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U.S. Citizenship  
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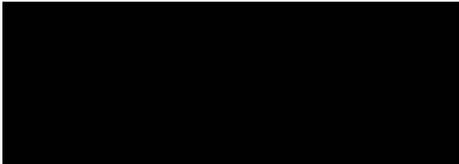
Petitioner:

Beneficiary:



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 construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 6, 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 either 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$25.10 per hour or \$52,208 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp.*, *NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the

federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on appeal includes counsel's brief and copies of the petitioner's owner's Uniform Residential Appraisal and Home Loan Statement, dated March of 2006. Other relevant evidence includes copies of the petitioner's 1998 through 2004 Forms 1120S, U.S. Income Tax Returns for an S Corporation, copies of the 1997 and 1999 through 2004 Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, copies of payroll checks issued on January 11, 2005 through September 20, 2005, and a copy of a letter, dated November 4, 2005, from [REDACTED]. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 1998 through 2004 Forms 1120S reflect ordinary incomes or net incomes from Schedule K of \$22,329, \$24,746, \$21,393, \$26,149, \$8,351, \$66,590, and \$46,155, respectively. The petitioner's 1998 through 2004 Forms 1120S also reflect net current assets of \$4,746, \$13,886, \$12,298, \$47,986, \$1,821, \$9,298, and \$6,941, respectively.

The 1997 and 1999 through 2004 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary of \$16,090, \$26,522, \$28,448, \$27,469, \$30,413, \$29,837, and \$31,585, respectively.

The payroll checks issued on January 11, 2005 through September 20, 2005 reflect wages paid to the beneficiary from a low of \$170 to a high of \$1,560.

The letter, dated November 4, 2005, from [REDACTED]

I have reviewed the 2004 Form 1120S of Steve Construction, Inc. and in my opinion the company did have the ability to pay the proffered wages of [REDACTED] as claimed by [REDACTED], the Acting Director of the U.S. Citizenship and Immigration Services. The company did not pay the proffered wages because it chose to spend [REDACTED] for additional fixed assets to expend [sic] the company and increase future earnings. To do that the company also took on additional financing of [REDACTED]

On appeal, counsel asserts that the "petitioning entity is an S Corporation, thus in evaluating the petitioner's financial ability, other financial assets of the petitioner - shareholder of an S Corporation, i.e., [REDACTED], President, may also be considered." Counsel also claims:

The Petitioner, [REDACTED], also owns numerous real estate properties that allow him to generate additional profit (leasing of commercial and private properties or sale of appreciated in value real estate properties). [REDACTED] is the petitioning entity's sole shareholder (100% of shares) as evidenced on Schedule K-1 of Form 1120S. Thus the sole owner/shareholder of petitioning company, [REDACTED] is able to use the financial resources from his other business investments, whereas he is the sole owner, to pay the wage offered to the Beneficiary.

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<sup>1</sup> 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).

\* \* \*

investments in real estate property have been also alluded to in the November 4, 2005, letter issued by an independent certified public accountant, letter was obtained by the Petitioner to provide the Service with an independent evaluation of the Petitioner's financial standing – it emphasizes the company's continuous business expansion and thus need to invest for expansion purposes any additional profits that the Petitioner might have generated in the amount equal to the proffered wage.

Further, as evidenced by the attached materials, was established in 1991 and since then it has considerably grown – please note that the company has generated greater profits within each consecutive year. Petitioner's continuous expansion evidences by itself the does have sufficient resources to pay the wage offered to the Beneficiary.

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).

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 January 8, 1998, the beneficiary claims to have been employed by the petitioner from February 1997 to the present. In addition, counsel has submitted Forms 1099-MISC for the years 1997 and 1999 through 2004, issued by the petitioner on behalf of the beneficiary, as evidence that the petitioner employed the beneficiary during those years. Therefore, the petitioner has established that it employed the beneficiary in 1997 and 1999 through 2004.

The petitioner is obligated to demonstrate that it had sufficient funds to pay the difference between the proffered wage of \$52,208 and the actual wages paid to the beneficiary in 1999 through 2004. As no Form 1099-MISC was submitted for the beneficiary for 1998, the petitioner must demonstrate that it had sufficient funds to pay the entire proffered wage of \$52,208 in 1998. The differences between the proffered wage and the actual wages paid to the beneficiary of \$26,522 in 1999, \$28,448 in 2000, \$27,469 in 2001, \$30,413 in 2002, \$29,837 in 2003, and \$31,585 in 2004 were \$25,686 in 1999, \$23,760 in 2000, \$24,739 in 2001, \$21,795 in 2002, \$22,371 in 2003, and \$20,623 in 2004.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

In the instant case, the petitioner's net incomes from Schedule K for 1988 through 2004 were \$22,329, \$24,746, \$21,393, \$26,149, \$8,351, \$66,590, and \$46,155, respectively. The petitioner could not have paid the proffered wage of \$52,208 from its net income in 1998. In addition, the petitioner could not have paid the difference of \$25,686 in 1999, the difference of \$23,760 in 2000, or the difference of \$21,795 in 2002 between the proffered wage of \$52,208 and the actual wages paid to the beneficiary of \$26,522 in 1999, \$28,448 in 2000, and \$30,413 in 2002 from its net incomes in 1999, 2000, and 2002. The petitioner could have paid the difference of \$24,739 in 2001, the difference of \$22,371 in 2003, and the difference of \$20,623 in 2004 between the proffered wage of \$52,208 and the actual wages paid to the beneficiary of \$27,469 in 2001, \$29,837 in 2003, and \$31,585 in 2004 from its net incomes 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.<sup>2</sup> 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 1998 through 2004 net current assets were \$4,746, \$13,886, \$12,298, \$47,986, \$1,821, \$9,298, and \$6,941, respectively. The petitioner could not have paid the proffered wage of \$52,208 from its net current assets in 1998. In addition, the petitioner could not have paid the difference of \$25,686 in 1999, \$23,760 in 2000, \$24,739 in 2001, \$21,795 in 2002, \$22,371 in 2003, and \$20,623 in 2004 between the proffered wage of \$52,208 and the actual wages paid to the beneficiary of \$26,522 in 1999, \$28,448 in 2000, \$27,469 in 2001, \$30,413 in 2002, \$29,837 in 2003, and \$31,585 in 2004 from its net current assets in 1999 through 2004.

On appeal, counsel claims that the sole owner of the petitioner's other financial assets, including real estate assets, and other business investments should be considered when determining the petitioner's ability to pay the proffered wage of \$52,208. In addition, counsel asserts that since the petitioner was established in 1991 and has shown continuous growth each year and its expansion that the petitioner has established its ability to pay the proffered wage.

Counsel is mistaken. 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 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." In addition, Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 1991. The petitioner has provided its tax returns for 1998 through 2004, with only three of those tax returns establishing the petitioner’s ability to pay the proffered wage of \$52,208. In addition, the three tax returns that establish the petitioner’s ability to pay the proffered wage are 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 or of any temporary and uncharacteristic disruption in its business activities. 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.

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.