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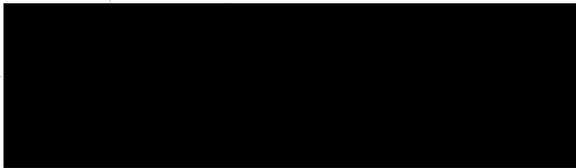


FILE: WAC 02 175 54036 Office: CALIFORNIA SERVICE CENTER Date:

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, 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 wholesale jeweler. It seeks to employ the beneficiary permanently in the United States as a manager and jewelry dealer. 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 some 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 12, 1998. The proffered wage as stated on the Form ETA 750 is \$18.29 per hour, which amounts to \$38,043 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on May 20, 1968, to have a gross annual income of \$275,008, and to currently employ three workers. In support of the petition, the petitioner submitted a Form G-28; an approved labor certification application; and, a Form 1120 for the petitioner's fiscal year 2000 tax return covering the period from July 1, 2000 to June 30, 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director on September 17, 2002, requested additional evidence pertinent to that ability as well as evidence showing the beneficiary's job experience qualifying him for the proffered position. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Additionally, the request for evidence (RFE) asked for copies of the petitioner's tax returns for fiscal years 1998-2002.

In response, counsel submitted incomplete copies of the petitioner's Form 1120 tax return for the fiscal years 1998–2000 (each return covers the period from July 1 of that year to June 1 of the following year)¹; an application for an extension to file the petitioner's 2001 tax return; and an unaudited income statement and balance sheet for the petitioner's business operations in 2001–2002.

The tax returns reflect the following information for the following fiscal years (ending June 30 of 1999, 2000, 2001 and 2002 respectively):

	1998	1999	2000	2001 ²
<u>Net income</u>	-\$177,582	\$166,605	-\$48,615	\$253,022
Current Assets	\$360,511	\$262,242	\$85,666	\$270,925
Current Liabilities	\$482,463	\$319,504	\$276,556	\$297,901
<u>Net current liabilities</u>	(\$121,952)	(\$57,262)	(\$190,890)	(\$26,976)

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 15, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's ability to pay arises from the financial strength of its principal shareholders, who are part of a well-financed partnership. Further, the beneficiary's services as a wholesale jewelry buyer would further bolster the petitioner's economic strength. In fact, had CIS not held up the petitioner's plans to hire the beneficiary, the petitioner financial picture would look better on paper, and more clearly demonstrate that it can pay the proffered wage. Finally, CIS is engaged in an "unconstitutional" campaign to obstruct the in-flow of immigrants in general.

Counsel thus submits the petitioner's Form 1120 tax return for fiscal 2001 (ending June 30, 2002), along with the partnership tax returns for 1997, 1999 and 2001 (including the Schedule K-1 relating to the petitioner's principal shareholder) of a partnership named Deguchi Investments.

First, this office will take up counsel's response to the September 17, 2002 RFE. The response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Next, counsel asserts that CIS should hasten to approve the hiring of the beneficiary because the petitioner's income will likely increase as a result. In this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a wholesale buyer will significantly increase profits for a jewelry dealer. In particular, the hypothesis that hiring the beneficiary will improve the petitioner's income picture does not outweigh the evidence already present in the petitioner's corporate tax returns. Further,

¹ This office notes that none of the returns submitted covers the first half of calendar year 1998 that includes the January 12, 1998 priority date.

² The petitioner's fiscal year 2001 (ending June 30, 2002) tax return, first submitted on appeal, for convenience is placed here alongside the petitioner's previously submitted returns for the prior years.

assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also asserts that the financial strength of the petitioner is backed up by the economic strength of a partnership that holds most or all of the stock shares of the petitioner. Contrary to counsel's assertion, however, 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. Counsel's reliance on the assets of the partnership that is the petitioner's primary shareholder 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 that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

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 pertinent 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. 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. 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).

Nevertheless, 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 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(d) through 6(d). Its year-end current

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

liabilities are shown on lines 16(d) through 18(d). 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 years in question, fiscal 1998-2001, however, were negative. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

For the tax years 1998 and 2000, the petitioner had negative net incomes. While in both fiscal 1999 and 2001, the petitioner had sufficient income to cover the proffered wage of \$38,043, in fiscal 1998 and 2000 it did not. Additionally, there is no information covering the period from the priority date, January 12, 1998, to June 30, 1998. A petitioner must establish the elements for the approval of the petition at the time of filing. 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). Further, the petitioner has failed to establish a continuous ability to pay, as required by the regulation at 8 C.F.R. § 204.5(g)(2), which provides:

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of calendar year 1998 or subsequently during fiscal years 1998 and 2000. 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.

payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.