

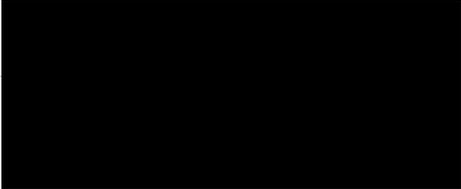
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U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services

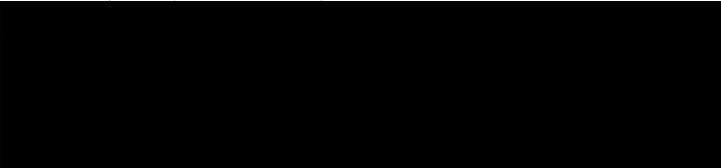


FILE: SRC 02 048 50480 Office: VERMONT SERVICE CENTER Date: APR 02 2004

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

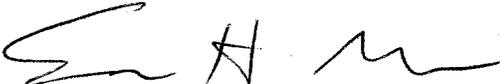
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 professional. The petitioner is an architecture and construction firm. It seeks to employ the beneficiary permanently in the United States as a chief financial officer/internal auditor. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner submits additional information and asserts that the director erred in concluding that the petitioner had not demonstrated its ability to pay the proffered wage.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii) 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)(2) also provides 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. . . . 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 [CIS].

Eligibility in this case rests, in part, 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. 8 C.F.R. § 204.5(d). Here, the petition's priority date is April 9, 1999. The beneficiary's salary as stated on the approved labor certification is \$47,686 per annum. The visa petition indicates that the petitioner was established in 1991. The tax returns reflect that the petitioner is organized as a corporation, having incorporated in 1994. The record also reflects that the petitioner has employed the beneficiary since 1997.

As evidence of its ability to pay, the petitioner initially submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 1998 and 1999. These tax returns show that the petitioner files its taxes based on a standard calendar year. They reveal the following information

Year	Current Assets (Sched. L)	Current Liabilities (Sched. L)	Net Current Assets (Sched. L)	Ordinary Income
1998	\$ 10,955	\$ - 0 -	\$ 10,955	-\$11,397
1999	\$ 17,092	\$ - 0 -	\$ 17,092	\$ 1,346

The information presented on the petitioner's Schedule L of its corporate tax returns reflects the petitioner's net

current assets. CIS will review net current assets as part of the determination of a petitioner's ability to pay the proffered wage. Net current assets represent cash or cash equivalents that would reasonably be available to pay a beneficiary's proposed salary during the year covered by the balance sheet as shown in Schedule L of a petitioner's federal tax return.

On March 29, 2002, the director requested additional evidence from the petitioner in support of its continuing ability to pay the proffered wage from the priority date of April 9, 1999 to the present. The director specifically instructed the petitioner to submit a copy of its 2000 federal income tax return as well as Wage and Tax Statements (W-2s) issued to the beneficiary, showing the wages paid, if the petitioner employed him during any of the relevant period from 1999 to 2001. The director also advised the petitioner that it may also submit monthly bank statements.

The petitioner responded on June 24, 2002, through counsel, by submitting a copy of its 2001 corporate tax return, but failed to submit any copies of W-2s, the petitioner's 2000 corporate tax return, or an explanation for omission. The 2001 corporate tax return indicates that the petitioner declared an ordinary income of \$58,557 and net current assets of \$14,290.

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. The director found that the petitioner's 1999 corporate tax return failed to demonstrate an ability to pay the proffered wage of \$47,686 out of either the petitioner's ordinary income or its net current assets. The director also noted that the petitioner failed to submit its 2000 corporate tax return and failed to submit copies of W-2s issued to the beneficiary. It is noted that the regulation at 8 C.F.R. § 103.2(b)(14) provides that a petitioner who fails to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition or application.

On appeal, counsel submits copies of the beneficiary's W-2s showing that the petitioner paid him \$40,000 per year in 1999, 2000 and 2001. Counsel also submits copies of the petitioner's 2000 corporate tax return. It indicates that the petitioner reported -\$2,827 in ordinary income. It also declared \$5,753 in current assets and no liabilities, resulting in net current assets of \$5,753. This information shows that if credit is allotted to the payment of wages to the beneficiary, the difference between the proffered wage of \$47,686 and the actual wages paid is \$7,686, which can be recovered from the petitioner's net current assets in 1999 and the petitioner's ordinary income in 2001. In 2000, however, neither the petitioner's ordinary income, nor its net current assets were sufficient to cover this additional amount.

Although counsel maintains on appeal that other materials such as an accountant's statement were submitted previously, the AAO notes that the only documents contained in the underlying record, submitted in response to the director's request for evidence, are noted above.

On appeal, counsel submits a copy of a letter, dated October 29, 2002, from the petitioner's accountant stating that the petitioner's owners have supported the financing activities of the company by providing guarantees of various lines of credit. In determining the petitioner's ability to pay the proffered wage, CIS examines 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). Relevant to the assets of individual shareholders of a corporation, it is noted that a corporation is a separate and distinct legal entity from its owners and shareholders and 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). Additionally, there is nothing in the governing regulation at 8 C.F.R. § 204.5 that allows CIS to consider the assets or resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar v. Ashcroft*, (2003 WL 22203713 (D. Mass)). It is further noted that, depending on the specific arrangement, such a line of credit, once funds are disbursed to the corporation, would be characterized as a liability representing a loan to be repaid.

On appeal, a compilation report offered by the petitioner's accountant is submitted to the record. The report is dated June 25, 2002 and accompanies financial statements presenting data covering the twelve-month period ending December 31, 2001. Although the petitioner's ability to pay the proffered wage during this period has been covered, it is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires either federal tax returns, annual reports or *audited* financial statements. (Emphasis added.) It neither states nor implies that an unaudited financial statement is an acceptable form of evidence to establish the petitioner's ability to pay the proffered wage. This would also apply to the unaudited financial statements submitted by counsel on appeal, presenting the petitioner's financial data for a nine-month period ending September 2002. Further, the regulation at 8 C.F.R. § 204.5(g)(2) also requires that the petitioner establishes a continuing ability to pay the proffered wage, beginning at the visa priority date. See also *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

In the context of the financial records contained in the record, counsel argues that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) may be applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. Counsel offers copies of various contracts that the petitioner has executed in 2002. The *Sonogawa* 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 the unique business hardship illustrated in *Sonogawa*. While it is noted that the petitioner has provided examples of contracts executed in 2002, this provides only a portion of the petitioner's current financial picture and omits consideration of the petitioner's other expenses and encumbrances.

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

Beyond the decision of the director, it is noted that the approved labor certification, Form ETA-750A, describes the educational requirements for the position of chief financial officer/internal auditor in item 14. It shows that an applicant must have a bachelor's degree in accounting. It is also noted that the regulation at 8 C.F.R. 204.5 §

(l)(3)(ii)(C)<sup>1</sup> provides that an alien qualifying as a professional must have a U.S. bachelor's degree or a foreign equivalent degree, rather than a combination of degrees or certificates. A review of the record raises a question as to whether the beneficiary has a foreign equivalent degree or rather multiple certificates of college attendance in Britain, culminating in membership in a professional association of chartered accountants.

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.

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<sup>1</sup> The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) also provides that an applicant qualifying as a skilled worker must have the education, training and experience specified by the labor certification.