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

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: EAC 02 240 54477 Office: VERMONT SERVICE CENTER Date: AUG 11 2005

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner was represented by counsel during the application process but has retained new counsel on appeal. All representations will be considered but the decision will be furnished only to the petitioner and the petitioner's present counsel.

The petitioner is a construction and woodworking company. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 granting 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 8, 1998. The proffered wage as stated on the Form ETA 750 is $30.06 per hour, which equals $62,524.80 per year.

On the petition, the petitioner left blank the spaces where it was required to enter the date it was established, the number of workers it employs, its gross annual income, and its net annual income. The record, however, contains a letter, dated April 4, 2002, from the petitioner's chairman and co-owner, stating that the petitioner's gross annual income is $1.4 million, its net annual income is $1.1 million,[1] that it was established on February 25, 1992, and that it employs five workers. Because the petition in this matter was filed on July 10, 2002, the circumstances under which that letter was provided are unclear.

[1] None of the evidence subsequently submitted supports this statement.

On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Brooklyn, New York.

In support of the petition, the petitioner's previous counsel submitted the petitioner's 1998 and 1999 Form 1120S, U.S. Income Tax Returns for an S Corporation, and the 2000 Form 1120S, U.S. Income Tax Return for an S Corporation of [redacted] Corporation. Those returns show that the petitioner and [redacted] report taxes pursuant to the calendar year.

The 1998 return shows that during that year the petitioner declared a loss of $18,761 as its ordinary income. At the end of that year the petitioner's current liabilities exceeded its current assets.

The 1999 return shows that during that year the petitioner declared ordinary income of $4,819. At the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 return shows that during that year [redacted] declared ordinary income of $11,651. At the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also provided a December 19, 2000 amendment of the petitioner's Certificate of Incorporation changing the petitioner's name to [redacted] Corporation.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on March 31, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested the petitioner's 2001 and 2002 tax returns, W-3 transmittals for 1998, 1999, 2000, 2001, and 2002, and, if it employed the beneficiary during any of those years, Form W-2 Wage and Tax Statements showing the wages it paid to the beneficiary.

In response, the petitioner's previous counsel submitted (1) 1998, 1999, 2000, 2001 and 2002 W-2 forms and W-3 transmittals, (2) 2001, and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, (3) a letter, dated June 23, 2003, from the petitioner's accountant, (4) a letter, dated June 19, 2003, from the petitioners' owner's bank, (5) copies of the petitioner's owner's 1998, 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax Returns.

None of the W-2 forms provided show that the petitioner paid any wages to the beneficiary. The W-3 transmittals show that the petitioner paid total wages of $140,295, $145,123.28, $174,502.84, $215,336.16, and $80,523.75 during 1998, 1999, 2000, 2001, and 2002, respectively.

The 2001 tax return shows that the beneficiary declared a loss of $188,178 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002 tax return shows that the beneficiary declared ordinary income of $57,111 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The June 23, 2003 letter from the petitioner's accountant states that the petitioner's owners, Mr. and Mrs. [redacted] have pledged one of their investment accounts as collateral for a loan to the petitioner, and have another investment account.

The June 19, 2003 letter from the petitioner's owners' bank states that the petitioner's owners maintain an account with that bank and states the balance of that account on that date.

Counsel also submitted a letter, dated June 24, 2003. In that letter counsel stated that the petitioner lost a big project due to the tragedy of September 11, 2001, which accounts for its loss during 2001. Counsel provided no evidence in support of the assertion that the petitioner's business was affected by the events of September 11, 2001.

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 September 2, 2003, denied the petition. In that decision, the director also noted that the petitioner had used two names and two addresses on the various documents submitted and that the petitioner had not established that [redacted] is the successor-at-interest of the original petitioner, [redacted] Interiors.

On appeal, the petitioner's new counsel asserts that the amounts paid to employees who have left the petitioner's employ, the petitioner's depreciation expense during various years, the petitioner's Schedule L, Line 1 end-of-year cash, the balance in its checking account, and the amount of its credit line should be considered funds available to pay the proffered wage.

In addition, counsel states that since early 1990 the petitioner has had a contract with [redacted] Carpentry, where the beneficiary has been employed, and that the beneficiary performed all of the carpentry work thus contracted. Counsel asserts that the amounts paid to [redacted] Carpentry were also funds that would have been available to pay the proffered wage, in the event that the petitioner was free to employ the beneficiary.

Counsel also cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a loss or low profits during a given year does not preclude approval of the petition.

With the appeal counsel provides (1) bank statements showing the balance of the petitioner's account on December 31, 1998, December 19, 1999, November 5, 2000, December 3, 2001, and December 3, 2002, (2) statements pertinent to investment accounts and credit lines in the petitioner's name, and (3) copies of checks drawn on the petitioner's account and payable to the order of [redacted] Carpentry during 1998, 1999, 2000, 2001, and 2002

As to the name and address discrepancies, counsel states that the petitioner changed its name and address during the pendency of the petition. The December 19, 2000 amendment of the petitioner's Certificate of

Incorporation supports counsel's assertion as to the name change. This office finds counsel's explanation credible.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, 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 Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner shall not be further considered.

Counsel asserts that the petitioner's business suffered as a result of the events of September 11, 2001. The only evidence in support of that assertion, however, is the large loss suffered by the petitioner during 2001. The evidence does not demonstrate that the large loss was related to the events of September 11. Further, even if the petitioner's loss during 2001 were explained by those attacks, they could not be responsible for the petitioner's losses and low profits during previous years.

Counsel asserts that some of the petitioner's former employees have left during various years and that their wages are, therefore, now available to pay the proffered wage. The petitioner's W-3 transmittals, however, show that the petitioner's total wages grew steadily every year from 1998 to 2001. The petitioner has not demonstrated that had additional funds available to pay an additional employee during any one of those years. Further, the evidence does not demonstrate that those former employees were carpenters. As such, the wages they were paid was not necessarily available to pay wages for the performance of the duties of the proffered position.

Counsel states that the petitioner paid [redacted] Carpentry for contract carpentry work, all of which work was performed by the beneficiary. In support of that assertion, counsel submits copies of checks drawn by the petitioner to the order of [redacted] Carpentry. The checks do not demonstrate that the beneficiary performed the work, even in part. Further, the checks do not demonstrate the nature of the work performed,[2] or that the beneficiary was capable of performing that work. Absent objective evidence to demonstrate that the funds paid to [redacted] Carpentry went to paying for the services that the beneficiary would provide were he hired, the amounts paid to [redacted] Carpentry will not be included in the calculation of funds available to the petitioner to pay the proffered wage.

Counsel's reliance on the bank statements and statements of other accounts submitted in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the

[2] The checks do not, in fact, even demonstrate that the checks were payment for contract services at all, rather than, for instance, materials.

sustainable ability to pay a proffered wage.[3] Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.[4]

A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 the Immigration and Naturalization Service, now 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 income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage.

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[3] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

[4] This office notes that counsel, on appeal, even urged that the petitioner's end-of-year cash, as reported at Line 1(d) of its Schedule L, should be added to the balance in its checking account at the end of the year. That calculation would almost certainly be duplicative.

Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $62,524.80 per year. The priority date is January 8, 1998.

During 1998 the petitioner declared a loss of $18,761. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during 1998. The petitioner has submitted no reliable evidence that any other funds were available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner declared ordinary income of $4,819. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during 1999. The petitioner has submitted no reliable evidence that any other funds were available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared ordinary income of $11,651. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during 2000. The petitioner has submitted no reliable evidence that any other funds were available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss of $188,178. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during 2001. The petitioner has submitted no reliable evidence that any other funds were available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of $57,111. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during 2000. The petitioner has submitted no reliable evidence that any other funds were available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

Counsel asserts, however, that pursuant to *Matter of Sonegawa, supra*, approval of the petition is not precluded, or possibly that the decision in *Sonegawa* precludes finding, under these circumstances, that the petitioner has

failed to demonstrate its ability to pay the proffered wage. *Sonegawa* however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in *Sonegawa* the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, 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 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 couturière.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. In the instant case, however, the petitioner posted a small loss during 1998. During 1999, 2000, and 2001 the petitioner declared profits. However, in no year was the amount of that profit insufficient to pay the proffered wage.

The large loss during 2001 may, as counsel asserts, be attributable to the aftermath of the events of September 11, 2001, although counsel submitted no evidence in support of that assertion. Unsupported assertions are insufficient to meet the burden of proof in these proceedings. *Matter of Soffici* 22 I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, the events of September 11, 2001 cannot explain the petitioner's loss during 1998 and small profits during 1999 and 2000. Nothing establishes that 1998, 1999, 2000, 2001 and 2002 were all uncharacteristically bad years for the petitioner. The record contains no objective reason to believe that the petitioner's business will flourish, with or without hiring the beneficiary.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, and 2002. 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.