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U.S. Citizenship
and Immigration
Services

B6

FILE: WAC 03 250 54318 Office: CALIFORNIA SERVICE CENTER Date: DEC 19 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:

[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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook, Japanese style food. 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 states that the director failed to consider other evidence submitted with the petition. Counsel submits additional documentation with regard to the assets of the petitioner's shareholders.

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 May 25, 2001. The proffered wage as stated on the Form ETA 750 is a monthly salary of \$2,002, or an annual salary of \$24,024. 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 in April 1988 and to have a gross annual income of \$1,831,392. The petitioner indicated it had 55 employees. In support of the petition, the petitioner submitted IRS Form 1120S, the petitioner's corporate income tax return for tax years 2000, 2001, and 2002. In addition the petitioner submitted a letter of employment verification from a restaurant in Japan; the petitioner's financial profit and loss statement for the months ending January through May 2003; seven Forms DE-6 state of California Quarterly Wage and Withholding Reports for the third quarter of 2001 to the first quarter of 2003; copies of letters dated August 24, 2000, April 23, 2001, and July 24, 2001 issued by the General Services Administration with regard to the petitioner's removal from the Hotel San Diego in San

Diego; and a letter dated April 4, 2001 issued by the Department of the Army regarding a 90-day notice to vacate businesses located in the Hotel San Diego, San Diego.

In a cover letter, counsel stated that the property formerly occupied by the petitioner at 339 Broadway, San Diego, was acquired by the United States federal government in August 2000, and that the petitioner was required to vacate the property on September 1, 2001. Counsel stated that as a result of the government requirement that the business relocated, the petitioner was closed for a period of time in 2001 and incurred moving and other expenses in connection with the relocation and tenant improvements at the new location. Counsel then stated for the calendar year 2000, the petitioner had gross sales of \$1.43 million and a net profit of more than \$41,000, and that although the petitioner's gross income increased in 2001, net income after expenses was a negative \$102,000 due to the one-time extraordinary relocation expenses. Counsel also stated that legal fees incurred as a result of the eminent domain issues with the federal government alone exceeded \$72,000. Counsel asserted that this sum represented an increase of more than 24 times the legal fees of \$3,103 in 2000. Counsel states that despite these legal fees, the petitioner also increased its gross payroll to more than \$509,000 from the previous year's total of \$473,000. Finally counsel states that although net income in 2002 was a negative \$29,197, a large component of the loss was the legal fees incurred during that year of \$63,045. Counsel pointed out that despite the high expenses, the petitioner had positive cash on hand of more than \$31,000 at the end of the year. Counsel also stated that during the entire three-year period reflected in the tax returns the petitioner has continued to have an average of approximately 50 employees per quarter, as reflected in the petitioner's Form DE-6 submitted to the record.

Counsel then stated that but for the federal government's actions that mandated relocation of the business, the profitability of the business would have continued in 2001 and 2002, and that the current operating statement reflects that the business has recovered from the one-time extraordinary expenses of the forced change of business location.

With regard to the tax returns submitted to the record, the petitioner's Forms 1120S indicate the following ordinary income for the petitioner for the years 2000 to 2002: \$41,751 in 2000; -\$102,731 in 2001; and -\$29,197.

On June 22, 2004, the director denied the petition. In his denial of the petition, the director stated that the petitioner's 2001 tax return ordinary income of -\$102,371. The director also stated that the petitioner's Schedule L reflected total current assets of \$7,777 and total current liabilities of \$116,707. Since the petitioner had not established that the petitioner employed the beneficiary in 2001, the petitioner had to establish its ability to pay the beneficiary full proffered wage of \$24,024 in 2001. Based on the petitioner's ordinary income, current assets and liabilities, the director stated that the petitioner had not established its ability to pay the proffered wage in 2001.

With regard to the petitioner's tax return for 2002, the director stated that the petitioner had ordinary income of -\$29,197, as well as total current assets of \$51,375 and total current liabilities of \$109,949. The director noted that evidence indicated that the petitioner did not employ the beneficiary in year 2002. Therefore the director determined that the petitioner had not established its ability to pay the beneficiary's proffered wage in 2002.

On appeal, counsel states that the director's decision was based solely on an analysis of the petitioner's tax returns for the year 2001 and 2002 and failed to consider the other evidence submitted with the petition. Counsel also states that the director failed to consider issues such as loans made to the petitioner totaling \$124,000; the financial impact of the decision by the federal government to take over a building in which one of the petitioner's restaurants was located; and S Corporation accounting principles. Counsel reiterates the explanation provided with the initial petition as to the eminent domain actions taken by the federal government with regard to the petitioner's 339 Broadway location, and the impact that such a forced evacuation of the building caused the petitioner, including increased legal fees. With regard to S corporation accounting principles, counsel states that an S corporation is treated like a partnership or sole proprietorship for tax purposes that permits the income of the corporation to be taxed to the shareholders of the corporation rather than the corporation itself. Counsel states that the director must look past the corporation to the assets of the shareholders as well. Counsel submits a statement of the president of the petitioner, Mrs. [REDACTED]

In this declaration Mrs. [REDACTED] details the assets that she and her husband possessed at the time of filing the instant petition. She stated that she and her husband own two homes with a combined total equity of more than \$270,000, and that the couples also has a line of credit of \$50,00 available, if necessary. Mrs. [REDACTED] states that the petitioner currently operates two Japanese restaurants in Southern California and employs approximately 62 persons. Mrs. [REDACTED] also states that the petitioner has been in business since 1988. During that period of time, Mrs. [REDACTED] states that the petitioner has never failed to pay wages to its employees on time and in full.

Mrs. [REDACTED] then examines the action taken by the U.S. federal government in August 2000 with regard to vacating the San Diego Hotel property. Mrs. [REDACTED] submits a copy of the stipulation and partial judgment in the civil proceeding, filed in U.S. District Courts for the Southern District of California, on behalf of the petitioner. Mrs. [REDACTED] also submits an appraisal form for one home and a copy of the San Diego Country Assessors tax bill for the second property. Mrs. [REDACTED] also submits a copy of the petitioner's line of credit for \$50,000 dated August 15, 2001.

In calculating the ability to pay the proffered salary, Citizenship and Immigration Services, (CIS) will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition.

With regard to using the assets of the petitioner's shareholders to pay the proffered wage, contrary to counsel's and the petitioner's assertions, 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.

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 wage. In the instant case, the petitioner did not claim that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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). 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. Since the priority date for the instant petition is May 2001, the income tax returns for 2000 are not relevant in establishing whether the petitioner had sufficient net income as of the priority date to pay the proffered wage. Therefore, only the petitioner's 2001 and 2002 tax returns are considered with regard to the petitioner's net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001 and 2002 shows the following amount of ordinary income: -\$102,731 and -\$29,197. These figures are not sufficient to establish the petitioner's ability to pay the proffered wage based on its net income.

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 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

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. The petitioner submitted the following information for tax years 2001 and 2002:

	2001	2002
Ordinary Income	\$ -102,731	\$ -29,197
Current Assets	\$ 7,777	\$ 51,373
Current Liabilities	\$ 116,707	\$ 109,949
Net current assets	\$ -108,707	\$ -58,576

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of -\$102,731, and net current assets of -\$108,707, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. In 2002, the petitioner shows a net income of -\$29,197 and net current assets of -\$58,576, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

As noted previously, the assets of the shareholders, including equity in homes, are not viewed as corporate assets, nor would the petitioner's shareholders' line of credit be available to pay the proffered wage.

Nevertheless, when examining the totality of the petitioner's circumstances, counsel's and the petitioner's remarks concerning the petitioner's longevity, and number of employees, and the petitioner's increased employee salary expenses in 2001 and 2002 also cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the instant petition, the petitioner's gross income has always been above \$1 million and the petitioner has paid salaries and wages each year of \$400,000 to \$578,000. Furthermore the impact of the petitioner's unforeseen relocation mandated by the federal government on the petitioner's 2001 business expenses is a factor that warrants further examination. Counsel's examination of the petitioner's legal fees, as documented by the petitioner's tax returns for 2001 and 2002, and the impact of such higher legal fees on the petitioner's profitability do have merit.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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, 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

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'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.

With regard to the instant petitioner, the petitioner had a profitable year in 2000, and had the ability to pay the proffered wage at that time, and then experienced a unprofitable year in 2001 and a less unprofitable year in 2002. While the petitioner has not provided any evidence of prospects for a resumption of successful business operations similar to the petitioner in *Sonegawa*, namely, magazine articles that document the petitioner's outstanding reputation as a Japanese restaurant, the petitioner has established its longevity, sustained ability to employ and pay a sizeable work force, and increasing gross profits following such events as unforeseen relocation, and opening a new business location. Such factors are reflective of the circumstances described in *Sonegawa*. They also reflect the petitioner's financial viability and support the petitioner's ability to pay the proffered wage. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

The petitioner has, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.