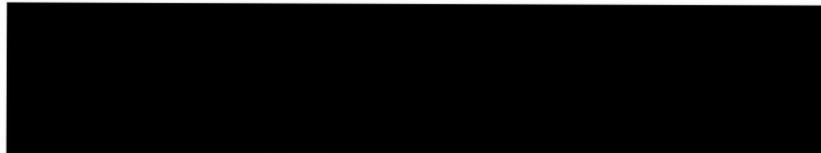




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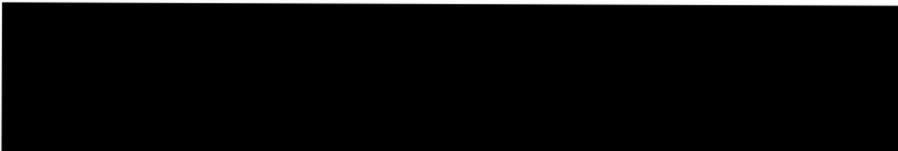


FILE: LIN 06 043 53180 Office: NEBRASKA SERVICE CENTER Date: APR 30 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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

The petitioner is a horticultural specialty grower of sod. It seeks to employ the beneficiary permanently in the United States as a horticultural specialty farming supervisor. 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 record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original January 9, 2006 denial, 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.

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. 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 system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$16.98 per hour or \$35,318.40 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 appeal¹. Relevant evidence submitted on appeal includes counsel's brief and copies of the petitioner's compiled financial statements for the years ending December 31, 2003, December 31, 2004, and September 30, 2005.² Other relevant evidence includes copies of the petitioner's 2001 through 2004 Forms 1120, U.S. Corporation Income Tax Returns, and copies of the beneficiary's 2001 through 2004 Forms W-2, Wage and Tax Statements. Counsel also submitted a copy of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2004 Forms 1120 reflect taxable income before net operating loss deduction and special deductions or net income of \$17,549, \$31,673, \$0, and -\$82,934, respectively. The petitioner's 2001 through 2004 Forms 1120 also reflect net current assets of \$45,185, \$20,965, -\$37,197, and -\$208,451, respectively.

The 2001 through 2004 Forms W-2, issued by the petitioner for the beneficiary, reflect wages earned by the beneficiary of \$16,197.50, \$12,039.60, \$22,160.19, and \$16,204.09, respectively.

On appeal, counsel claims that the director's decision was rendered without requesting any additional evidence, that the decision fails to combine actual wages paid and/or taxable income and/or net current assets to demonstrate ability to pay, that the decision utilizes the wrong procedure for determining ability to pay, and that the decision fails to consider that a one-year temporary inability to pay due to unusual or temporary circumstances should not be used as definitive evidence of the petitioner's ability to pay the proffered wage. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in support of his contention.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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).

² The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 750B, signed by the beneficiary on April 26, 2001, the beneficiary claims to have been employed by the petitioner from April 1997 to the present. In addition, counsel has provided copies of the beneficiary's 2001 through 2004 Forms W-2. Therefore, the petitioner has established that it employed the beneficiary in 2001 through 2004. The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$35,318.40 and the actual wages paid to the beneficiary in 2001 through 2004 of \$16,197.50, \$12,039.60, \$22,160.19, and \$16,204.09, respectively. Those differences are \$19,120.90, \$23,278.80, \$13,158.21, and \$19,114.31, respectively.

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 2001 through 2004 were \$17,549, \$31,673, \$0, and -\$82,934, respectively. The petitioner has established that it could have paid the difference of \$23,278.80 between the proffered wage of \$35,318.40 and the actual wage paid to the beneficiary of \$12,039.60 from its net income of \$31,673 in 2002. The petitioner has not established that it could have paid the differences of \$19,120.90, \$13,158.21, and \$19,144.31 between the proffered wage of \$35,318.40 and the actual wages paid to the beneficiary of \$16,197.50, \$22,160.19, and \$16,204.09 in 2001, 2003, and 2004, respectively, from its net incomes of \$17,549, \$0, and -\$82,934, respectively, in 2001, 2003, and 2004.

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.³ 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. The petitioner's net current assets in 2001 through 2004 were \$45,185, \$20,965, -\$37,197, and -\$208,451, respectively. The petitioner could have paid the difference of \$19,120.90 between the proffered wage of \$35,318.40 and the actual wages paid to the beneficiary of \$16,197.50 from its net current assets in 2001. The petitioner could not have paid the differences of \$23,278.80, \$13,158.21, and \$19,114.31, respectively, between the proffered wage of \$35,318.40 and the actual wages paid to the beneficiary of \$12,039.60, \$22,160.19, and \$16,204.09, respectively, from its net current assets in 2002 through 2004.

On appeal, counsel contends that the director's decision was rendered without requesting any additional evidence, that the decision fails to combine actual wages paid and/or taxable income and/or net current assets to demonstrate ability to pay, that the decision utilizes the wrong procedure for determining ability to pay, and that the decision fails to consider that a one-year temporary inability to pay due to unusual or temporary circumstances should not be used as definitive evidence of the petitioner's ability to pay the proffered wage. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in support of his contention.

8 C.F.R. § 103.2(b)(8) states in pertinent part:

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. . . Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence, including blood tests.

In the instant case, the petitioner submitted copies of its 2001 through 2004 income tax returns and copies of the beneficiary's 2001 through 2004 Forms W-2. The record of proceeding was complete in that it contained all the necessary initial evidence; and, therefore, the director was not obligated to issue a request for evidence. In addition, since the record of proceeding included evidence of ineligibility on the petitioner's part, the director was justified in denying the petition on that basis alone.

³ 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.

Counsel claims that the director's decision fails to combine actual wages paid and/or taxable income and/or net current assets to demonstrate ability to pay the proffered wage of \$35,318.40. While the director may not have specifically stated that he considered the wages paid to the beneficiary along with the petitioner's net incomes and net current assets, he certainly provided counsel with the necessary facts/numbers regarding the petitioner's ability to pay the proffered wage and his grounds for denying the petition. As shown in the above discussions regarding the petitioner's net incomes and its net current assets, even considering the wages paid to the beneficiary, the petitioner is unable to establish its ability to pay the proffered wage in 2003 and 2004. Furthermore, it is noted that the petitioner has filed additional petitions for additional workers (one was approved) with the same priority date or similar dates. Therefore, the petitioner must establish that it had sufficient funds to pay all the salaries from the respective priority dates, not just that of the beneficiary.

Counsel also asserts that the decision fails to consider that a one-year temporary inability to pay due to unusual or temporary circumstances should not be used as definitive evidence of the petitioner's ability to pay the proffered wage. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in support of his contention. In the current case, however, the petitioner has provided no evidence that it sustained a one-year temporary inability to pay the proffered wage due to an unusual or temporary circumstance. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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)).

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a 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 Sonogawa*, 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, the petitioner's tax returns indicate it was incorporated in 1997. The petitioner has provided tax returns for the years 2001 through 2004. However, while the petitioner's gross receipts increased each year from 2001 to 2004, out of the four tax returns

provided by the petitioner, only 2001 and 2002 establish the petitioner's ability to pay the proffered wage of \$35,318.40, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The petitioner would need to submit tax returns before the priority date of April 27, 2001 and after 2004 showing that it possessed positive net incomes before the priority date and that it had sufficient funds to pay the proffered wage after 2004 to include not only the wages of the beneficiary, but also those of the additional employees petitioned for in order to meet the requirements of *Matter of Sonogawa*.

The petitioner's 2001 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$17,549 and net current assets of \$45,185. The petitioner could have paid the difference of \$19,120.90 between the proffered wage of \$35,318.40 and the actual wages paid to the beneficiary of \$16,197.50 from its net current assets in 2001 provided the petitioner had only submitted the petition for the beneficiary.

The petitioner's 2002 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$31,673 and net current assets of \$20,965. The petitioner could have paid the difference of \$23,278.80 between the proffered wage of \$35,318.40 and the actual wages paid to the beneficiary of \$12,039.60 from its net income in 2002 provided the petitioner had only submitted the petition for the beneficiary.

The petitioner's 2003 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$0 and net current assets of -\$37,197. The petitioner could not have paid the difference of \$13,158.21 between the proffered wage of \$35,318.40 and the actual wages paid to the beneficiary of \$22,160.19 from either its net income or net current assets in 2003.

The petitioner's 2004 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$82,934 and net current assets of -\$208,451. The petitioner could not have paid the difference of \$19,114.31 between the proffered wage of \$35,318.40 and the actual wages paid to the beneficiary of \$16,204.09 from either its net income or its net current assets in 2004.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not 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 not been met.

ORDER: The appeal is dismissed.