

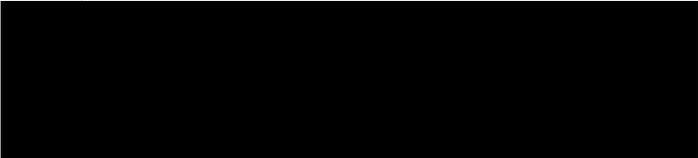
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

**B6**

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



File: WAC 02 052 54079 Office: CALIFORNIA SERVICE CENTER

Date: **DEC 05 2003**

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 Citizenship and Immigration Services (CIS) 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. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is a real estate financing and marketing firm. It seeks to employ the beneficiary permanently in the United States as a copywriter. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that director failed to adequately review the petitioner's tax return and other financial information.

Section 203(b)(3)(A)(i) of 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii) additionally provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

(2) *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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The sole issue on appeal is whether the petitioner has established its ability to pay the beneficiary's offered wage. Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification 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 petition's priority date is April 23, 2001. The beneficiary's salary as stated on the approved labor certification is \$31.02 per hour or \$64,521.60 annually. The record indicates that the petitioner has employed the beneficiary

since December 2000.

As evidence of its ability to pay, the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return for the years 2000 and 2001 and copies of its quarterly wage reports indicating that it paid the beneficiary \$20,242.50 in wages in 2001.

The information presented in the petitioner's 2000 Form 1120-A, U.S. Corporation Short-Form Income Tax Return shows that the petitioner had gross receipts/sales of \$241,571, no officers' compensation, salaries and wages of \$24,449, and a taxable income before net operating loss deduction (NOL) of -\$20,489. The petitioner declared -\$20,489 in net current assets as shown on Schedule L of the tax return.

The petitioner's 2001 Form 1120 federal corporate tax return shows that the petitioner had \$721,763 in gross receipts/sales, no officers' compensation, no salaries and wages, and a taxable income before the NOL deduction of \$19,658. Schedule L of the tax return shows that the petitioner had -\$66,600 in net current assets.

As noted above, the director denied the petition determining that the petitioner had not established its ability to pay the proffered wage as of the priority date of the visa petition and continuing until the present. We note that the record indicates that petitioner employed the beneficiary in 2001 at a rate that was \$44,279.10 less than the proposed salary stated on the approved labor certification. This sum could not be met out of either the petitioner's \$19,658 taxable income before the NOL deduction, or its negative figure of -\$66,600 given for net current assets.

On appeal, counsel resubmits the petitioner's 2001 corporate tax return. Counsel contends that the petitioner's gross income and total assets should be considered when evaluating the petitioner's ability to pay. Counsel also argues that the depreciation expense should be added back to the petitioner's net income.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

Counsel's assertion that the petitioner's total assets figure, as shown on its tax return, should be included in the calculation is also unpersuasive. It does not include a consideration of total liabilities and does not represent readily available funds that could be used to meet the

beneficiary's salary. As noted above, CIS will examine net income figures including, in some cases, a petitioner's net current assets as monies that would be readily available to meet the proffered wage. In this case, the petitioner's negative net current assets figure as reflected in Schedule L of its 2001 tax return represent the difference between its current assets and current liabilities. Similarly, only looking at the petitioner's 2001 total income of \$721,763 does not reflect consideration of the expenses incurred in order to generate such income.

Counsel also submits copies of the petitioner's monthly bank statements in support of his assertion that the petitioner has sufficient cash flow available to pay the beneficiary's offered wage. There has been no proof presented, however, to show that the 2001 balances relevant to the period covering the petitioner's priority date somehow represent additional funds beyond those figures presented in the petitioner's 2001 tax return. It is also noted that 8 C.F.R. § 204.5(g)(2) requires evidence in the form of audited financial statements, federal tax returns or annual reports. While additional material may be considered, such documentation generally cannot substitute for the regulatory requirements.

Counsel asserts that the owner of the petitioning business has personal credit card credit lines available to pay the proffered wage if necessary. In this case, the petitioner is organized as a corporation. Because 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 M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). It is also noted that such a loan to the corporation could be characterized as a liability to be repaid. Similarly, counsel's argument that the petitioner's owner's involvement in the formation of other corporation supports this petitioner's ability to pay the beneficiary's offered wage is also unpersuasive because as corporate entities, these firms are separate and distinct from the petitioning corporation.

Within the context of the financial records contained in the record, counsel argues that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. That case 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 *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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*. The petitioner in this case incorporated only three years before the relevant priority date. Nor has it been shown that 2001 was an uncharacteristically unprofitable year for the petitioner.

Based on the evidence contained in the record and after consideration of the financial data presented on appeal, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until the present.

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.