

PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services

B6



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: AUG 3 2004

IN RE:

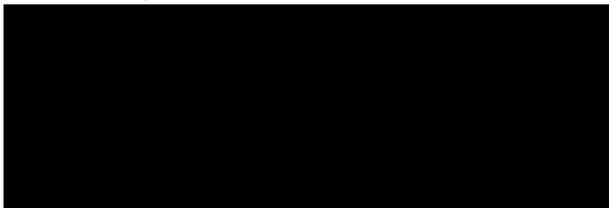
Petitioner:

Beneficiary:



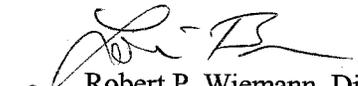
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


B- Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental technician. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the petitioner had filed an additional I-140 petition for another beneficiary and that the evidence failed to establish the petitioner's ability to pay the proffered wages both to the beneficiary in the other petition and to the beneficiary in the instant petition. The director therefore denied the petition. On appeal counsel states that the evidence of the petitioner's overall financial situation is sufficient to establish its ability to pay the proffered wages to the beneficiary in the other petition filed by the petitioner and to the beneficiary in the instant petition.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on 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. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is January 3, 2001. The beneficiary's salary as stated on the labor certification is \$19.63 per hour or \$40,830.40 per year.

The evidence submitted initially and in response to a request for evidence issued by the director includes the following: copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for 2001 and 2002; copies of Form 1040 U.S. individual income tax joint returns for the beneficiary and his wife for 2001 and 2002; copies of Form 1099 miscellaneous income statements for payments made by the petitioner to other dental laboratories in 2001 and 2002; an affidavit dated March 23, 2003 of the petitioner's president attesting to the petitioner's ability to pay the proffered wage; copies of three letters from customers of the petitioner written in 2003; and copies of the petitioner's Form DE-6 quarterly wage reports for 2002.

The director determined that the petitioner had filed an additional I-140 petition for another beneficiary and that the evidence failed to establish the petitioner's ability to pay the proffered wages both to the beneficiary in the other petition and to the beneficiary in the instant petition. The director therefore denied the petition.

Page 5

On appeal counsel submits a brief and evidence consisting of additional copies of the petitioner's tax returns and quarterly wage reports which had been submitted previously.

On appeal counsel states that the evidence of the petitioner's overall financial situation is sufficient to establish its ability to pay the proffered wages to the beneficiary in the other petition filed by the petitioner and to the beneficiary in the instant petition. Counsel states that if only one petition can be approved, the petitioner requests that the petition for the other beneficiary be approved first. But counsel asserts that the evidence of the petitioner's expenses on outside dental lab work, its net assets, its depreciation expenses, and its possibilities of being able to increase its business are sufficient to establish the petitioner's ability to pay the proffered wage not only to the other beneficiary, but to the beneficiary in the instant case as well. Counsel relies upon *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Since no new evidence has been submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 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. Tex. 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.*, the court held that the Immigration and Naturalization Service, now CIS, 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, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence in the record indicates that the petitioner is an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the following amounts for ordinary income: \$42,041.00 for 2001; and \$43,062.00 for 2002. Each of those figures is greater than the proffered wage of \$40,830.40. If the instant petition were the only one pending for the petitioner, the petitioner's ordinary income figures would be sufficient to establish the petitioner's ability to pay the proffered wage. Nonetheless, CIS records show that another I-140 petition was filed by the petitioner for another beneficiary about a month prior to the instant petition.

The affidavit dated March 23, 2003 of the petitioner's owner states that the proffered wage of the beneficiary of the other pending petition is \$40,830.40, and confirms that same amount as the proffered wage to the beneficiary in the instant petition.

The evidence of the petitioner's ordinary income as shown on the petitioner's tax returns in the record is insufficient to establish its ability to pay the other beneficiary and also to pay the beneficiary in the instant case. For 2000 if the petitioner paid the other beneficiary \$40,830.40 only \$1,210.60 would remain. For 2001 if the petitioner paid that same proffered wage only \$2,231.60 would remain. The remaining amounts would be insufficient to pay the proffered wage to the beneficiary in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: \$10,000.00 for the beginning of 2001; \$36,623.00 for the end of 2001; and \$22,223.00 for the end of 2002. Since each of those figures is less than the proffered wage of the other beneficiary of \$40,830.40, the net current assets are insufficient to pay the proffered wage even to one of the beneficiaries. Therefore the petitioner's net current assets are insufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary in the other pending petition and also to pay the proffered wage to the beneficiary in the instant case during the period at issue.

Counsel asserts that the petitioners net assets should be considered as additional resources, beyond the petitioner's ordinary income. However, the AAO does not combine income and assets figures. To do so could cause double counting, since funds generated by a petitioner as ordinary income are among the sources of a petitioner's assets

Counsel asserts that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. Each of the three letters in the record from customers of the petitioner states that the customer has been informed by the petitioner that it must decline some orders from that customer because of lack of lab technician employees. However, the letters give no figures on the amount of funds which would be generated to the petitioner if it were able to hire another employee.

The affidavit from the petitioner's owner gives an explanation of why the owner believes the petitioner would be able to pay the proffered wage to the beneficiaries in both petitions. But that affidavit does not give sufficient financial details supporting the owner's reasoning. In his affidavit the owner also states that he intends to make his personal financial resources available to pay the proffered wage if CIS determines that the petitioner's income is insufficient to pay the proffered wage. Nonetheless, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. It is further noted that 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 *3 (D. Mass., Sept. 18, 2003).

Other financial evidence in the record includes copies of Form 1099 miscellaneous income statements for payments made by the petitioner to other dental laboratories in 2001 and 2002. Those statements show payments by the petitioner of \$24,557.00 in 2001 and \$40,982.71 in 2002. The petitioner's owner states in his affidavit that the payments to other dental laboratories were necessary because of the absence of sufficient laboratory technicians on the petitioner's own staff. The evidence on that point is not detailed enough to establish that all of the outside dental laboratory expenses would be saved by hiring both beneficiaries. For the year 2002, crediting the outside dental laboratory expenses in the year 2002 as additional resources to pay the proffered wages would be sufficient to pay the proffered wages to both beneficiaries, with \$2,383.91 remaining. However, for 2001, crediting the outside dental laboratory expenses as additional financial resources of the petitioner would still leave the petitioner with \$15,062.80 less than the amount needed to pay the proffered wages to both beneficiaries. The laboratory expenses combined with the ordinary income therefore would be insufficient to establish the petitioner's ability to pay the proffered wages in 2001, the year of the priority date.

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is misplaced. That case relates to a petition 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 and routinely earned a gross annual income of about \$100,000. 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. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

In his decision, the director noted the presence of another pending petition. The director stated that the proffered wage in the other petition is the same as in the instant petition, \$40,830.40. The director correctly stated ordinary income of the petitioner for 2001 and 2002 and correctly found that the total of the proffered wages for the beneficiaries for the two pending petitions was \$81,660.80. The director correctly found that the ordinary income of the petitioner in 2001 and 2002 was insufficient to pay the proffered wages to both beneficiaries. The director failed to consider the petitioner's net current assets. That error, however, did not affect the director's decision, since, as shown above, the net current assets of the petitioner in 2001 and 2002 were also insufficient to pay the proffered wages to both beneficiaries. The director's decision to deny the petition was therefore correct.

The assertions of counsel on appeal fail to overcome the decision of the director.



Page 6

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.