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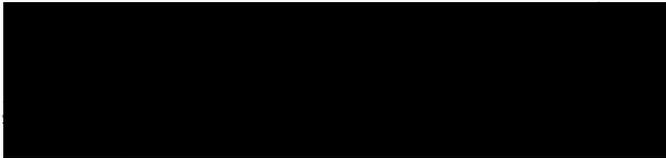
U.S. Department of Homeland Security
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U.S. Citizenship
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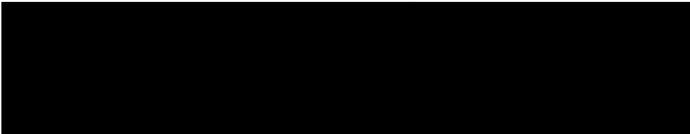
Office: CALIFORNIA SERVICE CENTER

Date: FEB 03 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 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 involved in domestic and international shipping, freight, and delivery of packages and information. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer. 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 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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 September 1, 1998. The proffered wage as stated on the Form ETA 750 is \$63,568 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of September 1997.

On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$1.5 million, and to currently employ seven workers. In support of the petition, the petitioner submitted excerpted copies of its Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 1998 through 2000, and Form 1120, U.S. Corporation Income Tax Return for 2001.

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, on December 4, 2002, the director requested additional evidence 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 requested copies of tax returns printed from the IRS, quarterly wage reports, payroll summaries, and any forms W-2 issued to the beneficiary to corroborate his attestation of actual employment with the petitioner since 1997.

In response, the petitioner submitted copies of its Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 1998 through 2000, and Form 1120, U.S. Corporation Income Tax Return for 2001. The tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income ¹	\$17,526	\$19,701	\$2,359	-\$22,204
Current Assets	\$310,356	\$191,552	\$182,715	\$66,113
Current Liabilities	\$228,555	\$109,927	\$98,122	\$33,756
Net current assets	\$81,801	\$81,725	\$84,593	\$32,357

In addition, the petitioner submitted copies of its quarterly federal tax returns, internally generated payroll records, and the petitioner's quarterly wage reports for all four quarters in 2001 and the first three quarters in 2002. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. The payroll records show that the beneficiary was paid gross wages of \$1500.00, netting \$1377.75, for the payroll period ending September 30, 1998.

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, on March 25, 2003, the director issued a notice of intent to deny the petition. The director stated that the petitioner failed to submit previously requested items such as copies of tax returns printed from the IRS and any forms W-2 issued to the beneficiary to corroborate his attestation of actual employment with the petitioner since 1997. The reply to the director was due on April 25, 2003.

In response, the petitioner submitted a letter from its representative, Mr. [REDACTED] (Mr. [REDACTED]) stating that he went personally to the IRS and requested transcribed tax records but was advised that they only had records for 3 years. The letter is dated April 2, 2003, and Mr. [REDACTED] states that he also requested copies by mail that should arrive "in two weeks." No further evidence was subsequently received into the record of proceeding. Additionally, Mr. [REDACTED] states that he runs more than one business and "[p]roceeds from these businesses give me the flexibility to spend more money on business [sic] or another." The petitioner submits IRS-generated corporate tax returns for 1999, 2000, and 2001, as well as signed corporate tax returns for 1997 and 1998. The figures in the IRS-generated corporate tax returns reflect the same data from the copies submitted into the record of proceeding previously. The petitioner also submits a copy of a quarterly wage report for the third quarter in 1998 corroborating payment of wages of \$1377.75 to the beneficiary.

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 May 7, 2003, denied the petition, specifically citing the petitioner's poor financial performance in 2001.

On appeal, counsel asserts that 2001 was an unusual year for the petitioner because of the tragedy of September 11, 2001 and its impact upon the petitioner's shipping/freight service and invokes application of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). Counsel also asserts that the director may, but is not required, to focus

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28 on the petitioner's corporate tax returns from 1998 through 2000. Ordinary income (loss) from trade or business activities as reported on Line 21 on the petitioner's 2001 corporate tax return.

solely upon net income and reasonably expects to increase its profit in the future. Counsel urges the consideration of cash assets in an account with Citibank International as evidence of sufficient funds to illustrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Finally, counsel asserts that the petitioner will continue its profitable business, submitting a videotape of what he asserts contains a television advertisement as well as pictures of the petitioner's premises, and states that the petitioner pays ample wages to its employees as evidenced by its Form W-3. The petitioner submits copies of invoices evidencing its business transactions shipping goods to various countries; copies of its previously submitted corporate tax returns; checking bank account statements from February 1998 to April 2003; pictures of what appears to be the petitioner's facility; and a "Videotape of Television Commercial."

The videotape was not properly authenticated nor transcribed with an affidavit of authentic transcription was required by the federal rules of evidence. Thus, it cannot be properly reviewed and accorded status or consideration as competent evidence in this proceeding. The pictures and invoices are not necessarily relevant and dispositive evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date as envisioned under 8 C.F.R. § 204.5(g)(2).

Counsel's reliance on the balances in the petitioner's bank accounts 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 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 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 sustainable ability to pay a proffered wage. 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 reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The petitioner's reliance on the assets of his other businesses is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998, 1999, 2000, or 2001. The petitioner demonstrated that it paid \$1377.75 to the beneficiary in 1998, thus reducing its obligation to show an ability to pay the full proffered wage to \$62,190.25 in that year.²

² Although the beneficiary claimed to work for the petitioner from 1998 to the present on both its ETA 750B and a G-325, Biographic Information sheet submitted in connection with his application to adjust status to lawful permanent resident, as well as the director's repeated requests for evidence of actual employment of and wages paid from the petitioner to the beneficiary, only one piece of evidence was submitted for 1998. Even a Form 1099, Miscellaneous Income, cashed pay checks, of the beneficiary's individual income tax returns with evidence pertaining to his source of income could evidence payment of wages to the beneficiary. The omission of evidence to corroborate attestations of employment, despite how helpful it would be to the petitioner's burden of proving

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, contrary to counsel's assertions, 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 petitioner's net incomes from 1998 to 2001 were \$17,526, \$19,701, \$2,359, and -\$22,204, respectively, which are all less than the proffered wage of \$63,568 for 1999 through 2001, and the difference between the wage paid and the proffered wage, \$62,190.25, for 1998. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income for 1998 through 2001.

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.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. The petitioner's net current assets during 1998 through 2001 were \$81,801, \$81,725, \$84,593, and \$32,357, respectively. The net current assets for 1998 through 2000 amply cover the proffered wage of \$63,568 for 1999 and 2000 as well as the difference between the wage paid and the proffered wage, \$62,190.25, for 1998. Thus, the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date out

its continuing ability to pay the proffered wage beginning on the priority date, is confusing at best and inconsistent and deceptive at worst. Any future proceedings must address this issue.

³ 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.

of its net current assets for 1998 through 2000. The petitioner's net current assets in 2001, however, are lower than the proffered wage, and thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its net current assets for 2001.

The petitioner demonstrated that it can pay the proffered wage in 1998, 1999, and 2000, but has not met its burden of proof for 2001. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a loss and net current assets of only \$32,357 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Contrary to counsel's assertions, *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), is not clearly applicable to the petitioner's case. *Sonogawa* 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 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 *Sonogawa* 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 *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. In every year the petitioner provided its corporate tax returns, its gross revenue ranged from \$1.3 million to \$1.5 million. There is no substantial variance in gross revenue in 2001. Thus counsel's argument that the petitioner's business was negatively impacted by the events on September 11, 2001 is not corroborated by the financial figures presented on the petitioner's tax returns. Since its gross revenues were at the same level as other years and no other reason is presented for the loss in net income and decrease in net current assets the petitioner reported on its tax return in 2001, the AAO cannot determine a nexus to September 11, 2001 as counsel urges. No evidence was presented for 2002 to corroborate counsel's assertion that the petitioner's business has rebounded after the tragedy. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001 relying upon *Sonogawa*.

Finally, counsel asserts that the petitioner's business will increase but provides no factual piece of corroborative evidence such as a business plan, financial expert's audited opinion, standard, or criterion for this proposition. Counsel's assertion is far too speculative to outweigh the data contained in the petitioner's 2001 tax returns. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible

to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The petitioner's demonstration of its future ability to pay the proffered wage would not bolster its burden of proving its ability to pay the proffered wage in 2001. 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).

Although demonstrating its ability to pay the proffered wage in 1998, 1999, and 2000, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. 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 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.