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**U.S. Citizenship
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Services**

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FILE: WAC-03-160-51058 Office: CALIFORNIA SERVICE CENTER

Date: DEC 16 201

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

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 sells store equipment and fixtures. It seeks to employ the beneficiary permanently in the United States as a display maker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director 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 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on August 12, 1999. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$31,200 per year). The Form ETA 750 states that the position requires two years experience.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$2,601,983, and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 22, 2000, the beneficiary did not claim to have worked for the petitioner but represented that he has been self-employed since May 1998 at a convenience store and described his duties to be similar to the proffered position.

With the petition, the petitioner submitted the following documents: a letter from Lance, Soll & Lunghard, LLP, Certified Public Accountants, stating that the petitioner has been paying the beneficiary in commissions that were reported on its corporate federal income tax return; an activity report from an account held by the petitioner at Bank of America reflecting checks issued to the beneficiary in 2000, 2001, and 2002; and the petitioner's corporate federal income tax returns for 1999, 2000, and 2001.

On April 24, 2004, 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 issued a notice of intent to deny pertinent to that ability. 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. The director specifically requested regulatory-prescribed evidence for 2002 and 2003 and noted that the petition would be denied because the petitioner's net income and net current assets from 1999 through 2001 were negative and did not reflect the petitioner's financial stability.

In response, the petitioner submitted its corporate federal tax returns for 2002 and 2003; previously submitted evidence, and copies of documents claimed to be invoices by the beneficiary to the petitioner with copy of the petitioner's checks showing payments for 2000 through 2004; an affidavit from the beneficiary stating that he "sold equipment and supervised the installation on behalf of [the petitioner] to [REDACTED] in Tijuana, Mexico" and that he was paid in Mexican pesos even though the actual checks were issued in U.S. dollars to benefit the Mexican employer; and some documents in Spanish that appear to be invoices from the beneficiary to the petitioner along with copies of checks from the petitioner to the beneficiary without proof that they were cashed.

Additionally, the petitioner submitted a letter stating the following, in pertinent part:

In November of 1998 we consummated an agreement with [the beneficiary] for him to become our Mexico sales representative. A commissioned agreement with some reimbursable expenses [sic]. That agreement is still in effect. During the period November 27, 1998 to May 19, 2004 we paid [the beneficiary] \$232,404 in commission and expenses.

Currently [the petitioner] has a backlog of orders totaling \$1,139,668.92. These jobs will be completed over the next 4 months. [The beneficiary] is currently working a quote for six AM-PM stores in Mexico, total quote approximately \$400,000.00. New orders are very strong.

Our intention all along was to be able to use [the beneficiary] on both sides of the border. We have customers here [Imperial & San Diego Counties] that he could take care of, while continuing to live and work in Mexico.

Counsel cited to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and unpublished AAO decisions for the premise that a company may establish its continuing ability to pay the proffered wage despite showing losses if accounting for certain expenses, such as depreciation, and factoring in wages already paid to the beneficiary. Counsel asserted that the petitioner has been paying more than the proffered wage through commissions paid to the beneficiary that are corroborated through the petitioner's corporate federal tax return. Counsel also asserted that the beneficiary was paid during 1998 through 2000 through payments made to a company in Mexico that then paid the beneficiary in pesos. Counsel also noted the petitioner's gross

revenues and amount of wages and officer compensation generally paid as additional evidence of the petitioner's continuing ability to pay the proffered wage.

The director denied the petition on July 1, 2004, finding that the evidence submitted with the petition and in response to its request for evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel reasserts past assertions and claims that the director erred by failing to consider payments made to the beneficiary for work performed for the petitioner. The petitioner submits a new letter from its accountant clarifying that the beneficiary has been a self-employed independent contractor¹ and that was why the petitioner claimed wages paid to him as commissions on its corporate tax returns and explains that depreciation is a non-cash expense that should be added back to the petitioner's net income. The petitioner resubmits previously submitted evidence.

On the appeal form submitted by the director to the AAO, the director commented that the petitioner's:

tax returns showed insufficient incomes and assets to fund the proffered wage. ETA 750 showed the [beneficiary] has been a SELF-EMPLOYED [sic] since 1998, not an employee of the petitioner. A Mexican employee that did not pay U.S. taxes cannot be considered as an employee of an employer of the U.S. [The petitioner submitted copies of checks issued to the [beneficiary] with no evidence showing whether checks were endorsed or cashed.

(Emphasis in original).

At the outset, counsel refers to decision issued by the AAO, but does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS) are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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 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 wage². In the instant case, the petitioner has failed to establish that it paid the beneficiary the proffered wage.

The AAO concurs with the director's comment to the appeal that there is insufficient corroborating evidence that the beneficiary was actually paid wages for work performed in the capacity of the proffered position for the petitioner. The checks made out to the beneficiary do not contain evidence that they were actually cashed. The documents in Spanish that were submitted without a translation are apparently invoices, but that is

¹ In his decision, the director claimed that the beneficiary's representation that he was "self employed" on the Form ETA 750 B was in contradiction to the explanation provided in response to the director's request for evidence that he sold and installed items to a Mexican business entity.

² The AAO accepts credible and probative evidence of wages paid to sponsored aliens for work performed in the capacity of the proffered position regardless of employee status.

unclear since a certified English translation of those papers was not submitted³. The regulation at 8 C.F.R. § 103.2(b)(3) specifies the following: “*Translations*. Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.” Thus, the invoices are defective evidence that cannot be considered.

Additionally, the AAO added up the amounts on the copied checks issued from the petitioner to the beneficiary in 2003 and they amounted to \$24,181. Counsel claims that the petitioner reported its commissions as “outside services” on statement 2 for that year, which contains the figure \$41,211. The figures do not match and plausibly would not if the petitioner paid other independent contractors like the beneficiary. However, the petitioner did not submit evidence to demonstrate a nexus between that figure and the amounts allegedly paid to the beneficiary. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states: “Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.” *Matter of Ho*, 19 I&N Dec. at 591-592 also states: “It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.”

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 contrary to counsel’s and the petitioner’s accountant’s assertions. 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 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. The court in *Chi-Feng Chang* further noted:

³ Counsel requested that adjudication of the appeal be delayed until he could submit translations of those invoices. However, the regulations governing the appellate process and the instructions to the Form 290-B do not permit an indefinite period in which to supplement an appeal once it has been filed. Counsel should have had the translations submitted back when he initially submitted Spanish documents, which was in May 2004.

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$31,200 per year from the priority date.

In 1999, the Form 1120S stated net income⁴ of -\$32,392.
In 2000, the Form 1120S stated net income of \$n/a.
In 2001, the Form 1120S stated net income of -\$80,140.
In 2002 the Form 1120S stated net income of -\$50,127.
In 2003, the Form 1120S stated net income of \$14,592.

Therefore, for the years 1999 through 2003, the petitioner did not have sufficient net income to pay the 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 include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.

⁴ Ordinary income (loss) from trade or business activities as reported on Line 21. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). In the instant case, except for 2001 and 2002, the petitioner's income is not exclusively from a trade or business, so its net income is derived from line 23 of its Schedule K. The AAO cannot ascertain whether or not the petitioner's income is exclusively from a trade or business in 1999 because the first page of Schedule K is missing. Additionally, the petitioner's net income in 2000 is unavailable because the second page of its Schedule K, which contains line 23 and its net income figure, is missing from the record of proceeding.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets during 1999 were -\$41,923.

The petitioner's net current assets during 2000 were -\$70,902.

The petitioner's net current assets during 2001 were -\$137,954.

The petitioner's net current assets during 2002 were -\$195,157.

The petitioner's net current assets during 2003 were -\$166,804.

Therefore, for the years 1999 through 2003, the petitioner did not have sufficient net income to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts that *Matter of Sonegawa*, 12 I&N Dec. at 612 applies to the instant case. However, *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in 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 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 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 have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1999, 2000, 2001, 2002, or 2003 were uncharacteristically unprofitable years for the petitioner.

There are other considerations for an S corporation, however. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category

⁵According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] both hold 50 percent of the company's stock. According to the petitioner's 1999, 2000, 2001, 2002, and 2003 IRS Forms 1120 line 7 (Compensation of Officers), they elected to pay themselves in the aggregate amounts of \$104,976, \$105,300, \$104,950, \$96,100, and \$98,100, in each year, respectively. According to the statements to the petitioner's returns in 1999 and 2000, either statement 1 or 2 depending on the year, only Mr. [REDACTED] his wife actually received compensation in those years. Mr. [REDACTED] did not receive any compensation in those years. The distribution of officers' compensation for years 2001, 2002, and 2003 is unclear. We note here that the compensation received by the company's owners during these five years was not a fixed salary.

CIS (legacy INS) has long held that it 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.

In the present case, however, CIS would not be examining the personal assets of the petitioner's owners, but, rather, the financial flexibility that employee-owners have in setting their salaries based on the profitability of their corporation. In this case, however, the record of proceeding does not contain any evidence that either [REDACTED] is willing or able to forego their compensation from any relevant year and instead applying it towards hiring the beneficiary and paying his proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner's letter stating that the beneficiary would continue to "live and work" in Mexico undermines the *bona fides* of the job opportunity. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Not all U.S. workers could live and work in Mexico. The underlying principal of a third preference employment-based immigrant visa is a permanent offer of employment resulting in lawful permanent resident status to the beneficiary. Lawful permanent resident status requires permanent residence in the United States or that status would be forfeited. Additionally, the requirement of living and working in Mexico is not a requirement of the proffered position as delineated on Form ETA 750 A, which materially alters the nature of the petition. Any additional proceedings in this matter or pursuant to this matter would need to address that additional issue. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the

initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.