

PUBLIC COPY

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

BE

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



AUG 07 2003

File: LIN 02 040 50533

Office: NEBRASKA SERVICE CENTER

Date:

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 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wicmann

Robert P. Wicmann, Director
Administrative Appeals Office

R

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

The petitioner is a travel agency and freight forwarding company. It seeks to employ the beneficiary permanently in the United States as a management analyst for its travel agency business. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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.

On appeal, counsel submits a brief and additional evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

Eligibility in this matter hinges on the petitioner's continuing 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 the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$33,696 per

year.

With the petition counsel submitted the petitioner's 2000 Form 1120-A U.S. Corporation Short-Form Income Tax Return. That return shows that the petitioner reported taxable income before net operating loss deduction and special deductions of \$5,480 during that year. Part III of that form, Balance Sheet per Books, shows that the petitioner had current assets of \$123,241 and current liabilities of \$108,239, which yields net current assets of \$15,002. Because the priority date of the petition is April 23, 2001, the petitioner's finances during 2000 are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Director, Nebraska Service Center, on January 18, 2002, requested additional evidence pertinent to that ability. The Service Center requested evidence of the number of workers the petitioner employs.

In response, counsel submitted several monthly statements of the petitioner's bank account and a copy of the petitioner's 2001 Form W-3 Wage and Tax Transmittal. That W-3 form indicated that the petitioner employed 12 workers during that year.

Counsel also submitted a copy of the petitioner's 2001 Form 1120-A U.S. Corporation Short-Form Income Tax Return. That return shows that the petitioner declared a loss of \$6,844 as its taxable income before net operating loss deduction and special deductions during that year. Part III of that form, Balance Sheet per Books, shows that the petitioner had current assets of \$131,561 and current liabilities of \$114,616, which yields net current assets of \$16,945.

Further counsel submitted a copy of the petitioner's unaudited financial statements for the 2001 calendar year.

Finally, counsel submitted a letter, dated March 27, 2002, in which he stated that the petitioner had suffered a loss during 2001 due to the effect of the terrorist attacks of September 11, 2002 on the travel industry.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 15, 2002, denied the petition.

On appeal, counsel provides a letter from the petitioner's president promising that the company would honor its financial obligation to the beneficiary. Counsel submits two additional letters, dated September 12, 2002 and September 13, 2002, from petitioner's two shareholders, one of whom is the president. In

those letters, the shareholders pledge their personal resources to pay the petitioner's obligations to the beneficiary.

Counsel submits unaudited financial statements for the six-month period ending June 30, 2002, and an unaudited statement of income and expenses budgeted for the 2003 calendar year.

In his own letter, dated September 12, 2002, counsel noted that the petitioner is a private company and states that "audited financial statements are not required."

8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are competent evidence of the petitioner's ability to pay the proffered wage. Those three types of evidence are annual reports, federal tax returns, and audited financial statements.

Although audited financial statements may not be required of privately held companies in any other context, 8 C.F.R. § 204.5(g)(2) makes clear that unaudited financial statements are not competent evidence of a petitioner's ability to pay a proffered wage. The unaudited financial statements submitted by the petitioner will not be considered for that purpose.

Counsel's reliance on the bank account statements in this case is similarly inapposite. First, bank statements show the amount in an account on a given date, and cannot show the continuing, sustainable ability to pay a proffered wage. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the tax return. Third, bank accounts are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent evidence of a petitioner's ability to pay a proffered wage.

The promises of the petitioner's shareholders to pay the proffered wage out of their own funds are of no effect. A corporation is a legal entity separate and distinct from its owners or stockholders.

The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders and their ability, if they wished, to pay the corporation's debts and obligations, cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980).

In determining the petitioner's ability to pay the proffered wage, the Service will first examine the net income figure reflected on the petitioner's federal income tax return, without

consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both Service and 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*, the court held the Service 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date of the petition is April 23, 2001. The proffered wage is \$33,696 per year. The petitioner declared a loss of \$6,844 and end-of-year net current assets of \$16,945. The petitioner has not demonstrated the ability to pay the proffered wage out of its income or its assets during 2001.

Counsel states that the petitioner's loss during that year was due to the effect of the terrorist attacks of September 11, 2002 on the travel industry. Counsel is correct that, if losses or low profits during a given year are uncharacteristic and occurred within a framework of profitable or successful years, then, pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), those losses might be overlooked in determining ability to pay the proffered wage.

Matter of Sonogawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years. 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. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonogawa*, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Here, the petitioner has not shown that its loss during 2001 was uncharacteristic. The petitioner's 2000 tax return, though not directly relevant to the issue of the ability of the petitioner to pay the proffered wage since the priority date, shows that the petitioner would have been unable to pay the proffered wage out of its income or assets during that year as well. Assuming the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it 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 not met that burden.

ORDER: The appeal is dismissed.