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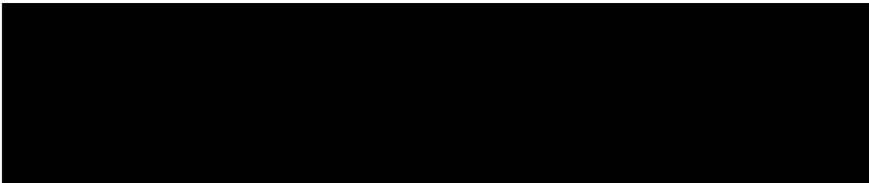
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional 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 an auto repair and body shop. It seeks to employ the beneficiary permanently in the United States as a translator or interpreter. As required by statute, a Form ETA 750, Application for Alien 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 submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage.

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.

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 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 September 13, 2001. The proffered wage as stated on the ETA 750A is \$31,304 per year. Part B of the ETA 750, signed by the alien beneficiary on August 20, 2001, does not indicate that he had worked for the petitioner as of that date.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on November 8, 2004, it is claimed that the petitioner was established on July 1, 2000, claims an annual gross income of \$284,380, \$45,844 in annual net income, and currently employs three workers.

With the petition and in response to the director's notice of intent to deny issued on February 22, 2005, in support of its continuing financial ability to pay the certified wage of \$31,304 per year, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, and 2003. They indicate that the petitioner uses a standard calendar year to file its taxes. The returns contain the following information relevant to the petitioner's net income, current assets, current liabilities and net current assets:

	2001	2002	2003
Net Income ¹ (Form 1120S)	-\$8,576	\$8,271	\$32,319
Current Assets (Sched. L)	\$7,800	\$9,307	\$10,724
Current Liabilities (Sched. L)	\$ 428	\$ 656	\$ 2,361
Net Current Assets	\$7,372	\$8,651	\$ 8,363

As noted in the above table, 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 provided copies of Wage and Tax Statements (W-2) reflecting the wages paid to the beneficiary by the petitioner. In 2004, a W-2 indicates that the petitioner paid the beneficiary \$1,905 in wages. The petitioner additionally provided copies of its Form 941, Employer's Quarterly Federal Tax Return for 2001 and 2002, copies of other workers' W-2s for 2001 and 2002, various copies of the principal shareholder's personal income tax returns, individual financial statements, individual bank statements, and an appraisal report relating to a residential property individually owned by the principal shareholder. The petitioner further provided a valuation report prepared by Academy Capital Valuation Experts related to the petitioning business prepared by an appraisal firm, which concluded that its fair market value in 2004 was approximately \$86,220.

The director denied the petition on October 2, 2006. The director concluded that the petitioner had not demonstrated its ability to pay the proffered wage. She noted that two W-2s were received indicating that the

¹ 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 IRS Form 1120S. The petitioner's net income is shown on line 21 of its 2001 tax return. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23* (1997-2003) and line 17e* (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> indicating that Schedule K is a (summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2001, 2002 and 2003, the petitioner's net income is found on Schedule K of its tax returns for 2001, 2002 and 2003.

petitioner had paid the beneficiary \$5,100 in 2002 and \$1,905 in 2004. The AAO does not find that the W-2 for 2002 is probative of wages paid to the beneficiary as the name on the W-2 is not used in other contexts to identify the beneficiary and the social security number does not match the other W-2. The director rejected consideration of the principal shareholder's asset in the corporate petitioner's ability to pay a given wage and additionally noted that other petitions had been filed for two other beneficiaries which were pending along with the beneficiary's. She noted that the petitioner had not shown that it possessed sufficient net assets to cover their proffered wages of approximately \$36,000 and \$38,000, respectively, as well as pay the beneficiary's proffered salary of \$31,304.

The director observed that her decision rested on the petitioner's failure to establish its ability to pay the proffered wage, but further noted inconsistencies appearing within the number of employees appearing on the petitioner's quarterly reports as compared to the state labor department records, as well as the beneficiary's employment verification letter. The director explained that the letter was dated August 25, 2001, and confirmed the beneficiary's qualifying employment as an interpreter and translator for the International Life Insurance Corp. in Korea from March 1, 1995 to July 30, 1998. According to the director, communication with the Korean Life Insurance Association indicates that this company was closed in 1998 and did not exist in 2001.

On appeal, counsel provides a copy of the beneficiary's 2005 W-2 indicating that the petitioner paid him \$33,020. Counsel also provides copies of other documentation previously submitted, as well as a copy of the petitioner's tax return for 2004. It reflects the following information:

	2004
Net Income (Form 1120S)	\$36,981
Current Assets (Sched. L)	\$12,214
Current Liabilities (Sched. L)	\$ 820
Net Current Assets	\$11,394

Counsel maintains that the quarterly reports are not misrepresented and that they were prepared by a certified public accountant.

Counsel also submitted a statement from the beneficiary as well as a Korean career certificate indicating his period of employment with the life insurance company as being from January 5, 1996 to July 20, 1998, which did not include a period of internship. The beneficiary also explained that the many insurance companies entered bankruptcy during this period and that it was a difficult to secure any employment confirmation but that he believed that the legal termination of the proceedings finally occurred in January 2002. The beneficiary states that he ultimately contacted the department manager due to this difficulty in securing an employment verification letter. The beneficiary additionally states that the career certificate from the Korea Deposit Insurance Corporation (KDIC) shows only the financing department that he was transferred to for the last two weeks of that job, rather than his original position in international marketing.

As stated by the director, the denial of this petition rested on the petitioner's failure to demonstrate its continuing ability to pay the proffered wage. As to the director's observations as to the inconsistencies presented by the employment verification letter from [REDACTED] of the International Life Insurance Corp. written in 2001,

approximately three years after the director's investigation revealed that the company had closed in 1998, the AAO would note that the beneficiary's statements on appeal did not overcome the lack of credibility raised by a letter on a company letterhead signed by [REDACTED], dated August 25, 2001, referring the beneficiary's employment in the marketing branch of the company. This letter made no mention of the business' bankruptcy, closing or continued viability as raised by the beneficiary's statements on appeal. Moreover, the career certificate offered on employ does not document that the beneficiary's former employer employed him as a translator/interpreter. The career certificate states only that he was employed in the financing department, commencing in 1996, not 1995 as raised in [REDACTED]'s letter. As such, the evidence submitted to the underlying record and on appeal does not satisfactorily resolve the inconsistencies raised in the director's denial. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Relying on figures represented within the Academy Capital appraisal report, counsel asserts that the petitioner's ability to pay the proffered wage has been established because of the report's claim that the petitioner's net assets ranged from \$84,526 in 2001 to \$86,220 in 2004. Additionally counsel asserts that by combining certain net cash flow amounts and depreciation expenses as presented within the report, the petitioner's ability to pay the certified wage may be demonstrated.

The AAO does not find these assertions persuasive. First, as noted by the director, it is noted that the principal shareholder's personal holdings will not be considered in determining the corporate petitioner's ability to pay the proffered wage. 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."

Additionally, counsel's reliance on the appraisal report in calculating the petitioner's continuing ability to pay the certified salary is misplaced. The report does not represent an audited financial statement consistent with the requirements of 8 C.F.R. § 204.5(g)(2) which requires that either federal tax returns, audited financial statements or annual reports must be submitted in order to establish a petitioner's ability to pay a proposed wage offer. According to the plain language of the regulation at 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.

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 beneficiary 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 has employed the beneficiary and has paid \$1,905 to him in 2004 and \$33,020 in 2005, as indicated on appeal.

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. at 1054 (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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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 as is asserted here by [REDACTED]. 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 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 Chang* 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. CIS rejects the inclusion of total or fixed assets in this analysis, as referred to by [REDACTED], because they 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.

In this matter, as referenced by the director, if a petitioner files multiple petitions, the petitioner must establish that it has the containing financial ability to pay the proffered wage of all sponsored beneficiaries as of the respective priority dates.

In 2001, neither the petitioner's net income of -\$8,576, nor its net current assets of \$7,372 could cover the proffered wage of \$31,304 for this beneficiary or any other pending petition. The petitioner has not demonstrated its ability to pay the proffered wage in this year.

In 2002, neither the petitioner's net income of \$8,271, nor its net current assets of \$8,651 could pay the proffered wage of this or any other sponsored beneficiary. The petitioner has not established its financial ability to pay the certified wage.

In 2003, the petitioner's net income of \$32,319 was sufficient to pay only this beneficiary's proposed wage offer of \$31,304.

In 2004, the petitioner's net income of \$36,981 was sufficient to cover either this beneficiary proffered wage or the beneficiary's wage identified in SRC0425351318, but not both. It may be additionally noted that the beneficiary's 2005 W-2 that was provided on appeal, indicates that his wages exceeded the proffered wage and established the petitioner's ability to pay in this year.

However, 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. (Emphasis added.) 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.

ORDER: The appeal is dismissed.