

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



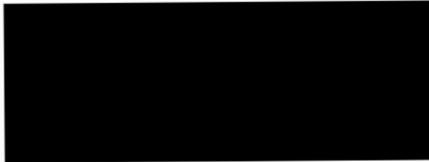
FILE: [REDACTED]
EAC 06 117 50914

Office: TEXAS SERVICE CENTER Date: APR 09 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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 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 construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter's helper. As required by statute, an ETA Form 9089, Application for Permanent 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 asserts that the director erroneously analyzed the evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the *Immigration and Nationality Act (the Act)*, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on September 6, 2005. The proffered wage as stated on the ETA Form 9089 is \$12.76 per hour, which amounts to \$26,540 annually. Part K of the ETA Form 9089, signed by the alien beneficiary on March 15, 2006, indicates that he has worked for the petitioner since January 1, 2003.

On Part 5 of the visa petition, filed March 16, 2006, it is claimed that the petitioner was established in 1986, and currently employs twelve workers.

Although, for the reasons discussed below, we concur with the director's decision to deny the petition based on the record, it is noted that the petitioner has filed at least one other Immigrant Petition for Alien Worker (Form I-140) for another alien involving the same job, at the same wage, using the same priority date, as reflected on the ETA Form 9089 (EAC0611751076). Neither the director nor the petitioner discussed this issue, but in such a case, it is the petitioner's burden to show that it has had the continuing financial ability to pay the wages for all immigrant visa petitions as of the priority date.

In this case, as evidence of its continuing financial ability to pay the certified wage of \$26,540 per year, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2005. It indicates that the petitioner uses a standard calendar year to file its taxes. The return reveals that the petitioner reported gross receipts or sales of \$2,391,809, total income of \$1,240,248, total expenses and deductions of \$1,240,248 including officer compensation of \$634,742, salaries and wages of \$260,652, taxes and licenses of \$60,828, and depreciation of \$82,597, and a taxable income of -0- before net operating loss (NOL) and special deductions. Schedule L of the tax return reflects that the petitioner had \$5,756 in current assets and \$74,562 in current liabilities, yielding net current assets of -\$68,806. 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 submitted a copy of the Wage and Tax Statement (W-2) that it issued to the beneficiary in 2005. It shows that that the petitioner paid \$18,516 in wages to the beneficiary that year. The petitioner, further provided an unsigned memorandum requesting the director to note the monies expensed as officers compensation, particularly \$355,900 paid to the sole shareholder, which is stated as an amount required to 'zero out' the corporation's income for tax purposes, the depreciation expense of \$82,597 and \$775,459 paid to subcontractors.

The director denied the petition on June 6, 2006. The director rejected consideration of the funds paid out as officer compensation or depreciation and concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage because neither its net current assets nor its net income, as shown on the 2005 tax return, were sufficient to cover the proffered wage.

On appeal, counsel disputes the director's use of the term "net income" analyzed as an amount reflected on the tax returns, noting that it should be considered as an economic concept and may include non-taxable items such as income from government bonds, but should not be confused with taxable income. Along with this line of reasoning, counsel asserts that depreciation should be not be taken into account when arriving at a real "economic" net income because it is not a cash expenditure. Counsel's point is taken but relevant legal authority refers to a petitioner's net taxable income or net income after taxes as the figure to be used in determining financial ability. See *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985).

Counsel also contends that the sole shareholder's officer compensation of \$355,900 should be considered as it represents what was remaining in the business at the end of the year and used as a tax planning measure to be paid to the shareholder as a deductible salary after satisfying its payroll obligation. Counsel also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in support of the claim that an expectation of an increase in revenue can also form a basis for a petition's approval and supports the theory that economic income and other resources including having the beneficiary as one of its employees can contribute to a petitioner's ability to generate income.

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).

In this case, we do not find persuasive the assertion that the officer compensation paid to the sole shareholder represented on the petitioner's tax returns should be added back to the corporate petitioner's income. It is observed that officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. There is also no first-hand evidence from the officer that such compensation could have been foregone during the period given.¹

It is further noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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 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 indicates that the petitioner paid the beneficiary \$18,516 in 2005, or \$8,024 less than the proffered wage of \$26,540.

¹ Undocumented suggestions that the beneficiary would be assuming a portion of this officer's compensation may be considered funds available to pay the proffered wage are misplaced. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for this officer or other documentation to identify whose workload, if any, would be reduced. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary would assume any portion of such duties or compensation. 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)).

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 taxable 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 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. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); 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.

Similarly, depreciation will not be added back to a petitioner's net taxable income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 536.

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 Sonogawa*, 12 I&N 612, is appropriate in this case. In *Sonogawa*, 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. In this case, one tax return contained in the underlying record does not represent a framework of profitable years analogous to the *Sonegawa* petitioner. 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*.

In this matter, neither the petitioner's taxable income of -0- before the NOL and special deductions, nor its net current assets of -\$68,806 demonstrates its ability to pay the \$8,024 difference between the proffered wage of \$26,540 and the actual wages of \$18,516 paid to the beneficiary. 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.

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.