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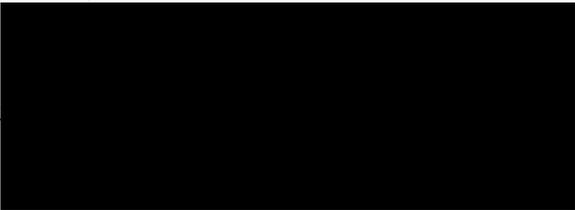


FILE: WAC-02-157-53278 Office: CALIFORNIA SERVICE CENTER Date: MAY 26 2004

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

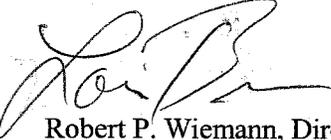
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


for 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 construction company. It seeks to employ the beneficiary permanently in the United States as a contract negotiator. 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 evidence failed to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On appeal counsel states that the director failed to properly consider evidence of the long-term financial stability of the company, notwithstanding temporary periods of unprofitability.

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:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is July 18, 1997. The beneficiary's salary as stated on the labor certification is \$29.62 per hour or \$61,609.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. The evidence consisted of a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1998; a copy of an education evaluation dated October 7, 1998 for the beneficiary by Education Evaluators International, Inc; and a copy of the beneficiary's course transcript dated April 19, 1984 from the National Polytechnic Institute, Mexico City, Mexico, with certified translation.

In a request for evidence (RFE) dated July 15, 2002, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and evidence of the beneficiary's work experience.

Counsel responded to the RFE with a letter dated October 5, 2002, accompanied by additional evidence consisting of: a letter dated October 4, 2002 from the petitioner's president; copies of the beneficiary's Form W-2 Wage and Tax Statements for 1997, 1998, 1999, 2000 and 2001; copies of the petitioners Form 1120S U.S. income tax returns for an S corporation for 1997, 1998, 1999, 2000, and 2001; a copy of the beneficiary's diploma issued June 26, 1984 from the National Polytechnic Institute, Mexico City, Mexico, with certified translation; an additional copy of the beneficiary's course transcript dated April 9, 1984 from the National Polytechnic Institute, Mexico City, Mexico, with certified translation; a copy of an undated letter from the petitioner stating its business name, year of beginning business and number of employees; a copy of the beneficiary's pay stub from the petitioner dated August 9, 2002; copies of Form W-2 wage and tax statements for 1999 for four employees of the petitioner, including the beneficiary, and for 2001 for four employees of the petitioner, including the beneficiary; and copies of the petitioner's California Form DE6 quarterly wage reports for the last two quarters of 2001 and the first two quarters of 2002.

The director issued a second RFE, dated November 4, 2002, requesting evidence to explain the relationship between the petitioner and the second company name which appears on the petitioner's tax documents along with the petitioner's name. The second RFE also requested evidence of the beneficiary's work experience.

Counsel responded to the second RFE with the following evidence: a letter from the petitioner's president dated December 2, 2002; a copy of a California Fictitious Business Name Statement showing that the petitioner's name is the business name for a corporation; a copy of a California Certificate of Workers Compensation Insurance dated January 14, 2003, a bank statement dated July 31, 2003 from the Union Bank of California for an account of the petitioner with account number ending in 991; a copy of a certificate of general liability insurance dated May 26, 1999 for the petitioner issued by Elmco Insurance, Inc. of Santa Ana, CA; a copy of an Internal Revenue Service notice dated March 27, 1995 accepting the petitioner as an S corporation; a copy of the petitioner's Articles of Incorporation showing incorporation in California on January 4, 1995; and a copy of the petitioner's California building contractor's license dated May 11, 1995.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence consisting of a letter dated May 29, 2003 from a certified public accountant; copies of bank statements from the Union Bank of California for an account of the petitioner with account number ending in 991 for the months of January through March 2003 and for an account of a corporation in Buena Park, California (hereinafter corporation #2) with account number ending in 995 for the months of January through April 2003; copies of the first page of the Form 1120S U.S. Income Tax Return for an S Corporation for corporation #2 for the years 2000 and 2001; copies of a financial statement dated April 15, 2003 for corporation #2; a copy of a California Fictitious Business Name Statement showing the legal name and the business name of corporation #2; and a copy of a California corporate transcript dated July 29, 1999 of the articles of incorporation of corporation #2, showing incorporation in California on July 15, 1999.

Counsel states on appeal that the director failed to properly consider evidence of the long-term financial stability of the company, notwithstanding temporary periods of unprofitability. Counsel asserts that the director failed to properly follow the ruling in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The AAO will first evaluate the decision of the director based on the evidence in the record prior to the director's decision. The evidence submitted on appeal will then be considered.

The California Fictitious Business Name Statement for the petitioner in the record is sufficient to establish that the petitioner's name is the business name for a corporation. The name of that corporation appears on the petitioner's tax returns, along with the petitioner's name. That same corporation name appears as the employer on the copies of the beneficiary's Form W-2 wage and tax statements in the record.

In determining the petitioner's ability to pay the proffered wage, 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 evidence establishes that the petitioner employed the beneficiary for each of the years in the relevant time period for analysis.

The beneficiary's Form W-2 wage and tax statements in the record show that the petitioner paid the beneficiary the following amounts in compensation: \$36,400.00 in 1997; \$36,400.00 in 1998; \$36,400.00 in 1999; \$42,655.50 in 2000; and \$46,586.25 in 2001. The amount paid to the beneficiary in each of those years was less than the proffered wage of \$61,609.60. The amounts need to raise the beneficiary's wages to the proffered wage are \$25,209.60 in 1997; \$25,209.60 in 1998; \$25,209.60 in 1999; \$18,954.10 in 2000; and \$15,023.35 in 2001. Since the amount paid to the beneficiary in each of those years was less than the proffered wage, the information on the beneficiary's W-2 forms fails to establish the ability of the petitioner to pay the proffered wage.

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 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 CIS 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., supra*, at 1054.

In the case of an S corporation, the relevant net income figure is shown on Form 1120S, U.S. Income Tax Return for an S Corporation on line 21, reflecting ordinary income. In the instant case, the petitioner's tax returns show the following amounts for ordinary income: -\$25,457 for 1997; \$24,353 for 1998; -\$33,709 for 1999; -\$53,470 for 2000; and -\$60,169 for 2001. The record before the director closed on January 27, 2003, at which time the petitioner's tax return for 2002 was not yet due. Therefore the petitioner's return for 2001 was the most recent return available at the time of the director's decision. Only in 1998 was the petitioner's

ordinary income a positive figure, but the ordinary income that year of \$24,353.00 was less than the \$25,209.60 needed to raise the beneficiary's actual compensation for that year to the proffered wage. Since the ordinary income figures for 1997, 1999, 2000 and 2001 are negative, those figures also fail to establish the ability of the petitioner to pay the beneficiary the wage increases needed to raise the beneficiary's actual compensation to the proffered wage during those years.

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 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 the 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.

In the instant petition, calculations based on the Schedule L's attached to the petitioner's Form 1120S U.S. income tax returns for an S corporation yield the following amounts for net current assets: \$0 for the beginning of 1997; -\$20,174 for the end of 1997; \$1,137 for the end of 1998; -\$20,168 for the end of 1999; \$18,067 for the end of 2000; and -\$1,124 for the end of 2001. Each of those amounts is less than the amount needed in that year to raise the beneficiary's actual salary to the proffered wage. Therefore, the information on the petitioner's net current assets fails to establish the ability of the petitioner to pay the proffered wage during the relevant period.

In his brief counsel asserts that the director failed to properly following the ruling in *Matter of Sonegawa, supra*, which permits a consideration of the total financial situation of the business enterprise. The evidence in the record prior to the director's decision most pertinent to this point is the letter dated October 4, 2002 from the petitioner's president. In that letter, the president states that the petitioner's business income varies from year to year, because at times large sums are received for work done in previous years. In addition, the president states that the petitioner at times uses legitimate non-cash tax deductions in order to minimize taxable income or to defer the declaration of profits to a later year.

Counsel's reliance on *Matter of Sonegawa, supra* 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 *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 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, parallel to those in *Sonegawa*, have been shown to exist in this case. Also, the tax returns in evidence show a consistent pattern of financial losses, in 1997, 1999, 2000 and 2001, and a

consistent pattern of zero or negative net current assets, at the beginning of 1997 and at the end of the years 1997, 1999, 2000 and 2001. Therefore the instant petition is distinguished from *Sonegawa, supra*, in which the petitioner had experienced only a single year of financial difficulties and in which the evidence established that the reasons for those difficulties were ones which were not likely to recur.

In his decision the director analyzed the petitioner's net income and net current assets before analyzing the beneficiary's actual compensation received from the petitioner during the relevant period. That order of analysis lacks clarity, because evidence of a beneficiary's actual compensation may itself be sufficient to establish a petitioner's ability to pay the proffered wage. Even if the actual compensation was less than the proffered wage, the amount of increase needed to raise the beneficiary's wages to the proffered wage must be calculated in order to ascertain whether the petitioner's net income or net current assets in each of the relevant years were sufficient to pay the needed wage increase. Nonetheless, the lack of clarity in the director's method of analysis did not render that analysis incorrect.

In his decision, the director correctly stated the petitioner's ordinary income for each of the relevant years, and correctly calculated the petitioner's net current assets for the end of each year. The director failed to calculate the petitioner's net current assets for the beginning of 1997. Assuming that figure is relevant, that error did not affect the director's decision, since the net current assets for the beginning of 1997 were zero, a figure which does not show the petitioner's ability to pay the proffered wage as of the priority date. The director also correctly stated the amounts of the beneficiary's actual compensation during each of the relevant years, and found that those amounts were insufficient to establish the ability of the petitioner to pay the proffered wage. For the reasons stated above, the decision of the director that the evidence fails to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence was correct.

The evidence on appeal includes a letter from the accountant of the petitioner, who states that the petitioner and corporation #2 are each owned in 50% shares by the same two individuals, and that the two corporations have been functioning as a single business entity. The accountant asserts that the two corporations together have been very profitable. The accountant states that all employees of the petitioner have been transferred to the payroll of corporation #2, except for the beneficiary of the instant petition. The accountant states that the reason the beneficiary was not transferred to the payroll of corporation #2 was to avoid giving the incorrect impression that the beneficiary had changed jobs.

The other evidence submitted on appeal along with the accountant's letter, including several months of bank statements of the petitioner and of corporation #2, contains information in support of the assertions of the accountant.

The accountant's letter raises the issue of the relationship of corporation #2 to the petitioner. Decisions of the AAO and its predecessor agencies allow for the substitution of a new petitioner where the evidence establishes that the new petitioner is a successor in interest of the original petitioner. This status requires documentary evidence that successor has assumed all of the rights, duties, and obligations of the predecessor company. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In the instant petition, the evidence pertaining to corporation #2 fails to establish that corporation #2 is the successor in interest to the petitioner. The accountant's letter contains only a general summary of the business operations and financial profits of the petitioner and of corporation #2. The record lacks documentation on the specific relationship between the petitioner and corporation #2. The record also lacks evidence to establish the ability of corporation #2 to pay the proffered wage during the relevant time period.

The articles of incorporation of corporation #2 show the date of incorporation as July 15, 1999, a date approximately two years after the priority date in the instant petition. As shown above, the financial resources of the petitioner were insufficient to pay the proffered wage as of the July 18, 1997 priority date. Therefore even if the financial resources of corporation #2 were considered, they could not help to establish the ability of the petitioner to pay the proffered wage as of the priority date, since corporation #2 did not yet exist at that time.

Furthermore, even for the period since July 15, 1999, when corporation #2 was incorporated, the evidence pertaining to corporation #2 is insufficient to establish its ability to pay the proffered wage. The tax return information in the record for corporation #2 consists of only the first pages of the returns for 2000 and 2001. That information is insufficient to establish the ability of corporation #2 to pay the proffered wage for 1999 through 2001.

The accountant asserts that the compensation paid to the owners of the petitioner and of corporation #2 should be included in the net income of each corporation, since the owners had the discretion to decide how much income to take out of the corporations. However, the record contains no evidence on which to base an evaluation of the amount of compensation needed by the owners to pay for their own personal household expenses. 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).

For the foregoing reasons, the evidence submitted on appeal would fail to establish the petitioner's ability to pay the proffered wage, even if that evidence were properly before the AAO.

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.