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**U.S. Citizenship
and Immigration
Services**

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FILE:

WAC 03 163 52197

Office: CALIFORNIA SERVICE CENTER

Date: **DEC 14 2006**

IN RE:

Petitioner:

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:

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 commercial management and leasing firm. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. 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)].

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 August 16, 2001. The proffered wage as stated on the Form ETA 750 is \$11.92 per hour, which amounts to \$476.80 per week or \$24,793.60 per annum. On the Form ETA 750B, signed by the beneficiary on July 9, 2001, the beneficiary claims to have worked for the petitioner since February 2001 as a management analyst/administrative assistant.

On Part 5 of the visa petition, filed on May 2, 2003, the petitioner claims to have been established in 1992, to currently employ thirty-three workers, and to have a gross annual income of approximately 1.14 million dollars. In support of its ability to pay the beneficiary's proposed wage offer of \$24,793.60 per year, the petitioner initially

submitted incomplete copies of its Form 1120, U.S. Corporation Income Tax Return for 2001. It reflects that the petitioner files its federal tax returns using a fiscal year running from August 1st to July 31st of the following year. Thus, the 2001 tax return covers the period from August 1, 2001 to July 31, 2002. It contains the following information pertinent to taxable income before the net operating loss (NOL) deduction and special deductions,¹ current assets and liabilities, and net current assets.

| 2001 | |
|--------------------------------|----------|
| Taxable Income before NOL | \$ 1,413 |
| Deduction (Form 1040) | |
| Current Assets (Sched. L) | \$ 3,056 |
| Current Liabilities (Sched. L) | \$ 7,252 |
| Net current assets | -\$4,196 |

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

In support of its ability to pay the proffered wage, the petitioner also submitted a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001. It shows that she received \$4,800 in wages from the petitioner that year. Copies of the petitioner's January, February, and March 2003 payroll records of the beneficiary's wages were also offered with the petition. They reflect that she was compensated at the rate of \$800 every two weeks, which amounts to \$10.00 per hour. The petitioner further supplied copies of its state quarterly wage report for 2002. They indicate that the beneficiary's wages for each of those four quarters was \$4,800, which amounted to \$19,200 for the year.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On February 6, 2004, the director instructed the petitioner to submit evidence of its ability to pay the proffered salary in the form of federal tax returns, audited financial statements or annual reports covering the period from the priority date of August 16, 2001 to the present. The director also requested that the petitioner provide such evidence for 2002 and 2003. He further instructed the

¹ For the purpose of this review, the petitioner's taxable income before the NOL deduction and special deductions will be treated as its net income.

² 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 payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner to provide copies of its state quarterly wage reports for the four quarters of 2003, as well as copies of the beneficiary's pay statements for November, December 2003, and January 2004.

In response, the petitioner submitted a copy of its 2002 corporate tax return containing its financial information covering the period from August 1, 2002 to July 31, 2003. This return reflects the following information:

| 2002 | |
|--------------------------------|-----------|
| Taxable Income before NOL | -\$16,448 |
| Deduction | |
| Current Assets (Sched. L) | \$ 5,737 |
| Current Liabilities (Sched. L) | \$ 1,040 |
| Net Current Assets | \$ 4,697 |

The petitioner also provided copies of its state quarterly wage reports for each of the quarters in 2003. They show that the petitioner paid the beneficiary \$4,800 during the first quarter ending March 31, 2003, \$4,900 for the second quarter ending June 30, 2003, \$5,400 for the third quarter ending September 30, 2003, and \$5,400 for the fourth quarter ending December 31, 2003. Payroll statements provided for the last couple of months of 2003 until the pay period ending on February 2, 2004, indicate that the beneficiary's salary went from \$900 every two weeks to \$1,050 every two weeks, beginning with the first pay period of 2004.

The petitioner further supplied a copy of a corporate tax return from another company called [REDACTED] along with a letter from the petitioner's executive vice-president, [REDACTED]. [REDACTED] explains that the petitioner has already been paying the beneficiary the proffered wage as shown by the pay stubs and 2003 quarterly wage reports. He further states that the [REDACTED] is a related real estate management firm and that these combined operations are illustrative of the petitioner's current and future ability to pay the certified wage.

The director reviewed the petitioner's financial data provided to the record and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of August 16, 2001. The director denied the petition on July 20, 2004. The director noted that the information provided on the 2002 tax return failed to indicate that the difference between the proffered wage and the \$19,200 paid to the beneficiary could be covered.

On appeal, counsel contends that the petitioner has already been paying the proffered wage to the beneficiary and that its gross income and ability to have regularly paid its employees since its incorporation in 1992 shows its stability and ability to pay the proffered salary. In support of this assertion, counsel resubmits various copies of the petitioner's payroll records and state quarterly wage reports showing wages paid to the beneficiary in 2002 and 2003, as well as a copy of the state quarterly wage report for the second quarter in 2004, and a pay record of her wages paid to August 1, 2004. The 2003 and 2004 payroll statements indicate that the beneficiary's salary was \$800 every two weeks until the June 16, 2003, pay period when it was raised to \$900 every two weeks, where it remained for the rest of 2003 until it was increased to \$1,050 every two weeks in January 2004.

Counsel also supplies a copy of the petitioner's 2003 corporate tax return for 2003. It covers the period from August 1, 2003 until July 31, 2004, and shows the following:

| | |
|--------------------------------|-----------|
| Taxable Income before NOL | \$ 9,487 |
| Deduction (Form 1040) | |
| Current Assets (Sched. L) | \$ 15,215 |
| Current Liabilities (Sched. L) | \$ 1,031 |
| Net current assets | \$ 14,184 |

It is noted that the [REDACTED] corporate tax return will not be considered in the review of the petitioner's ability to pay the proffered wage, absent a showing that it is legally obligated to pay the beneficiary's wages. 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 and 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). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) affirmed the rejection of the offer of the petitioner's director to personally pay the proffered wage stating "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."

Counsel also claims on appeal that based on the principles outlined in a CIS interoffice memo, *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memorandum"), the petitioner has established its ability to pay the proffered wage.

With regard to the 2004 Yates Memorandum, it is noted that this document is not intended to create any right or benefit or constitute a legally binding precedent, but merely offered as guidance.³ In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during the relevant period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record indicates that the petitioner has employed the beneficiary since February 2001. As the most relevant comparison to the petitioner's net income or net current assets reflected on its corporate tax returns should be based on a fiscal year running from August 1st to July 31st of the following year, it is noted that the beneficiary's earnings for the last five months of 2001 were about \$2,000 or about \$400 per month based on a monthly average of her 2001 total earnings reflected on the W-2. According to the payroll records for 2002, the beneficiary was paid \$11,854.56 for the first seven months of 2002, for a combined total of about \$13,854.56 for the fiscal year

³See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

running from August 1, 2001 to July 31, 2002. These wages reflect an amount of \$10,939.04 less than the proffered wage of \$24,793.60.

The remaining five months of 2002 indicate that the petitioner paid the beneficiary approximately \$8,000. For the first seven months of 2003, her year-to-date earnings as of August 1, 2003, as reflected on the petitioner's payroll records, indicate that she had been paid \$12,318.19, for a combined total of approximately \$20,318.19 for the fiscal year running from August 1, 2002 to July 31, 2003. These wages show an amount of about \$4,475.41 less than the certified wage.

For the fiscal year measured from August 1, 2003 to July 31, 2004, based on the documents submitted to the underlying record and on appeal, the beneficiary was paid about \$9,000 for the last five months of 2003 and \$15,450 for the first seven months of 2004, for a total of \$24,450, or about \$343.60 less than the certified wage.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross receipts exceeded the proffered wage is misplaced. Similarly, showing that the petitioner paid cumulative wages in excess of the proffered wage or at a specified level is not persuasive. 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.

Counsel also submits copies of the petitioner's bank statements covering a period from January 1, 2001 to July 31, 2003. The balances vary widely from -\$405 to about \$23,000. Counsel's reliance on the petitioner's bank statements is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner'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 provides an inaccurate financial profile of the petitioner. The regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports or audited financial statements if it considers its tax returns a poor reflection of its financial position. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was

submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, as mentioned above, CIS will review a petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, although the financial information presented on the petitioner's 2002 tax return submitted to the underlying record and the 2003 tax return provided on appeal, show that the petitioner's net current assets of \$4,697 and \$14,184, respectively, could cover the shortfall between the actual wages paid and the certified wage during those periods, the petitioner's financial data presented in its 2001 tax return, did not demonstrate its ability to pay the wage offer during this period. For the fiscal year running from August 1, 2001 to July 31, 2002, which also encompasses the visa priority date of August 16, 2001, neither the petitioner's net taxable income of \$1,413 nor its net current assets of -\$4,196, could cover \$10,939.04 difference between the actual wages paid of \$13,854.56 and the certified wage of \$24,793.60.

Counsel asserts that the petitioner's twelve-year history of operation since 1992, increasing gross income, and its ability to cover its cumulative payroll justifies the petition's approval. It is noted that the Regional Commissioner in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), sustained an appeal where the evidence indicated such factors as a reasonable expectation of continued increasing profits. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the three tax returns contained in the record do not represent a framework of profitable years analogous to the *Sonegawa* petitioner. Here, the petitioner posted modest net taxable income for each of the three years represented in the corporate tax returns. The AAO cannot conclude that the petitioner has demonstrated that such unique circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the wage certified in the application for labor certification beginning on the priority date. (Emphasis added). Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered wage as of the priority date of the petition.

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.