

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

PUBLIC COPY



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

[Redacted]

B6

MAR 04 2011

FILE:

[Redacted]

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:
Beneficiary:

[Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 203 (b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Perry Rhew
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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. 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 and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage and that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).¹

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate that the beneficiary possessed the requisite education and experience as set forth on the Form ETA 750.. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

¹The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

Here, the Form ETA 750 was accepted for processing on February 19, 2003.² The proffered wage is stated as \$15,746 per year. Part B of the ETA 750, which was signed by the beneficiary on July 10, 2003, does not indicate that the petitioner has employed the beneficiary as of the date of signing.

The Immigrant Petition for Alien Worker, (Form I-140) was filed on January 10, 2008. Part 5 of the petition indicates that the petitioner was established on October 21, 1994, claims a gross annual income of \$463,115, a net annual income of \$14,426 and employs two workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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).

Further, where multiple petitions are filed, the petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Additionally, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. In this case, USCIS electronic records indicate that the petitioner had filed at least four Form I-140s. Including the current beneficiary, the remaining petitions with pending cases have been filed for:

[REDACTED]	Priority date of 03/12/2002),
[REDACTED]	Priority date of 04/29/2002)
Current beneficiary,	[REDACTED] Priority date of 02/19/2003)
[REDACTED]	Priority date 10/01/2002)

² 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 importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

The proffered salaries for these beneficiaries as shown by their respective approved labor certifications are:

█	\$19,552
█	\$19,115.20
█	\$15,746
█	\$15,745.60 ³

As noted by the director, █ represents a beneficiary proposed as a replacement of another employee identified as █ is currently in the Philippines and has not been employed by the petitioner. Further, the record contains copies of a 2002, 2004, 2005, 2006 and 2007 W-2, as well as a 2003 individual tax return belonging to █. As noted by the director, there is no evidence that █ has departed the petitioner's employment or documentation of the nature of her termination. 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)). Wages already paid to others are generally not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.⁴

In support of its ability to pay the proffered wage of \$15,746 in this case, the petitioner provided copies of its 2003, 2004, 2005, 2006 and 2007 Form 1120S, U.S. Income Tax Return for an S Corporation to the underlying record and on appeal. They reflect that its fiscal year is a standard calendar year. The tax returns contain the following information:

Year	2002	2003	2004	2005
Net Income ⁵	-\$67,687	-\$ 3,519	-\$1,381	-\$9,959

³ The appeal of the denial of the Form I-140 was dismissed. A subsequent motion to reopen the AAO's decision was late filed and dismissed.

⁴ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

⁵ Where an S Corporation's income is exclusively from a trade or business, U.S. 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. 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 (2002, 2003) line 17e

Current Assets	- \$ 8,778	\$ 1,125	\$3,712	\$ none
Current Liabilities	\$ none	\$ none	\$ none	\$2,589
Net Current Assets	- \$ 8,778	\$ 1,125	\$3,712	-\$2,589

Year	2006	2007
Net Income	\$ 297	-\$107,336
Current Assets	\$15,710	\$ 4,746
Current Liabilities	\$ none	\$ none
Net Current Assets	\$15,710	\$ 4,746

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.⁶ 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.⁷

In support of the corporate petitioner's ability to pay the proffered wage, the petitioner also provided the following copies of documents in the form of 1099s, W-2s or Internal Revenue Service (IRS) transcripts of W-2s. They reflect wages paid to the current beneficiary as well as to two other sponsored beneficiaries for the following years and amounts:

(2004, 2005) or line 18 (2006, 2007) 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.). Here, the petitioner's net income is reflected on line 23 of Schedule K in 2002 and 2003, line 17e in 2004-2005 and on line 18 in 2006 and 2007.

⁶ 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.

⁷ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

Difference from Proffered Wage of \$15,746 per year

1.	2003	current beneficiary	\$3,000	\$12,746 less
	2004		none submitted	\$15,746
	2005		\$16,605	\$ 859 more
	2006		\$17,615	\$ 1,869 more
	2007		\$19,885	\$ 4,139 more

It is noted that proof of wages paid to the current beneficiary for 2004 by the petitioner consisted of an IRS transcript showing information from the beneficiary's individual tax return and did not include a W-2 or Form 1099. As this document does not indicate the origin of his income in this year, it will not be considered.

Difference from Proffered Wage of \$19,115.20

2.	2002		\$ 7,200	\$11,915.20 less
	2003		\$14,400	\$4,715.20 less
	2004		\$19,370	\$ 254.80 more
	2005		\$30,126	\$11,010.80 more
	2006		\$31,608	\$12,492.80 more
	2007		\$20,345	\$ 1,229 more

Difference from Proffered Wage of \$19,552

3.	2002		\$ 6,000	\$13,552 less
	2003		\$ 12,000	\$ 7,552 less
	2004		\$ 14,300	\$ 5,252 less
	2005		\$ 15,923.50	\$ 3,628.50 less
	2006		\$ 18,837.50	\$ 714.50 less
	2007		\$ 20,985	\$ 1,433 more

Difference from Proffered Wage of \$15,745.60

4.	2002		not employed by Petitioner	\$15,745.60
	2003		" "	\$15,745.60
	2004		" "	\$15,745.60
	2005		" "	\$15,745.60

2006	“	“	\$15,745.60
2007	“	“	\$15,745.60

Additionally, the petitioner has submitted a declaration in the form of a “Secretary’s Certificate,” dated January 29, 2009, from the employee and corporate secretary, [REDACTED] and signed by [REDACTED]. It claims [REDACTED] (sole shareholder) salary will be reduced to cover the deficiencies between the proffered salaries and the wages paid to the pending beneficiaries. The claim also states that [REDACTED] husband can support her and the family on his salary. The sole shareholder, [REDACTED] did not sign this statement to attest to her willingness to forego her wages. Additionally provided are copies of [REDACTED] W-2s for 2002 through 2007, showing that officer’s compensation was reported on page 1 of the corresponding corporate tax return(s).

The director declined to consider the personal assets or compensation of the shareholder and concluded that the corporate petitioner had failed to establish its ability to pay the proffered wage in view of the other petitions filed.

On appeal, counsel resubmits documentation supplied to the underlying record and additionally provides another Secretary’s Certificate from [REDACTED] dated December 18, 2009, attesting that the number of care homes that the petitioning corporation has at any given time is three and that three caregivers are employed in each home.

Although counsel asserts that the individual shareholder’s assets in the form of a reduction in officer compensation should be attributable to the petitioner’s ability to pay the proffered wage, it remains that the named employer certified on the Form ETA 750 is a corporation and must establish its own continuing ability to pay the proffered salary. Counsel cites no legal authority compelling USCIS to view the value of a shareholder’s individually held assets as indistinguishable from that of the corporation when evaluating a corporate petitioner’s ability to pay the proffered wage. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation’s sole owner. Likewise, a corporation and its stockholders are

not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court found that the petitioner had failed to rebut the principle that, "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." It is concluded that the [REDACTED] personal holdings will not be considered in determining the corporate petitioner's ability to pay the proffered wage.

However, in this case, we decline to consider officer compensation paid to [REDACTED] as applicable toward the corporate ability to pay the proffered wage. It is noted that 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 and as such, the compensation would not ordinarily be considered to be an available source with which to pay the beneficiary. Here, it is unclear, how many additional duties performed by [REDACTED] as the sole shareholder of the corporate petitioner are going to be assumed by the beneficiary when it the record indicates that the beneficiary had already been employed as a caregiver. Moreover, it is unclear what other personal expenses the sole shareholder incurs on an annual basis during the relevant years before considering any application of personal income paid as officer compensation to the corporate petitioner's ability to pay. Further, it is noted that no individual tax return was supplied as well as reasonable household expenses relevant to that tax year so as to confirm whether officer compensation would have been reasonably available even if other factors had been established. Additionally, as noted above, [REDACTED] did not sign any statement attesting to her willingness to forego part or all of her 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).

In determining a petitioner's ability to pay a proffered salary, USCIS considers whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage. If established, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage during a given period. 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. Here, as noted above, the record indicates that for 2005, 2006, and 2007, the petitioner paid compensation to the instant beneficiary, [REDACTED] which exceeded the proffered wage and thus demonstrated its ability to pay the certified salary in those years.

For 2003 and 2004, however, as set forth above, the collective deficiencies between the wages paid to the beneficiaries, including [REDACTED], and the respective proffered wage(s) was \$40,758.80 in 2003 and \$36,743.60 in 2004. It is noted that we concur with the director's observation that wages of other beneficiaries that may exceed his or her proffered wage in a given year will not be applied to cover the deficiency of another beneficiary.

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, 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, (E.D. Mich. 2010). 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).

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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. “[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).

As set forth above, in 2003, neither the petitioner’s net income of -\$3,519 nor its net current assets of \$1,125 was sufficient to cover the difference of \$12,746 between actual compensation of \$3,000 paid to the instant beneficiary and the proffered wage of \$15,746, or the cumulative deficiencies of \$40,758.80 resulting from a comparison of actual compensation and proffered wage(s) of all beneficiaries. In 2004, neither the petitioner’s net income of -\$1,381 nor its net current assets of \$3,712 could cover the beneficiary’s proffered wage of \$15,746 in this year or establish its ability to pay this beneficiary. Further, it could not cover the collective deficiencies of the other beneficiaries’ wages. The petitioner did not establish its ability to pay the proffered wage of the current or the other beneficiaries in this year because the cumulative deficiency between each of the proffered wages and the actual compensation paid resulted in a \$36,743.60 shortfall.

Matter of Sonegawa, 12 I&N Dec. 612 (Reg. Comm. 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of 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, historical growth and outstanding reputation as a couturiere.

Although [REDACTED] affirmed that the company has three care homes at any given time, no detail or documentation has been provided that would clearly establish that such analogous circumstances to *Sonegawa* are present in this case that would support the approval of this petition on this basis. 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)). Further, from the corporate tax returns submitted to the record, it is noted that from 2002 to 2007, the petitioner's declared gross income has declined. Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* that are persuasive in this matter. The AAO cannot conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

In the context of this petition and the other pending petitions for multiple beneficiaries, the petitioner has not established that it has had the *continuing* financial ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2).

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.