

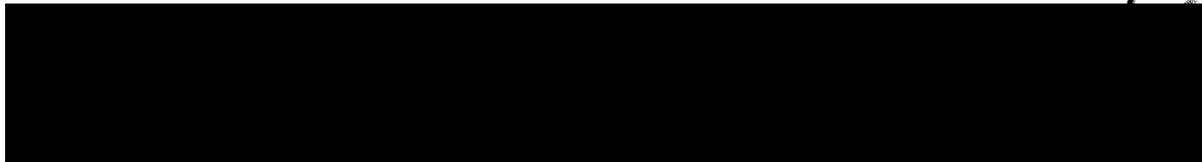
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U.S. Department of Homeland Security
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U.S. Citizenship
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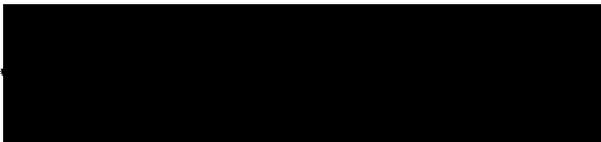


FILE: WAC-02-253-53042 Office: CALIFORNIA SERVICE CENTER Date: **AUG 22 2005**

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

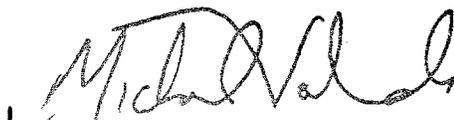
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director of the California Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted. The prior decision of the AAO will be affirmed. The petition remains denied.

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 October 6, 1999. The proffered wage as stated on the Form ETA 750 is \$2,300 per month, which would be \$27,600 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner¹.

The petitioner is a flower wholesaler. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.

On January 9, 2003, 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 because its net income and net current assets reported for 2001 were less than the proffered wage, and denied the petition accordingly.

The AAO affirmed the director's decision on March 31, 2004 for the same reasons stated by the director that also included a discussion of the petitioner's net income and net current assets in 1999 in addition to 2001 since the petitioner submitted its 1999 corporate tax return on appeal. The AAO noted that the record of proceeding did not contain the petitioner's 2000 corporate tax return. The AAO's decision discussed the petitioner's owner's investment statements, the petitioner's bank statements, and the petitioner's gross receipts, general salaries and wages paid, and officer's compensation as reported on its federal corporate tax returns. Additionally, on appeal,

¹ 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.

counsel asserted that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) applied to the petitioner's case because its product was in high demand. The AAO determined that the petitioner's reliance upon *Sonogawa* was misplaced because no unusual circumstances parallel to the facts of *Sonogawa* were established in the instant case and it also had not been established that 1999, 2000, or 2001 were uncharacteristically unprofitable years for the petitioner.

On motion, counsel submits additional evidence and a brief. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Counsel asserts that the petitioner has new evidence that establishes its continuing ability to pay the proffered wage. The petitioner submits evidence of a new retail store and a new contract with Rite Aid. Thus, since new evidence is presented, the motion qualifies for consideration as a motion to reconsider.

On review, the record of proceeding affirms the AAO's prior determination that the petitioner has not demonstrated a continuing ability to pay the proffered wage beginning on the priority date.

Counsel states in his motion that "[i]n January 2003, [the p]etitioner . . . commenced operating a new business with the dba of 'Ginny G Floral Design.' That business is a retail outlet for [the p]etitioner which caters to the general public rather than whole sale sales and distribution." With the motion, the petitioner submits a Wells Fargo checking account statement issued to the petitioner "dba Ginny G Floral Design" for April 2004 and Ginny G. Floral Design's unaudited profit and loss statements for 2003 and 2004.

At the outset, unaudited financial statements 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.

Additionally, aside from one checking account statement, there is insufficient evidence concerning the relationship between the petitioner and Ginny G Floral Design. Typically a fictitious name certificate indicates a "dba" moniker. Additionally, no corporate documentation, such as agreements or state filings, was submitted to illustrate the nature of the relationship between the petitioner and Ginny G Floral Design². Only counsel explained that the petitioner operates a new business; however, without further corroborating evidence, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

² This is important since 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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."

Even if the evidence concerning the petitioner and Ginny G Floral Design were sufficient to show that the petitioner could utilize the assets of Ginny G Floral Design, as properly noted by the AAO previously, counsel's reliance on the balances Ginny G Floral Design's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate an entity's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of Ginny G Floral Design. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on Ginny G Floral Design's bank statement somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L, which is part of Ginny G Floral Design's net current assets. No regulatory-prescribed evidence was submitted at all concerning the financial situation of Ginny G Floral Design, such as a corporate tax return, annual report, or audited financial statements, as required by 8 C.F.R. § 204.5(g)(2). Instead, it merely provided unaudited profit and loss statements, which as discussed above, are insufficient evidence of an entity's continuing ability to pay the proffered wage.

Even if it could be established that Ginny G Floral Design's financial assets were available to the petitioner, counsel conceded that the relationship began in 2003, which is after the priority date in 1999. 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).

Counsel also states in his motion that the petitioner entered into a contract with Rite Aid Corporation in January 2004 "to supply wholesale flowers to Rite Aid stores in the Los Angeles area." The petitioner submits its proposal to Rite Aid and emails that appear to be correspondence between a Rite Aid representative and the petitioner indicating business activities occurring in January 2004. The evidence is not dispositive proof of a sustainable source of income for the petitioner since there is no contract in the record of proceeding with detailed terms of the additional source of revenue for the petitioner. Additionally, this revenue would be reported on the petitioner's corporate tax returns and CIS would still review the petitioner's net income and net current assets after expenses. Finally, as noted above, 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. at 49. Since the relationship was apparently established after the date of the priority date in 1999, the evidence is not dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Upon review, the AAO's prior adjudicator accurately assessed the petitioner's net income and net current assets in 1999 and 2001, which were lower than the proffered wage and failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.³ On motion, the petitioner submits its 2000 corporate tax return,

³ As noted in the prior AAO decision, 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross

which reflects a loss and negative net current assets, which also do not establish its ability to pay the proffered wage in that year. Therefore, the petitioner has not established that it has the continuing ability to pay the proffered wage beginning on the priority date out of its net income.

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 motion to reopen or reconsider is granted. The prior decision of the AAO, dated March 31, 2004, is affirmed. The petition remains denied.

receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 the Service should have considered income before expenses were paid rather than net income.

Additionally, 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 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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.