to pay the proffered wage, such as a set amount of net income, net current assets, number of employees, longevity of business, etc., the agency and its adjudicators do assess the totality of circumstances in every individual case. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity’s business activities should be considered when the entity’s ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).⁸ In the present case, the petitioner has been in business for at least 20 years at the time the Form ETA 750 was filed.⁹ The petitioner consistently reported over \$1 million in gross receipts, paid \$150,000 to \$200,000 in salaries and wages, and according to the February 3 and May 28, 2003 Tax Counsel Letters, most of its direct costs included wages paid to independent contractors, so that it paid out consistently a total of approximately \$450,000 for labor and still left it with a profit every year.

The petitioner’s totality of circumstances in this case, in which the petitioner is structured as a C corporation, also includes an analysis of its officer’s compensation. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation’s taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner’s figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that Mr. [REDACTED] holds 100% percent of the company’s stock. According to the petitioner’s 1999, 2000, and 2001 IRS Form 1120, Line 12, Compensation of officers, Mr. [REDACTED] elected to pay himself \$182,000, \$225,185, \$123,385 in each year, respectively. As noted above, CIS (legacy INS) has long held that it may not “pierce the corporate veil” and look to the assets of the corporation’s owner to satisfy the corporation’s ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

⁸ *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere.

⁹ The petitioner claimed on the visa petition that it began business in 1979. Its tax return for 2001 reflects that it was incorporated in 1984.

In the present case, however, CIS is not examining the personal assets of the petitioner's owner per se, but, rather, the financial flexibility that the employee-owner has in setting his salaries based on the profitability of the corporation. The May 28, 2003 Tax Counsel Letter states that Mr. [REDACTED] wage is set at a level intended to eliminate corporate taxes," that many of Mr. [REDACTED] expenses are "paid by the corporation thereby reducing his need for significant compensation," and that Mr. [REDACTED] family has other sources of income and is therefore not relying upon his paycheck to maintain the family's standard of living." There is no reason to doubt the credibility of this probative and relevant piece of evidence weighing in favor of applying Mr. [REDACTED] officer's compensation towards the petitioner's ability to pay the proffered wage.

The proffered wage is \$35,588.80 per year, which is significantly less than the compensation Mr. [REDACTED] received in every year. Although the record of proceeding does not contain any objective evidence, such as personal tax returns or other supporting documentation to verify the credibility of the premise that Mr. [REDACTED] could have foregone a portion of his officer's compensation, the AAO finds that the preponderance of the evidence in the record of proceeding suggests that Mr. [REDACTED] could or would forego all or a portion of his officer's compensation in order to assist the petitioner with paying the proffered wage. This, combined with the previous factors referenced above, demonstrates that the petitioner has made a valid job offer and has the ability to pay the proffered wage. 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 and analyzing the unique factual circumstances of this case, we conclude that the petitioner has demonstrated that it has the ability to pay the salary offered as of the priority date of the petition and continuing to present.

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 met that burden.

ORDER: The AAO's prior decision is withdrawn and replaced with the foregoing. The appeal is sustained and the petition is approved.