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



**U.S. Citizenship
and Immigration
Services**

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

FEB 16 2010

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

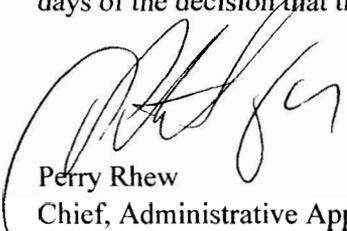
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]
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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home improvements firm. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, an 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 demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, maintains that the petitioner has had the continuing ability to pay the proffered wage.¹

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 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.

¹ 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.

The petitioner must demonstrate that it has had the continuing financial ability to pay the proffered wage as of 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, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage is set forth as \$14.03 per hour which amounts to \$29,182.40 per annum. The beneficiary signed Part B of the Form ETA 750 on April 23, 2001, indicating that he has been employed as a roofer by the petitioner from June 1999 to the present (date of signing). Similarly, a biographic information form, (G-325A) signed by the beneficiary on June 15, 2007 and filed in connection with his application for permanent residence also states that the petitioner has employed him as a roofer since June 1999. However, item 8 of Part 6 of the Immigrant Petition for Alien Worker (I-140) states that the certified position is a new one. The petitioner has not explained this discrepancy. 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).

In support of the petitioner's continuing ability to pay the beneficiary's proposed wage offer of \$29,182.40 and in response to the director's request for evidence, the petitioner provided copies of Form 1120S, U.S. Income Tax Return(s) for an S Corporation for 2001, 2002, 2003, 2004, 2005, and 2006. The returns indicate that the petitioner has filed its tax returns using a standard calendar year.

The tax returns contain the following information:

	2001	2002	2003	2004
Net Income ²	\$ 6,168	\$ 7,441	\$ 5,888	\$ 2,196
Current Assets	\$ 15,482	\$ 36,578	\$ 39,129	\$ 1,814
Current Liabilities	\$ 43,685	\$ 2,025	\$ 2,851	\$ 2,593
Net Current Assets	-\$ 28,203	\$ 34,553	\$ 36,278	-\$ 779

² Where an S Corporation's income is exclusively from a trade or business, United States Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. 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 (2001-2003), line 17e (2004-2005), and line 18 (2006) 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 Schedule K for 2001-2006, the petitioner's net income is found on Schedule K of its tax return.

	2005	2006
Net Income	\$8,479	\$10,767
Current Assets	\$9,652	\$14,250
Current Liabilities	\$ none	\$ 4,102
Net Current Assets	\$9,652	\$10,148

As illustrated in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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-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 evidence and renewed upon appeal, counsel asserts that amounts taken as "Compensation of Officers" on the corporate tax return must be added back to net income because they represent profits distributed to officers and are reported on the officers' individual tax returns. Counsel submits a copy of a 2006 AAO decision in which officer's compensation was considered.

The director denied the petition on February 14, 2008. He concluded that the petitioner had failed to demonstrate its ability to pay the proffered wage through either its net income or net current assets. He further declined to consider officer compensation as probative of the corporate petitioner's ability to pay the proffered salary.

With regard to officer compensation, counsel's assertions are not persuasive in this case. It is noted that the selected AAO decision does not constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a). As noted above, as an alternative to net income, USCIS will also review net current assets which represent the difference between current assets and current liabilities (payable in less than a year) as a method to determine whether a corporate petitioner has sufficient reasonably available liquid assets in order to pay the proffered wage during a given period.

³ According 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.

As noted by the director, 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 *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary as a roofer and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. Moreover, there is also no first-hand evidence from the officer(s) that he was willing or able to forego part of his compensation during the period of time under consideration. Undocumented suggestions that the beneficiary would be assuming a portion of this compensation and that the officer compensation may be considered funds available to pay the proffered wage are misplaced. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for the officer claimed or other documentation to identify whose workload, if any, would be reduced. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary would assume any portion of such duties or compensation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel's assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 alien 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. In this matter, although requested in the underlying record, and despite the beneficiary's claim to have worked for the petitioner, the petitioner failed to provide any evidence of compensation paid to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS 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 (supported by audited financial statements) as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income 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. 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); *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009).

In *K.C.P. Food Co., Inc. v. Sava*, 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.

Similarly, depreciation or other expenses will not be added back to a petitioner's net income. With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[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." *Chi-Feng Chang* at 537 (emphasis added).

Counsel also relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in asserting that the petition should be approved. In *Sonogawa*, the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner's reasonable expectations of increasing business and increasing profits despite evidence of past small profits. That case, however, relates 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 *Sonegawa* 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 petitioner had 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, 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).

Unlike the *Sonegawa* petitioner, this petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonegawa* are applicable. As shown on the corporate tax returns, the petitioner's gross sales and receipts have declined from two million in 2001 to \$677,274 in 2004 and then increased to \$1.4 million in 2006. Further, although the petitioner demonstrated its ability to pay in 2002 and 2003 because it held sufficient net current assets of \$34,553 and \$36,278, respectively, to cover the proffered wage of \$29,182.40, its net income has never exceeded \$10,767 in any of the relevant years. The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

As noted above, although the petitioner established its ability to pay the proffered wage in 2002 and 2003, in 2001, 2004, 2005, and 2006, it has not demonstrated this ability. In 2001, neither the petitioner's net income of \$6,168 nor its net current assets of -\$28,203 was sufficient to cover the proffered wage of \$29,182.40. The petitioner failed to demonstrate the ability to pay the proffered wage in this year.

In 2004, the petitioner's net income of \$2,1096 was not enough to cover the proffered wage. Its net current assets of -\$779 was also not sufficient to cover the certified salary. The petitioner did not establish its ability to pay the certified salary in this year.

In 2005, neither the petitioner's net income of \$8,479, nor its net current assets of \$9,652 was sufficient to show its ability to pay the proffered wage.

Similarly, in 2006, neither its net income of \$10,767, nor its net current assets of \$10,148 was enough to cover the proposed wage offer or demonstrate its ability to pay.

Based on a review of the evidence in the record and the argument submitted on appeal, the petitioner has failed to establish its *continuing* ability to pay the proffered wage as of the priority date. 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.