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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAY 01 2007
WAC 06 119 50738

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

The petitioner is a fish farm. It seeks to employ the beneficiary permanently in the United States as a fish farmer. As required by statute, an ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.¹ 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.

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 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 25, 2001. The proffered wage as stated on the labor certification is \$10.40 per hour, which amounts to \$21,632 annually. Part 2 of the ETA 750B, signed by the alien beneficiary on April 24, 2001, does not indicate that he has worked for the petitioner; however, a stamped DOL correction suggests that there may be an additional attachment to this section of the ETA 750. It has been omitted. A copy of the Citizenship and Immigration Services (CIS) Form G-325A, Biographic Information also accompanies the petition. It was signed by the beneficiary on February 18, 2006, and indicates that he works for the petitioner. His employment commencement date is not given.

On Part 5 of the visa petition, filed March 6, 2006, it is claimed that the petitioner was established in 1993,

¹ A partial copy was provided. Even if otherwise eligible, this petition may not be approved without the complete original or a certified duplicate original labor certification provided from the DOL. It is also noted that the employer's name on the labor certification is "[REDACTED]." On the tax returns and other financial documentation, the name is "[REDACTED]" For the purpose of this decision, the AAO will treat this as a typographical error, but this should be addressed in future proceedings, if any.

currently employs two workers, has a gross annual income of \$739,565 and a net annual income of \$405,171.

In this case, as evidence of its continuing financial ability to pay the certified wage of \$21,632 per year, the petitioner provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2004. It is a partial copy, but 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 \$739,565, total income of \$405,171, officer compensation of \$-0-, salaries and wages of \$14,232, and ordinary income of -\$53,875.²

Schedule L of the tax return reflects that the petitioner had \$156,251 in current assets and \$189,089 in current liabilities, yielding net current assets of -\$32,838. Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, 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.

On April 28, 2006 the director requested additional evidence of the petitioner's continuing ability to pay the proffered wage, advising it that the evidence must include copies of federal tax returns, annual reports, or audited financial statements, that cover the years 2001 through 2005. The director also instructed the petitioner to submit copies of any Wage and Tax Statements (W-2s) for the years under consideration (2001-2005). If the petitioner employed the beneficiary, the original labor certification, and an employment verification letter certifying that the beneficiary had acquired three months of work experience in the position offered of fish farmer as of the priority date of April 25, 2001.

In response, the petitioner provided a copy of its 2005 federal tax return. It reflects the following:

Gross receipts or sales	\$654,123
Total Income	\$399,625
Officer compensation	\$ 3,700
Salaries and Wages	\$ -0-
Ordinary Income (Form 1120S)	-\$ 61,667
Current assets (Sched. L)	\$186,868
Current liabilities (Sched. L)	\$451,026
Net current assets	-\$264,158

The petitioner also provided a copy of an employment verification letter, a copy of an internally generated profit and loss statement dated May 2006, a copies of a promissory note and deed of trust executed on January 3, 2006, showing a loan for \$300,000 received by the petitioner from "██████████" and a letter from the petitioner's president, "██████████" Mr. ██████ affirms the petitioner's ability to pay the

² For the purpose of this review, ordinary income will be treated as net income.

proffered wage even though the petitioner's financial documentation reveals a net loss. He explains that this has occurred because funds have been diverted to develop another property. Mr. [REDACTED] adds that the petitioner has applied for a loan for \$300,000 to provide additional cash flow.

Counsel's transmittal letter submitted with the petitioner's response indicates that no W-2s are available for the beneficiary because of a lack of a social security number.

The director denied the petition on August 17, 2006. The director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage based on the financial information provided to the record.

On appeal, counsel provides copies of the petitioner's federal corporate tax returns for 2001 and 2003. They contain the following:

	2001	2003
Gross receipts or sales	\$1,010,615	\$891,726
Total Income	\$ 531,831	\$517,950
Officer compensation	\$ none	\$ 27,000
Salaries and Wages	\$ 12,577	\$ 30,077
Ordinary Income (Form 1120S)	\$ 36,836	-\$ 52,730
Current assets (Sched. L)	\$ 209,962	\$122,658
Current liabilities (Sched. L)	\$ 198,538	\$138,403
Net current assets	\$ 11,429	-\$ 15,745

Counsel also provides a copy of the petitioner's 2004 state tax return and a copy of a magazine article discussing the aquaculture industry. Counsel maintains that the petitioner's significant labor cost deductions taken on its tax returns could easily pay the beneficiary's salary. He asserts that while the petitioner has experienced a loss in 2004, it also had a positive income for 2001, 2002, and 2003, and that the loan recently taken out to insure the petitioner's expansion should also be considered. Relying on *Matter of [REDACTED]* 2002-INA-105 (2004 BALCA), counsel asserts that the petitioner's overall fiscal circumstances should be considered.

Counsel's assertions are not persuasive. It is noted that *[REDACTED]* involved a sole proprietorship. Unlike a corporation, a sole proprietorship does not exist as a separate entity from the owner. Therefore the owner's overall financial circumstances are considered. In that case, the certifying officer erred in focusing on Schedule F (Profit or Loss From Farming) of the sole proprietor's individual tax return rather than reviewing the more inclusive figure reflected as the owner's adjusted gross 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 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 for a given period. 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. Here, while the record suggests that the petitioner may have employed the beneficiary in the past and may currently employ the beneficiary, the petitioner has not provided any documentation of such compensation such as W-2s, Form 1099s-Miscellaneous Income, or cancelled checks reflecting the amount of compensation paid.

Counsel's assertion relating to the petitioner's labor costs is well-taken; however, it is noted that wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Before the beneficiary may be considered as a replacement for a worker during a given period, there must be evidence that the position of the previous employee involved the same duties as those set forth in the Form ETA 750. Here, the record does not document the position, duty, and date of termination of the worker(s) who performed the duties of the proffered position. Moreover, if the petitioner already employs the beneficiary, it is difficult to conclude that he may simultaneously be deemed to represent another worker's replacement.

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 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*); *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.

It is noted that in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the Regional Commissioner sustained an appeal where the petitioner's 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, the petitioner's highest gross revenue was reported in the earliest year, 2001. With the exception of that year where the petitioner had sufficient net income of \$36,836 to pay the proffered wage, its tax returns for remaining years of 2003, 2004, and 2005, reflect negative figures for both net income and net current assets. Although the petitioner may be attempting to expand, this does not overcome the evidence presented on the tax returns or establish a framework of profitable years analogous to the *Sonegawa* petitioner. Moreover, the loan undertaken by the petitioner in 2006 is not immediately relevant to the years under consideration in this case. While it may underwrite the petitioner's existing and future business operations, it also represents a significant encumbrance and risk. 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, the evidence shows that the petitioner established the ability to pay the proffered wage of \$21,632 in 2001 based on its reported net income of \$36,836 which could meet that obligation.

The petitioner provided no financial documentation for 2002. Its ability to pay the proposed wage offer for this year has not been demonstrated.

The petitioner's 2003 tax return reveals that neither the petitioner's net income of -\$52,730, nor its net current assets of -\$15,745 establish its ability to pay the proffered salary in that year.

In 2004, neither the petitioner's net income of -\$53,875 nor its net current assets of -\$32,838 reflected an ability to pay the certified salary.

Similarly, in 2005, neither its net income of -\$61,667, nor the -\$264,158 in current assets demonstrated the petitioner's ability to pay the certified wage.

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 petitioner failed to demonstrate that it 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.

ORDER: The appeal is dismissed.