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U.S. Citizenship
and Immigration
Services

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FILE: WAC 02 251 51786 Office: CALIFORNIA SERVICE CENTER Date: FEB 18 2005

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 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 dismissed.

The petitioner is a jewelry business. It seeks to employ the beneficiary permanently in the United States as a diamond setter. 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 petitioner does have the ability to pay the proffered wage, and submits new documentation.

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), 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 24, 1996. The proffered wage as stated on the Form ETA 750 is ten dollars an hour, or an annual salary of \$20,800. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for French Design Jewelry since 1993.

On the petition, the petitioner claimed to have been established in 1987, to have four employees, and to have an estimated net annual income of \$125,000. In support of the petition, the petitioner submitted IRS Form 1120S, the petitioner's corporate income tax returns, for the years 1996 to 2000, with accompanying Schedule L's and statements. The petitioner also submitted a letter from [REDACTED] president, French Design Jewelry, Los Angeles, California, that stated the beneficiary worked for his company from March 1993 to April 1999.

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 November 5, 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 federal tax returns from the year 2001 to the present, with accompanying schedules and tables, to demonstrate its continuing ability to pay the proffered wage. The director also requested copies of the beneficiary's Form W-2 wages and tax statements for the years 1996 to the present, as well as Form DE-6 Quarterly Wage Report, with names, social security numbers, and number of weeks worked for all employees for the last four quarters.

In response, counsel submitted the petitioner's corporate tax returns for the year 2001. In addition, counsel submitted copies of IRS Form W-2 for the beneficiary from 1996 to 1999. Counsel stated that the beneficiary worked at French Design Jewelry at that time, and returned to Mexico in 1999. Counsel also submitted Form DE-6 Quarterly Wage reports for four quarters ending in March, June, September, and December 2002.

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. The director stated that although the petitioner had established that it had sufficient funds to pay the proffered wage in 1997, 1998, 1999, and 2001, the petitioner's income tax returns for 1996 indicated a taxable income of -\$86,838, with net current liabilities of \$170,491. The director also stated that the petitioner's tax returns for the year 2000 indicated a taxable income of -\$14,295 with net current assets of \$9,209. Based on this evidence, the director determined that the petitioner did not have sufficient assets to pay the proffered wage as of the priority date, namely September 24, 1996, and also in the year 2000. On June 10, 2003, the director denied the petition.

On appeal, counsel states that the petitioner believes the petition was denied without complete information and documentation concerning its financial condition. With regard to the reported losses in 1996 and 2000, counsel submits the following documentation:

A letter from [REDACTED] C.P.A., Los Angeles, California that indicates the 1996 corporate losses were a result of a \$159,150 theft. [REDACTED] refers to Statement 1, of the petitioner's 1120S income tax form for 1996, that explains the figure on line nineteen of the first page of the tax return, identified as "other deductions." [REDACTED] also examines the petitioner's losses in 2000 and explains that the corporation files all its tax returns on cash basis, and therefore, accounts receivable, inventory and accounts payable are not included in the income tax returns. [REDACTED] states that if these items were included, the results of the petitioner's business operation would differ from the items of income and expenditure presently included in the income tax return.

With reference to [REDACTED] letter, counsel states that it is common corporate accounting practice to minimize net profits to avoid double taxation.

IRS Form 1120 Shareholder Ownership Percentages, a document filed with the petitioner's 2000 corporate income tax return. According to counsel, the form indicates that [REDACTED] owned 50 percent of the shares.

Petitioner's minutes of an annual meeting dated January 1, 2003 that indicates [REDACTED] is sole shareholder of the corporation.

A letter from [REDACTED] that states that he is the sole shareholder of the petitioner and offers his personal guarantee and his personal assets to ensure that the salary offered in the petition is paid in full.

A statement of [REDACTED] net worth as of June 27, 2003. This statement is written on the letterhead of [REDACTED] Glendale, California, and signed by Mr. [REDACTED]. This statement indicates that the sole shareholder of the petitioner has a net worth of \$4,372,760.

A statement from Smart Watch, GMAC Mortgage, that indicates the sole shareholder pays a monthly mortgage of \$1,821.32, and indicates that the current principal balance is \$4,710.12.

A short form deed of trust and assignment of rents document for a loan in the amount of \$200,000 made by the sole shareholder and his wife, also identified as a California corporation named Arine Corporation to Mr. [REDACTED] and his wife.

A monthly statement from the Morgan Stanley Company that indicates the petitioner's sole shareholder and his wife's joint cash and money market funds account contains \$115, 888.95, and that their stock portfolio contains \$819,203 as of May 31, 2003.

A statement from TDWaterhouse investment company that indicates that as of May 30, 2003, the sole shareholder had a stock portfolio worth \$505,790.

Counsel states that since [REDACTED] is the sole shareholder, case law dictates that he may submit evidence of his personal assets to guarantee the payment of the beneficiary's wage. Counsel cites to the following Board of Alien Certification Labor Appeals (BALCA) decisions: *The Whistlers*, 90-INA-569 (January 31, 1993), and *Ohsawa America*, 88-INA-240 (August 20, 1988).¹ With regard to *The Whistlers*, counsel states that the findings of this case indicate that documentation supplied by individuals with personal knowledge of the employer's business and finances is persuasive. With regard to *Ohsawa America*, counsel states this case indicates that despite prior losses and a negative working capital, the attestation of a petitioner's accounting firm and bank regarding its financial worth and the continuing financial support pledged by its major shareholder indicated that sufficient funds were available to pay the alien.

Counsel also states that significant facts in the precedent decisions that the director identified in his denial distinguish these decisions from the instant petition. With regard to *Elatos Restaurant Corp. v. Sava*, counsel states that the court held that the petitioner failed to provide any financial viability beyond the tax return, and also that the petitioner's total gross sales were only \$109,962. Counsel states that in the instant petition, the petitioner has a multi million dollar sales history and has demonstrated significant financial viability beyond tax returns. With regard to *Chi-Feng Chang v. Thornburgh*, counsel states that the court's decision concentrated on the fact

¹ The correct name for the first BALCA decision cited by counsel is *The Whistlers*, 1990-INA-569.

that the petitioner's total payroll was actually less than the \$14,400 salary to be paid to the beneficiary. Counsel asserts that in the instant case, the petitioner has paid salaries and wages significantly higher than the offered wage. Finally, with regard to *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), counsel states that the gross sales of the petitioner in *K.C.P. Food Co., Inc.* were \$120,000 per year. Counsel finally states that the petitioner has been and continues to be financially able to pay the offered wage of \$10 an hour. Counsel asserts that case law is clear that CIS must examine more than just numbers on a tax return, especially in cases where the corporation attempts to limit profits and has paid substantial amounts in salaries and wage, and the sole shareholder has personally pledged his financial guarantee.

Counsel's reliance on the assets of the sole shareholder 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 an individual or entity that has no legal obligation to pay the wage. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Financial information about the sole shareholder of the petitioner, [REDACTED] and his wife does not establish the ability of the petitioner to pay the proffered wage since the petitioner is a corporation. [REDACTED] and his wife are not legally liable for the financial obligations of the corporation. Although [REDACTED] submitted an affidavit stating his desire to guarantee the payment of the wages of the beneficiary that affidavit does not appear to be legally enforceable as a guarantee. The affidavit lacks the amount of salary to be guaranteed, the period of the purported guarantee, the conditions under which the guarantee would take effect, and the consideration received by the affiant in return for the guarantee. In fact the affidavit states only, "I wish to offer my personal guarantee and to pledge my personal assets to assure that the salary offered in this petition is paid in full." A legally enforceable guarantee would require an explicit commitment of a guarantee, not merely an expression of a desire to make a guarantee. See generally 38 Am. Jur. 2d, Guaranty, §§ 1, 5, available on Westlaw database (updated May, 2003). Aside from its legal deficiencies, the affidavit is dated July 10, 2003, nearly seven years after the priority date. Even if enforceable as a guarantee of the future wages of the beneficiary, the affidavit of [REDACTED] could not help to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the present. Finally, on appeal, counsel states that case law dictates that the sole shareholder may submit evidence of his personal assets as well to guarantee the payment of the beneficiary's wage; however, counsel does not identify any such case law. The assertions of counsel, do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988).

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. Although the petitioner submitted W-2 salary statements for the beneficiary for the years 1996 through 1999, as correctly noted by the director, the employer in these years does not appear to be the petitioner. Even though the addresses of both the former employer and the petitioner are the same, and Mr. [REDACTED] is named as the employer in the French Design Jewelry W-2 forms, there is no documentation in the record that, establishes that French Design Jewelry and Supreme Jewelry Corporation are one and the same

company. Therefore, in the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage as of September 1996 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). Contrary to counsel's comments on *Elatos* and *K.C.P. Food Co.* with regard to the petitioner's gross sales, 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 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 returns for 1996, 1997, 1998, 1999, 2000, and 2001 shows the following amounts of ordinary income: -\$86,838, \$68,603, \$80,289, \$225,109, -\$14,295, and \$145,887. As correctly noted by the director, these figures establish the ability of the petitioner to pay the proffered wage in 1997, 1998, 1999, and 2001. However, they do not establish the petitioner's ability to pay the proffered wage in 1996 and 2001. Thus, the petitioner cannot establish its ability to pay from an analysis of its net income from the priority date, September 24, 1996, 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.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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

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

current assets. The petitioner's net current assets from 1996 to 2001 are the following: -\$170,491 in 1996, \$ -126,586 in 1997, -\$137,984 in 1998, \$61,849 in 1999, -\$11,722 in 2000, and \$44,159 in 2001. Thus, the petitioner could establish that it had sufficient net current assets in 1999, and 2001 to pay the beneficiary's proffered wage; however, the petitioner's federal income tax returns for the remaining years, which include 1996 and 2000, both years with negative ordinary income, indicate that insufficient net current assets existed to pay the beneficiary's wage. In addition, this method of analysis did not establish that the petitioner had either sufficient ordinary income or net current assets in 1996 or 2000 to establish its ability to pay the proffered wage. Accordingly, the petitioner did not establish that it had the ability to pay the proffered wage from the priority date to the present time.

With regard to counsel's reference to *The Whislers* and *Ohsawa America*, counsel does not provide legal authority for the applicability of BALCA's precedent decisions to these proceedings occurring under the Department of Homeland Security. Nor does counsel submit how CIS's regulatory authority to verify the petitioner's ability to pay the proffered wage is obviated by DOL.

On appeal, counsel cites to three CIS precedent decisions. In citing to *Elatos Restaurant Corp.*, and *K.C.P. Food Co., Inc.*, counsel emphasizes the differences between the gross sales of the petitioners and the substantially higher gross sales of the instant petitioner. However, as outlined above, CIS does not focus on the gross sales of a petitioner in calculating the ordinary income or current net assets of a petitioner. Therefore the fact that in all three cases cited by counsel, the petitioners had smaller gross sales than the instant petitioner is not dispositive in this matter. While counsel attempts to contrast the finding in *Elatos* as to the financial viability of the petitioner with the financial viability of the petitioner's sole shareholder, as noted above, the examination of the financial resources of the sole shareholder of a S Corporation is not determinative of whether the petitioner itself is financially viable.

In citing to *Chi-Feng Chang*, counsel states that the court decided that the petitioner's total payroll was actually less than the \$14,400 salary to be paid to the beneficiary. Counsel states that in the instant petition, the petitioner has paid salaries and wages significantly higher than the proffered wage. However, the decision in *Chi-Feng Chang* concerned a petitioner with two consecutive years of business losses, and payrolls for all its employees in each of those years that were less than a proffered salary of \$14,000. Based on the petitioner's federal income tax returns, the court found that the legacy INS decision that the petitioner was unable to pay the proffered wage was reasonable. In addition, in the district director's decision, there is no discussion of the amount of proffered wage versus the petitioner's total payroll, therefore counsel's comments on this case are irrelevant.³

³ Although the director refers to *Chi-Feng Chang*, in stating that the petitioner needs to establish the ability to pay at the time the petition is filed, and not at the time of the actual adjudication, this precedent decision is more commonly utilized by CIS to establish the expertise of the AAO in making determinations on the petitioner's ability to pay wages based on federal income tax returns and net income figures. Counsel does not appear to be questioning this authority. Further, although the director refers to filing a petition in reference to establishing the priority date, the petitioner must establish its ability to pay the proffered wage, as of the date the labor certification application was received by the Department of Labor, not as of the date the I-140 petition is received by CIS.

A CIS precedent decision that is somewhat analogous to the instant petition is *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), a case that relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. In the instant petition, the petitioner filed the petition in 1996, a year in which it had negative net income. The record then indicates that the petitioner had successful years in 1997, 1998, 1999, and 2001, with one year of operating losses in 2000. On appeal, counsel submits a letter from Stanley Ingel, identified as the petitioner's accountant, who prepared several of the petitioner's tax returns. Mr. [REDACTED] explanation of the petitioner's financial status in 1996, along with the documentation of the theft of goods in the petitioner's federal income tax return, is reasonable and plausible. Nevertheless the record contains no information of years prior to 1996 to determine whether the year 1996 should be viewed as an uncharacteristically unprofitable or difficult within a framework of profitable or successful years, as outlined in *Sonegawa*.

In addition, the petitioner's unprofitable year in 2000, is set within a framework of the year 1999, in which the petitioner had ordinary income of \$225,109, and the year 2001, in which the petitioner had ordinary income of \$14,587. While such figures establish one unprofitable year set between two profitable years, neither the petitioner nor counsel presents any explanation of the petitioner's business operations in 2000, to explain the reason for the loss in 2000 and the significantly smaller income in 2001. While Mr. [REDACTED] comments on the filing of income tax returns on a cash basis are reasonable, for purposes of this proceeding, the method used by the petitioner in its tax records is not sufficient to establish that the petitioner is able to pay the proffered wage from the priority date and onward.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. The petitioner also has not demonstrated that it had sufficient ordinary income or net current assets to pay the proffered wage as of the priority date and to continue to pay the proffered wage. Thus, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the director's decision shall stand, and the appeal will be dismissed.

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.