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FILE: EAC-02-278-52528 Office: VERMONT SERVICE CENTER

Date: **AUG 08 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.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference 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 is a kosher butcher. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 beginning on the priority date of the visa petition and denied the petition accordingly.

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.

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 the 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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 15, 1998. The proffered wage as stated on the Form ETA 750 is \$524.00 per week, which amounts to \$27,248 annually.

With the petition, the petitioner submitted the petitioner's Forms 1120S U.S. Income Tax Return for an S Corporation for the years 1998 through 2001. The tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Ordinary income	\$-7,333	\$-6,337	\$4,227	\$-2,181
Current Assets	\$50,640	\$28,240	\$31,565	\$20,972
Current Liabilities	\$30,282	\$20,193	\$22,512	\$15,063
Net current assets	\$20,358	\$8,047	\$9,053	\$5,909

Additionally, the petitioner's president provided a letter that stated the following:

In the years 1998, 1999, 2000 and 2001 the [petitioner] paid me \$88,900.- \$104,000.- \$104,000.- and \$104,000 [sic] respectively, as compensation of officers, as results from the [petitioner's] income tax returns for the years 1998 – 2001.

The amounts that I received as compensation of officers where [sic] at the disposal of the [petitioner] and could have been used as wages for [the beneficiary], for whom the [petitioner] filed an alien employment certification application ion 1998 and is filing now an immigrant petitioner for alien worker.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 1, 2002, the director requested additional evidence pertinent to that ability. He specifically requested the following:

You have requested the consideration of compensation of officers [sic] deduction on the tax return as a source of available funds with which to compensate the beneficiary. The compensation of officers represents monies already expended by the [petitioner]. Therefore, this expense is not considered to be readily available funds with which to meet the wage.

In response, counsel for the petitioner explained in a cover letter that the petitioner is a "Subchapter S' Corporation, whose corporate funds flow directly through the Personal Income Tax Returns of its Shareholder and are not considered or taxed separately." He also urged the director to consider the compensation of the petitioner's president to support the petitioner's ability to pay the proffered wage. Counsel submits the petitioner's president's individual income tax returns for 1998 through 2001 and as well as a signed pledge "to assure from his own income, if necessary, payment of [the b]eneficiary's annual salary of \$27,248"

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 12, 2003, denied the petition. The director noted the discrepancy between the visa petitioner's statement of gross and net annual incomes, \$1,045,000 and \$104,000, respectively, versus its actual tax returns that frequently show a loss. The director stated the following:

If a [petitioner's] ordinary income figure is not at least as large as the salary offered to a beneficiary, and if the beneficiary is not presently employed [by] the [petitioner], we generally use the following formula to assess ability to pay the proffered wage for the year in question:

Ordinary income, plus depreciation, plus current assets, minus current liabilities.

If the resulting figure is at least as large as the salary offered, we consider the [petitioner] to have been capable of paying the salary offered for that year.

The director concluded that using the stated formula, the petitioner failed to demonstrate enough income to cover the amount of the proffered salary. The director determined that the petitioner's president or stockholders may not be personally accountable for paying the beneficiary's salary and thus cannot supplement the petitioner's ability to pay the proffered wage.

On appeal, counsel asserts that precedent is in favor of approving the petitioner in spite of the petitioner's fluctuations in net income. Additionally, counsel states the following:

The shareholder's written undertaking to pay any shortfall in the [petitioner's] consistently profitable operations is binding as it is in writing (satisfying the New York State "Statute of Frauds" requirement) and relied upon (the legal requirement for Consideration) by the Beneficiary (having foregone other offers of employment) and as it is submitted under penalty of perjury to be relied upon (by [CIS] in its I-140 adjudication).

On appeal, the petitioner submits a letter from a certified public accountant who explains the tax consequences of an S corporation and stating that the petitioner arbitrarily chose to have its officers' compensation result in "breakeven net income."

Counsel's reliance on the assets of the petitioner's president and shareholders is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Additionally, this separation of liability adversely impacts counsel's reliance upon the petitioner's president's "pledge" to pay the beneficiary's income out of his own income. Not only is such consideration impossible in this context, but the statute of frauds quoted by counsel does not make this evidence competent and probative since the beneficiary's signature or proof of acquiescence is not demonstrated anywhere on the document.¹

The director erred in the formula he set forth in his decision. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any of the relevant years.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.² Reliance on federal income

¹ The statute of frauds requires certain contracts to be in writing and signed by the parties bound by the contract. The purpose is to prevent fraud and other injury. See, e.g. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).

² The director erred by adding back depreciation .

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income. In the instant case, the petitioner's ordinary income is either negative or too low to cover the amount of the proffered wage.

Nevertheless, counsel is correct that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end 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 end-of-year 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 petitioner's net current assets during the year in question, 1998 through 2001, however, were only \$20,358, \$8,047, \$9,053, and \$5,909, respectively, all lower than the proffered wage.⁴

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998. In 1998, the petitioner shows a net income of \$-7,333 and net current assets of only \$20,358, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1998.

³ 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.

⁴ The director erred by adding net income with net current assets as by doing so, effectively two conflicting accounting methodologies were merged. Net income or net current assets alone must cover the proffered wage.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999. In 1999, the petitioner shows a net income of \$-6,337 and net current assets of only \$8,047, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1999.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, the petitioner shows a net income of only \$4,227 and net current assets of only \$9,053, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2000.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of \$-2,181 and net current assets of only \$5,909, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

Counsel urges reliance upon *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). However, *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 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 couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that any year out of 1998 through 2001 was an uncharacteristically unprofitable year for the petitioner.

Counsel also argues 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. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998 through 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.