

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

FILE:

[REDACTED]
LIN 07 008 52323

Office: NEBRASKA SERVICE CENTER

Date: JUN 19 2009

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, and the petition will be approved.

The petitioner claims to operate and manage commercial property. It seeks to employ the beneficiary permanently in the United States as a maintenance repairer. As required by 8 C.F.R. § 204.5(i)(3), the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL). 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 petition. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 22, 2007 denial, the primary 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), grants preference classification to qualified immigrants who are capable 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the labor certification was originally filed with the DOL on March 2, 2001. The proffered wage stated on the labor certification is \$16.64 per hour (\$34,611.20 per year). The labor certification states that the position requires 24 months of experience in the job offered.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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.¹

The evidence in the record of proceeding includes the petitioner's Forms 1120, U.S. Corporation Income Tax Return, for 2001 through 2006; a letter from the petitioner's accountant; and a letter stating that the beneficiary was employed by ██████████ Maintenance Services from February 1989 to October 1995. The petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1977, to have a gross annual income of over \$9 million, and to employ 94 workers. According to the tax returns in the record, the petitioner's fiscal year is from February 1 to January 31. On the labor certification, signed by the beneficiary on September 29, 2006, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director incorrectly analyzed the petitioner's tax returns, and claims that the net income figure on the petitioner's tax returns do not correctly reflect the company's financial strength due to its tax planning strategy of distributing its profits as bonuses to its officers and employees.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for the petition based on it, 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, U.S. Citizenship and Immigration Services (USCIS) 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, USCIS will first examine whether the petitioner employed and paid the beneficiary during the required 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered

¹The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 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).

wage for the required period, the petitioner is obligated to establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the required period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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. 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). Reliance on the petitioner's gross sales and wage expense is misplaced. Showing that the petitioner's gross sales exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 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. [USCIS] 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 Chang*, 719 F. Supp. at 537

The petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.²

<u>Year</u>	<u>Net Income (\$)</u>
2001	6,169.00
2002	9,718.00
2003	0.00
2004	0.00

²For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120.

2005	64,258.00
2006	27,111.00

Therefore, for the years 2001 through 2004 and 2006, the petitioner did not have sufficient net income to pay the 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 that period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. 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, USCIS 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.³ If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its net current assets for the required period, as shown in the table below.⁴

<u>Year</u>	<u>Net Current Assets (\$)</u>
2001	105,604.00
2002	74,166.00
2003	15,012.00
2004	-75,458.00
2006	-248,222.00

For the years 2003, 2004 and 2006, the petitioner did not have sufficient net income or current assets to pay the proffered wage. Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

³According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

⁴On Form 1120, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel submits a letter from the petitioner's accountant that claims the director erred by not adding back depreciation to the petitioner's net income, and by not adding back unearned income to the petitioner's net current assets. The petitioner's accountant also claims that the petitioner's tax planning strategy is to minimize its net income by issuing bonuses to executives and employees at the fiscal year end, resulting in a lower net income figure that does not accurately reflect the company's financial health.

The petitioner's accountant incorrectly interprets the director's statement that the analysis of tax returns is performed "without consideration of depreciation." As is explained in detail above, this statement means that, when determining net income, USCIS does not add back depreciation to the net income figure listed on Line 28 of Form 1120.

The petitioner's accountant also states that the current liability described as "unearned income" should not be subtracted from the petitioner's current assets because it reflects funds in the petitioner's bank account received from its tenants for the two to three week period after the end of the corporate year. Categorizing these amounts as unearned income permits the petitioner to avoid counting the funds as income until the next fiscal year, thereby lessening its taxes for the current year. Since these amounts will be credited as income for the next fiscal year, it is correct to deduct unearned income from the petitioner's current assets. To omit this amount would incorrectly inflate the petitioner's net current assets.

Finally, the petitioner's accountant states that the petitioner's tax planning strategy results in a net income figure that does not accurately reflect the petitioner's financial health. USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years 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 USCIS deems relevant to the petitioner's ability to pay the proffered wage.

It is noted that the petitioner claims to have been in business since 1977.⁵ Also, as corroborated by six years of tax returns and other credible evidence in the record, the petitioner appears to have consistently employed a substantial number of workers, most recently claimed in the petition to total 94. The petitioner's 2006 tax return indicates that, in that year, it paid salaries and wages of \$225,850 and incurred labor costs of \$1,579,205. Tax returns from prior years show similar expenditures. It appears that the petitioner has also employed third parties to provide janitorial services and security services and incurred significant expenses related thereto.

Finally, the petitioner's tax returns show that the petitioner is equally owned by three individuals. The three owners each received \$412,000.00 in 2001, \$531,000.00 in 2002, \$520,000.00 in 2003, \$556,500.00 in 2004, \$638,000.00 in 2005, and \$635,000.00 in 2006. The petitioner's tax returns show gross sales of \$7,436,942.00 in 2001, \$7,869,429.00 in 2002, \$8,340,716.00 in 2003, \$8,839,635.00 in 2004, \$9,497,051.00 in 2005 and \$9,241,843.00 in 2006. From 2001 through 2006, the petitioner never had a net loss. However, its net income was \$0.00 in 2003 and 2004, and less than \$10,000.00 in 2001 and 2002, despite substantial gross annual sales and compensation paid to its officers and other workers each year. Therefore, the petitioner's tax returns corroborate the claim that the petitioner minimized its net income each year by paying out its profits to its owners.

The petitioner's size, longevity, number of employees, and officer compensation, cannot be overlooked. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

The evidence submitted establishes that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The appeal is sustained

⁵According to the California Department of State website, the petitioner is active and in good standing. See <http://kepler.sos.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C0856449> (last access June 16, 2009).