

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

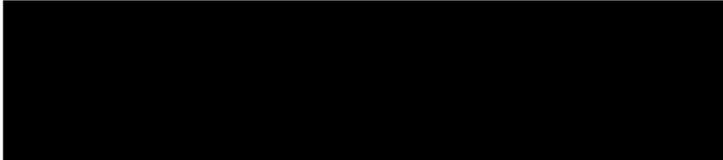
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

Bf

PUBLIC COPY

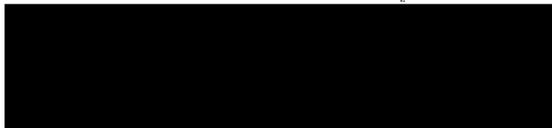


FILE: LIN 06 056 51259 Office: NEBRASKA SERVICE CENTER Date: MAY 01 2007

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

PETITION: Immigrant Petition for Alien Worker as an 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a motel manager. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial 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 contends that the petitioner has demonstrated its continuing financial 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 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, Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage is \$12.25 per hour, which amounts to \$25,480 per year. On Form ETA 750B, signed by the beneficiary on August 21, 2004, the beneficiary claims to have worked for the petitioner as a motel manager since January 2000.

Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed on December 15, 2005, indicates that the petitioner was established in 1994, has a gross annual income of \$349,000 and currently employs four workers.

In support of its ability to pay the proffered salary, the petitioner initially provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002, 2003, and 2004. They indicate that the petitioner uses a standard calendar year to file its tax returns. The returns contained the following information:

	2002	2003
Gross Receipts or Sales	\$359,087	\$359,258

Total Income	\$365,269	\$359,258
Compensation of Officers	\$ 51,796	\$ 24,000
Salaries and Wages	\$ 7,200	\$ 37,276
Ordinary Income ¹	-\$ 32,913	-\$285,524
Current Assets (Sched. L)	\$444,877	\$ 20,087
Current Liabilities (Sched. L)	\$333,172	\$169,593
Net current assets	\$111,705	-\$149,506

Year	2004	
Gross Receipts or Sales	\$343,001	
Total Income	\$348,850	
Compensation of Officers	\$ 42,000	
Salaries and Wages	\$ 17,626	
Ordinary Income	-\$ 22,516	
Current Assets (Sched. L)	\$ 27,561	
Current Liabilities (Sched. L)	\$ 161,578	
Net current assets	-\$ 134,017	

Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end 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 also provided copies of its federal employer's quarterly tax return (Form 941) for 2002-2004, accompanied by copies of the corresponding state quarterly wage report for those years. The petitioner identified from three to six employees on these reports. The beneficiary is not on any of these lists.

A letter from the petitioner's majority shareholder, [REDACTED]" accompanied the petition. He states that the beneficiary has been working for him as a motel manager for the past 5 years, but he has not formally put him on the payroll because the beneficiary lacks a social security number. Mr. [REDACTED] states that he is the designated manager of the operation, but that he and his wife's wages would be available to pay the beneficiary because [REDACTED] wants to engage in other business ventures.

On January 17, 2006, the director requested additional evidence, including documentation establishing the petitioner's ability to pay the proffered salary beginning on the April 30, 2001, priority date and continuing until the present. The director requested additional evidence from the petitioner including copies of the petitioner's federal income tax returns for 2001 and 2005, copies of any Form 1099-MISC, Miscellaneous Income or Wage

¹ For the purpose of this review, ordinary income will be treated as net income.

and Tax Statements (W-2s) issued to the beneficiary, and copies of the beneficiary's individual income tax returns for 2001-2005. If no W-2s, or 1099s are available, the director asked that the petitioner provide legible copies of cancelled checks, money orders, or similar evidence showing the wages paid to the beneficiary. The director further asked for an explanation of Mr. [REDACTED] statement relating to the method of payment of the beneficiary's compensation due to lack of a social security number and the beneficiary's social security number appearing on the Immigrant Petition for Alien Worker, (I-140). The director further asked for the petitioner's notarized explanation for any tax years claimed to be uncharacteristically unprofitable supported by any pertinent documentation.

In response, the petitioner, through counsel, submitted copies of unaudited financial statements and a corresponding accountant's letter. The financial statements refer to the Capitol Manor for each of the years 2001 to 2004 and for the eleven months ending November 30, 2005. They also refer to the accountant's "compilation report." The letter accompanying these statements is dated March 10, 2006, and is signed by [REDACTED] C.P.A. Mr. [REDACTED] states that the petitioner's tax returns include the financial data from two motel operations, but Capitol Manor has been more profitable. He adds that the other motel, "Economy Inn," underwent extensive renovations beginning in 2001, resulting in higher depreciation deductions and reduction of revenue due to the unavailability of some of the accommodations. Mr. [REDACTED] claims that the financial statements representing the Capitol Manor operation show that it is profitable.

Counsel submitted his own affidavit explaining that the beneficiary had acquired a social security card sometime around 1997, but that it was not valid for employment. Counsel states that this was the reason Mr. [REDACTED] concluded that he could not formally put the beneficiary on the payroll. Counsel's transmittal letter summarized Mr. [REDACTED] analysis and urged that the Capitol Manor operation had the ability to pay the proffered wage in each of the relevant years.

On May 17, 2006, the director denied the petition, concluding that the petitioner had not established its continuing ability to pay the proposed wage offer of \$25,480. Declining to consider Mr. [REDACTED] explanation that he and his wife would not draw wages from the corporation, if the beneficiary were hired as a permanent employee, the director stated that it "appears the beneficiary would not be assuming duties performed by either of these officers, as he is reportedly already performing the duties of a motel manager." The director also added that "in addition, [the beneficiary] will be managing only one of the motels operated by the corporation. Additional duties relating to the other motel and the corporation as a whole are performed by someone, presumably the shareholder-employees. The petitioner has not established that the beneficiary will be assuming the duties currently performed by the officers, so that their wages are now available to compensate him."

The director further noted that while the petitioner had demonstrated the ability to pay the certified wage in 2002, its tax returns for 2003 and 2004 did not reflect sufficient available cash or cash equivalent resources to pay the certified wage. He also determined that the unaudited, compiled financial statements submitted in support of one of the corporate petitioner's motels were not sufficient to demonstrate the petitioner's ability to pay the proffered wage, as the petitioner's corporate structure includes both motels.

On the notice of appeal, counsel requested an additional 30 days to provide a brief and/or additional evidence. Counsel states that the director failed to appreciate that the beneficiary will be assuming "an expanded role of

management, thereby freeing current wages paid to others for him. Additionally, in dismissing the appropriate allocation of revenue and expenses between the employing location and the other, CIS ignores the fact that the accounting firm is actually preparing the allocation. Additional detail and information will be presented in the subsequent submission." In response to a recent facsimile inquiry counsel indicates that an additional brief and/or evidence was not submitted and relies upon the response to the director's request for evidence and his assertions on the notice of appeal.

In determining a petitioner's ability to pay a certified wage, CIS will examine whether a petitioner may have employed and paid wages to a beneficiary during a given period. If a petitioner establishes by credible 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. If either the petitioner's net income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, while Mr. [REDACTED] and the beneficiary claim that the petitioner has employed him as a motel manager, no documentation of the payment of wages or compensation has been provided.

The argument that both Mr. [REDACTED] and his wife's officer compensation was available to pay the proffered wage is not persuasive. If such replacement is contemplated, it should be supported by affidavits and credible documentation such as an individual tax return showing that such compensation could have been foregone during the period given. It is further observed that officer compensation is paid to an officer who materially participates in the business. Many of the duties performed by an 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. Moreover, as noted by the director, the beneficiary was already employed as a motel manager, so it is unclear how he would be assuming the duties (and compensation) of these officers, so that their compensation would have been available to them. It is further noted that even if the entire \$24,000 claimed as officer compensation were added back to the petitioner's net income in 2003, the resulting -\$261,524 would still fall short in covering the proffered salary. Similarly, in 2004, adding back \$42,000 in officer compensation would adjust the petitioner's net income to \$19,484, which is still \$5,996 less than the certified wage.

CIS will also review the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. Additionally, it will review a petitioner's current assets and current liabilities as reflected on Schedule L of the tax return as an alternative method of determining a petitioner's ability to pay the proffered wage. 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). 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 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.

The compiled financial statements prepared by the petitioner's accounting firm, which present the financial data of one of the corporate petitioner's two motels, cannot be considered determinative of the petitioner's ability to pay the proffered wage in that year. According to the plain language of 8 C.F.R. § 204.5(g) (2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. A compilation is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). It is restricted to information based upon the representations of management. See *Barron's Accounting Handbook*, 37071 (3rd ed. 2000). As such, the compiled financial statements are not probative of the petitioner's ability to pay a proffered salary during the relevant period. Moreover, as reflected in the record, the petitioner is a corporation. Its consolidated operations are represented in its federal income tax returns, which are among one of the three types of evidence required to demonstrate the petitioner's continuing ability to pay the proffered wage. Thus, the financial information of its operation as a whole is required.

It is noted that in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), 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 *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 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, although the profitability of one motel is suggested to have been affected by renovations, the record does not specifically establish the nature and timeline of these events or demonstrate that they may have occurred beyond the scope of normal business operations within a framework of profitable years analogous to the *Sonogawa* 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 *Sonogawa*.

In this case, for 2001, the petitioner did not provide any audited financial statements, federal tax returns, or annual reports, pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2). Its ability to pay the proffered wage beginning at the priority date of April 30, 2001, has not been established.

In 2002, its net current assets of \$111,705 was sufficient to pay the proffered wage. The petitioner's ability to pay the certified wage has been demonstrated for that year.

In 2003, neither the petitioner's -\$285,524 in net income, nor its net current assets of -\$149,506 were sufficient to cover the proposed wage offer.

In 2004, its tax return reflects that neither its net income of -\$22,516 nor its net current assets of -\$134,017 were sufficient to establish its ability to pay the proposed wage offer for this year.

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.