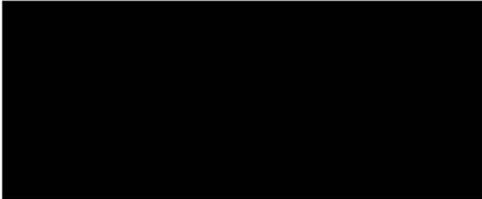


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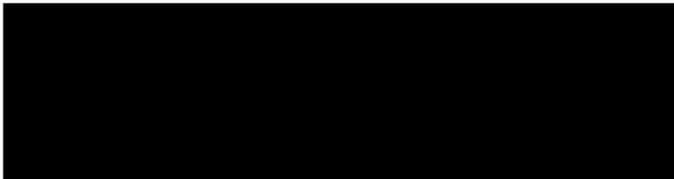
Date: OCT 29 2008

IN RE: 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 employment based 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 landscaping firm. It seeks to employ the beneficiary permanently in the United States as a gardener. 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 asserts that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

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:

*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 establish that its ETA 750 job offer to the beneficiary is realistic. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition subsequently filed based on the approved ETA 750. The priority date is the date that the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Therefore, 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. Here, the ETA 750 was accepted for processing on March 11, 2002. The proffered wage as stated on Part A of the ETA 750 is \$11.54 per hour, which amounts to \$24,003.20 per year.

On Part B of the ETA 750, signed by the beneficiary on March 6, 2002, the beneficiary claims to have worked for the petitioner since December 1999.

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on May 30, 2006, the petitioner states that it was established on June 8, 1988, reports \$996,864 in annual gross income, \$257,098 in annual net income and currently employs nineteen workers.

As evidence of its continuing financial ability to pay the proposed wage offer of \$24,003.20 per annum and in response to the director’s request for evidence, dated January 3, 2007, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return, for 2001, 2002, 2003, 2004 and 2005. The returns indicate that the petitioner files its tax returns using a standard calendar year. The returns also contain the following information:

	2001	2002	2003	2004	2005
Net Income <sup>1</sup>	-\$ 125,678	-\$ 189,564	\$ 59,077	\$ 257,098	-\$ 2,989
Current Assets	\$ 534,082	\$405,024	\$435,304	\$ 620,377	\$ 675,806
Current Liabilities	\$ 539,561	\$587,805	\$567,338	\$ 539,798	\$ 658,667
Net Current Assets	-\$ 5,479	-\$182,781	-\$132,034	\$ 80,579	\$ 17,139

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.<sup>2</sup> 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. In this case, the corporate petitioner’s year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. 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-

<sup>1</sup> For the purpose of this review of the petitioner’s Form 1120 corporate tax returns, the petitioner’s net income is found on line 28 (taxable income before net operating loss deduction and special deductions). CIS uses a corporate petitioner’s taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner’s total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, CIS examines a petitioner’s taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

<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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

In response to the director's request for additional evidence in support of its ability to pay the certified salary of \$24,003.20 per year, including a request for evidence of wages paid to the beneficiary in 2002, 2003 and 2005 such as Form 1099s or Wage and Tax Statements (W-2s), the petitioner provided a letter from its business counselor, [REDACTED] EA supported by unaudited financial statements related to 2001-2006. Smith confirms in the letter that the beneficiary would be providing services in 2007 that other employees were paid to perform previously. He further stated that the petitioner's inventory decreased in 2002 due to the loss of an available farm that contained tree inventory; that the 2005 net operating income should be considered without the depreciation expense, and that line 9 of Schedule L of the corporate tax return related to other investments are actually held short term and are available to meet current operating requirements.

Following a review of the petitioner's net income and net current assets, the director denied the petition on May 9, 2007, determining that neither the petitioner's net income nor its net current assets were sufficient to demonstrate its ability to pay the proffered wage. The director further noted that the petitioner had not provided any evidence of compensation paid to the beneficiary even though the record indicated that he had claimed employment since 1999.

On appeal, the petitioner, through counsel, submits additional evidence consisting of copies of the petitioner's Transmittal of Wage and Tax Statements (W-3s) showing cumulative wages paid in 2002 and 2003, respectively, and copies of the petitioner's quarterly federal tax returns (Form 941s) for the last quarter of 2002 and 2003 indicating total wages paid during those respective quarters.

Counsel asserts on appeal that the petitioner's ability to cover its payroll during 2002 and 2003 as well as its gross sales of \$1,273,415 indicated its ability to pay the proffered wage. She also claims that the 2001 loss should be disregarded because it occurred before the priority date was established in 2002.

Although the petitioner's tax returns indicate that either the petitioner's net income or net current assets were sufficient to cover the proffered wage of \$24,003.20 in 2003 and 2004, we do not find counsel's assertions persuasive as to the petitioner's ability to pay the proposed wage offer in 2002 and 2005. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* financial ability beginning at the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth in the alien labor certification that the petitioner submitted to the DOL is clear.

Additionally, the submission of the unaudited financial statements in support of [REDACTED] letter is not probative of the petitioner's continuing ability to pay the certified salary during the relevant period. These documents do not represent audited financial statements 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. Further, as noted by the director, line 9 of Schedule L does not represent a sum which was included in the report of current assets reflected on line 1 through line 6 of Schedule L and therefore cannot be included in the calculation of the petitioner's net current assets as explained above.

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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, although the record suggests that the petitioner has employed the beneficiary beginning in 1999, the petitioner failed to submit any evidence of compensation paid to the beneficiary. This also raises questions about the assertion that in 2007, the beneficiary was intended to provide services that were previously supplied by other workers. It is noted that such an assertion must be supported a complete explanation of the beneficiary's past and current employment, his duties and salary, as well as a description and identification of the duties of the worker(s) he was intended to replace.<sup>3</sup>

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 supported by federal case law. *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 or gross sales or payroll as is asserted here on appeal by counsel. 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

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<sup>3</sup> It is noted that it is not the purpose of the employment visa program to replace U.S. employees with immigrant workers.

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.

In this case, in 2003, the petitioner's net income of \$59,077 was sufficient to pay the proffered wage of \$24,003.20 and demonstrate its ability to pay in that year.

Similarly, in 2004, either the petitioner's net income of \$257,098 or its net current assets of \$80,579 could have covered the proffered salary and demonstrate its ability to pay in that year.

In 2002, however, neither its net income of -\$189,564 nor its net current assets of -\$182,781 was sufficient to cover the proffered wage and establish the petitioner's ability to pay during this year. It is noted that the decrease in the petitioner's inventory which [REDACTED] attributed to the loss of the availability of a tree farm does not alter this determination as "inventories" reflected on line 3 of Schedule L sustained a \$71,060 reduction, that if added back, would still leave a negative figure as the petitioner's net current assets for that year.

The petitioner also failed to demonstrate its ability to pay the proposed salary of \$24,003.20 in 2005 as neither its net income of -\$2,989 nor its net current assets of \$17,139 was enough to cover the certified wage. The petitioner failed to establish its continuing ability to pay the proffered salary in 2002 and 2005.

Similarly, we do not find that an approval based on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is appropriate in this case. In *Sonogawa*, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere and the fact that unlike the four and one-half years that the instant petitioner had been established at the time of the I-140 filing, the petitioner in *Sonegawa* had been in business for eleven years and had shown substantial potential for growth. In this case, although two of the petitioner's tax returns reflect its ability to pay the proffered wage they do not represent a framework of profitable years analogous to the *Sonegawa* petitioner. The petitioner's tax returns for 2002 and 2005 failed to reflect amounts sufficient to cover the proffered wage by either its net income or its net current assets. No evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonegawa* have been submitted. 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*.

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.