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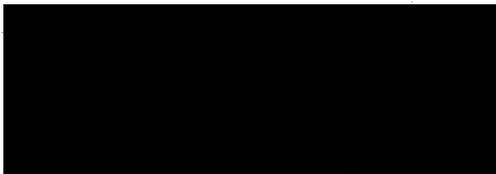
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: SEP 30 2004

IN RE:

Petitioner:

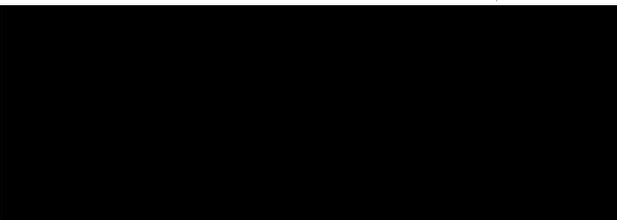


Beneficiary

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was twice 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 in the business of garment manufacturing and sewing contract work. It seeks to employ the beneficiary permanently in the United States as a garment sample maker. 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.

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

*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 hinges on the petitioner's ability to pay the wage offered from 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 March 19, 2001. The beneficiary's salary as stated on the labor certification is \$2,602 per month or \$31,224 per year.

The director deemed the evidence insufficient as to the petitioner's ability to pay the proffered wage at the priority date and noticed 30 days to submit additional evidence or authority to support the petition on January 16, 2003 (RFE1).<sup>1</sup> RFE1 asserted that Citizenship and Immigration Services (CIS), formerly the Service or INS, knew unspecified information,<sup>2</sup> of which the petitioner was unaware.

Counsel responded to RFE1 on February 14, 2003 and protested both the response time of 30 days and reliance on undisclosed evidence without provision for counsel to inspect the record. Counsel claimed 211 employees for the petitioner and submitted the statement of its financial officer to certify the petitioner's ability to pay the proffered wage at the priority date.<sup>3</sup> The 2001 Form 1120S, U.S. Income Tax Return for an S corporation, Schedule A, showed cost of labor of \$1,148,704, salaries and wages of \$41,340, and a total of \$1,190,044 (the

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<sup>1</sup> The AAO designates this document as RFE 1 because, as counsel points out, the director should have noticed a request for evidence (RFE), rather than the intent to deny. Thus, the proper notice was 84 days. See 8 C.F.R. § 103.2(b)(8).

<sup>2</sup> Evidently, the director referred to a perceived contradiction between the petitioner's payroll in dollars and its number of employees. The facts of this matter are set forth below.

<sup>3</sup> Further provisions of 8 C.F.R. § 204.5(g)(2), *supra*, authorized this.

2001 payroll).<sup>4</sup> The 2001 Form 1120S, however, reported an ordinary (loss) from trade or business activities of (\$68,722) as of the priority date.

The director referred only to the (loss), stated that the petitioner did not establish that the beneficiary qualified for the classification under the visa petition, and denied the petition in a decision dated February 24, 2003.

The petitioner filed an appeal on March 21, 2003, and the director treated it as a motion to reopen and reconsider (MTR). The request for evidence, dated May 28, 2003 (RFE2), revealed that the petitioner had filed two (2) visa petitions for garment sample makers.<sup>5</sup> Consequently, the petitioner must prove the ability to pay \$62,448 more in wages as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Moreover, the 2001 Form 1120S, in Schedule L, reflected no current assets, minus current liabilities of \$21,782, and the remainder as a (deficit) of (\$21,782) for net current assets.<sup>6</sup> The director properly allowed 84 days for the response to RFE2.<sup>7</sup>

In response to RFE2, counsel stated that the petitioner was a separate subchapter S corporation and employed only 58 employees in December 2001. Counsel averred that the petitioner's shareholders are husband and wife, had operated it as a sole proprietorship, and had now incorporated it as an additional subchapter S corporation, namely, Song's Fashions (Song's). Counsel surmised that, since the sum of Song's 46 employees and the petitioner's 58 equals 104, the petitioner must be allowed to prove ability to pay simply upon the financial officer's statement for an enterprise of at least 100 employees.<sup>8</sup>

Counsel further asserted that CIS should include straight-line depreciation as income, to justify the ability to pay the proffered wage and, by inference, accelerated depreciation. Counsel says, "[t]his pure tax benefit **above** traditional depreciation amounts to an additional \$26,691 which was available for payment of wages."

In further response to RFE2, counsel asserted that CIS must add assets of the erstwhile sole proprietors of Song's and of the petitioner to determine the ability to pay under *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988).

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<sup>4</sup> Counsel ultimately contends that the 2001 payroll, framed by two (2) profitable years of operations, justifies the application of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

<sup>5</sup> The director, on this occasion welded a CIS motion to reopen (CIS-MTR) to a Form I-797 (RFE) to create RFE2.

<sup>6</sup> Net current assets equal the difference of the taxpayer's current assets minus current liabilities. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. See *Barron's Dictionary of Accounting Terms* 117-118 (3<sup>rd</sup> ed. 2000). Current assets and current liabilities appear, respectively, on designated lines of Schedule L of the tax return, such as Form 1120, 1120S, or 1065. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period.

<sup>7</sup> RFE2 cast an inquiry as to how the petitioner had 211 employees with salaries and wages of \$41,600. This figure stated the salary and compensation of officers. The 2001 payroll was, of course, \$1,192,044 and may have applied, as counsel discloses, to 58 workers.

<sup>8</sup> The brief did not reference quarterly wage and withholding reports (Forms DE-6) in a helpful way, either as to claims of 104 or 211 employees.

In regard to *Matter of Sonogawa, supra*, counsel interpreted it to mandate an approved petition if two profitable years frame an unprofitable one. This explanation posited that events of September 11, 2001 created a bad year, with reverses in the stock market, and blames those events for the petitioner's loss. Counsel did not reconcile this hypothesis with the fact that the 2001 Form 1120S reports gross receipts and sales at \$1,748,237, a higher figure than any since the priority date. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In a decision, dated September 24, 2003, the director considered that the petitioner did not establish any affiliation of the petitioner and Song's in 2001 or any common location thereafter. Also, in 2001, as of the priority date, the Form 1040, U.S. Individual Income Tax Return of the alleged sole proprietors, showed a (deficit) of adjusted gross income of (\$941) and the petitioner an ordinary loss of (\$68,722), less than the proffered wage. The director reasoned that CIS would consider only assets of the petitioning corporation and would not exercise its discretion to use the financial officer's statement of the petitioner's ability to pay. The director determined that the petitioner did not establish the ability to pay the proffered wage at the priority date, continuing until the beneficiary obtains lawful permanent residence, and, consequently, denied the petition.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at or after the priority date. If documentary evidence supports the employment of the beneficiary at a salary equal to, or greater than, the proffered wage, such evidence is *prima facie* proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner established no payment of salary or wages to the beneficiary at or after the priority date.

If the petitioner does not establish that it paid the beneficiary wages at least equal the proffered wage for any relevant period, CIS will next examine the petitioner's net income, 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983).

In *K.C.P. Food Co., Inc.*, 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 CIS should have considered gross receipts or income before expenses were paid rather than net income. Similarly, wages paid to others do not justify the ability to pay the beneficiary the proffered wage. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Counsel disparages the reference to net income and claims that *Ubeda* invokes the consideration of all assets of the petitioning corporation. On the contrary, it concerns a sole proprietorship and requires sufficient assets to cover business expenses, the additional employees under labor certifications, and the living expenses of the petitioner's household. Its principles do not reach the attribution of assets of other entities to a petitioning corporation.

In the face of judicial precedents, as noted above, counsel cites no authority for either of the propositions, that CIS has always added "classic" straight-line depreciation back to income, or that CIS might restore, by an

extension of reasoning, "an additional 12% of artificial acceleration of depreciation in the year 2001 amounting to \$26,691."

Alternatively, counsel urges that only one (1) of the petitioner's three (3) years in business has been unprofitable. It is, however, the one of the priority date. A petitioner must establish the elements for the approval of the petition at the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In furtherance of the application of *Sonegawa, supra*, counsel contends that the 2001 payroll of \$1,190,044 supplants net income as the measure of the ability to pay the proffered wage at the priority date. Reliance on *Sonegawa* is misplaced. It 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, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

If wages paid to the beneficiary and the petitioner's net income are less than the proffered wage, CIS will review the petitioner's net current assets. As previously noted, they were a deficit at the priority date.

Further submissions on appeal include 2000-2002 Forms 1040, Individual Income Tax Returns, of the petitioner's two (2) shareholders. Counsel calls attention to the petitioner's payment of rents of \$60,000 annually to its "corporate owners" and stipulates that this money never left their control. Counsel contends, nevertheless, that CIS must consider such rents paid and income to the corporate petitioner under the holding in *Full Gospel Portland Church v. Thornburgh, supra*. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court, even in matters arising in the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The rationale in *Full Gospel* stated that CIS should consider pledges of parishioners in determining the ability to pay a staff member's wages. Counsel suggests that CIS should treat the capacity and willingness of shareholders of the petitioning corporation as such evidence. The petitioner, however, documents no obligation, such as a pledge, of any assets or income. Sums are not readily available to pay the proffered wage at the priority date, once the petitioner has disbursed them. Moreover, the shareholders' 2001 Form 1040 reported a (\$941) deficit of adjusted gross income, less than the proffered wage.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, CIS does not accept the proposition that corporations may rely on assets of other entities and persons. 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). CIS will not “pierce the corporate veil” to consider 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).

After a review of the federal tax returns, Forms DE-6, and briefs it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.