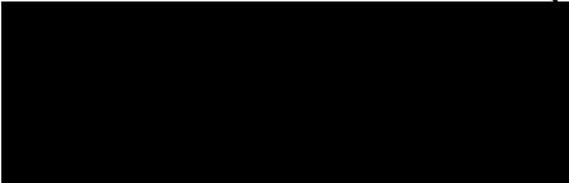


U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

Handwritten signature



JUN 15 2004

FILE: WAC 02 277 54531 Office: CALIFORNIA SERVICE CENTER Date:

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
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. The petitioner is an Islamic meat and food market. It seeks to employ the beneficiary permanently in the United States as an Islamic *halal* meat cutter. 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, counsel submits additional information and asserts that the petitioner has established its ability to pay the beneficiary's proffered salary.

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.

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 upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is March 15, 2001. The beneficiary's salary as stated on the labor certification is \$2,350 per month or \$28,200 per year, based on a 40-hour week. The record indicates that the petitioner was established in 2000 and is currently organized as a corporation although initially it was a sole proprietorship.

As evidence of its ability to pay, the petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001. It shows that the sole proprietor filed his tax return jointly with his spouse and declared four dependents. The sole proprietor declared an adjusted gross income of \$36,449 including a business income of \$30,041.

On December 18, 2002, the director issued a notice of intent to deny the petition. The director observed that while the sole proprietor's income was greater than the beneficiary's proffered wage of \$28,200, it left

insufficient funds to adequately meet the living expenses of the sole proprietor and his family. The director's notice afforded an additional thirty days to the petitioner to submit additional information or evidence in support of its ability to pay the proffered salary.

In response, the petitioner submitted additional financial information for the director's consideration, as well as a letter, dated January 13, 2003, from the sole proprietor explaining that the business is now incorporated. The sole proprietor also asserts that hiring the beneficiary will enhance the business, but provided no further detail as to the basis of this projection.

Along with the petitioner's response to the director's notice of intent to deny the petition, the petitioner submitted a copy of its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. It shows that the petitioner incorporated on June 20, 2001. The tax return covers the petitioner's financial status from June 20th through December 31, 2001. The petitioner declared ordinary income of -\$3,469. The attached Schedule L balance sheet reflects that the petitioner had \$9,866 in current assets and \$1,830 in current liabilities, resulting in \$8,036 in net current assets. CIS will consider net current assets in addition to net income because it indicates the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Neither the petitioner's ordinary income of -\$3,469, nor its net current assets of \$8,036 could cover the beneficiary's proposed salary, even if the prior 2 ½ months could be met by the petitioner's income as a sole proprietorship.

The petitioner's response also included a compilation of its financial information as of November 30, 2002. As noted by the accountant's letter, dated January 9, 2003, explaining the nature of its report, a compilation does not represent financial statements that have been audited or reviewed and solely rely on management's representations. As such, compilations offer little independent probative value in evaluating a petitioner's ongoing financial ability to pay a proposed wage offer and contravene the regulatory requirements of 8 C.F.R. § 204.5(g)(2).

The petitioner also submitted copies of its checking account statements from 2001 and 2002. A brief review indicates that while the petitioner has shown a consistent and steady cash flow, its ending monthly balances were often less than a \$1,000. It is also noted that bank statements represent a portion of a petitioner's financial picture and do not reflect the full range of a petitioner's assets and liabilities. To the extent they reflect 2001 balances correlating with the time period covered by the petitioner's corporate tax returns, there is also no proof that they represent additional monies not already described on the tax return balance sheet. Simply going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The director denied the petition, concluding that the petitioner had not demonstrated its continuing ability to pay the proffered wage.

On appeal, counsel submits a copy of the petitioner's 2002 corporate federal income tax return, which shows an ordinary income of \$48,532, a copy of the 2002 individual tax returns of the principal shareholders, and a copy of a February 26, 2003, letter from the petitioner's accountant asserting that the officer compensation of \$60,000 should be added back to the petitioner's net income, as shown on the unaudited 2002 financial statements previously submitted to the record.

As the ordinary income shown on the 2002 tax returns is sufficient to cover the beneficiary's proffered wage during that period, it is unnecessary to determine whether officer compensation should be added back to the petitioner's net income. It is noted, however, that in determining a 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 such as officer compensation. 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 (9th 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 (7th Cir. 1983).

With reference to the consideration of the individual tax returns of the principal shareholders after the petitioner incorporated, it is noted that corporations are separate and distinct legal entities from its owners and shareholders. Thus, 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); *Matter of Tessel*, 17 I&N 631 (Act. Assoc. Comm. 1980). As noted in *Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass), "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Finally counsel suggests that the holding of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) should be applicable in this case where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. *Matter of Sonogawa* 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. In this case, the record reflects that the petitioner was established only two years before filing the petition and only two years of financial information are contained in the record. The petitioner has not demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

As set forth by 8 C.F.R. § 204.5(g)(2), the petitioner must establish an ongoing ability to pay the proffered wage as of the visa priority date. In this case, the petitioner's evidence did not support its ability to pay in 2001. Accordingly, based on the evidence contained in the record and the foregoing discussion, the AAO cannot conclude that the petitioner has presented sufficient persuasive evidence to demonstrate that its continuing ability to pay the proffered wage as of the visa 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.

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ORDER: The appeal is dismissed.