

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

B6

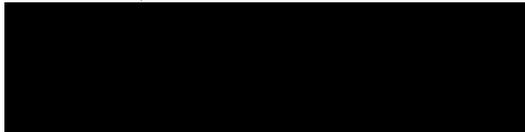


FILE: WAC 02 270 51181 Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2005

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 a delivery service. It seeks to employ the beneficiary permanently in the United States as a dispatching service manager. 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 additional evidence and contends that the evidence demonstrates the petitioner's continuing ability to pay the proffered wage.

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 January 8, 1998. The proffered wage as stated on the Form ETA 750 is \$22.72 per hour, which amounts to \$47,257.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner as since January 1995.

On Part 5 of the petition, the petitioner claims to have been established in March 1995. In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of its Form 1120, U.S. Income Tax Return for an S Corporation for 1998. It reflects that the petitioner uses a standard calendar year to file its tax returns. The 1998 return shows that the petitioner reported net income of \$16,753 that year. Schedule L of the return indicates that the petitioner had \$1,753 in current assets and \$7,254 in current liabilities, resulting in -\$5,501 in net current assets. Besides net income, CIS will consider a petitioner's net current assets as an alternative method of reviewing the ability to pay the proffered salary. Net current assets represent a measure of a petitioner's liquidity during a given period and are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A

---

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

corporation's year-end current assets and current liabilities are shown on Schedule L. 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.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, 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 covering the period 1999 to the present.

In response, the petitioner submitted its corporate tax returns for 1999, 2000, and 2001. The tax returns reflect the following information for the following years:

	1999	2000	2001
Net income	\$ 9,609	\$24,541	\$20,189
Current Assets	-0-	\$10,009	\$ 186
Current Liabilities	\$18,352	\$25,999	\$48,753
Net current assets	-\$18,352	-\$15,990	-\$48,567

On March 13, 2003, the director advised the petitioner that the tax data did not strongly support its ability to pay the proffered wage and requested that the petitioner provide copies of the Wage and Tax Statements (W-2s) provided to the beneficiary. The director instructed the petitioner that if it cannot provide W-2s, then it should submit other organized pay records covering 1998-2001.

In response, the petitioner submitted copies of the beneficiary's W-2s for 1998, 1999 and 2000. The petitioner paid the beneficiary \$14,300, \$13,000, and \$12,900 in 1998, 1999, and 2000, respectively. The petitioner did not submit a copy of the beneficiary's 2001 W-2, although it offered a copy of the beneficiary's individual tax return for 2001. It showed that the beneficiary reported \$9,592 in wages on his 2001 tax return.

Following an examination of the petitioner's net income and net current assets, as well as the amounts paid to the beneficiary,<sup>2</sup> the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage. The director denied the petition on May 28, 2003.

On appeal, counsel resubmits copies of the petitioner's 1999, 2000 and 2001 corporate tax returns. He additionally provides a copy of the petitioner's 2002 corporate tax return. It shows that the petitioner reported net income of \$32,905. Schedule L reflects that the petitioner had \$12,560 in current assets and \$94,236 in current

---

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.

<sup>2</sup> As stated above, the AAO cannot locate a 2001 W-2 issued to the beneficiary. The director apparently based his review upon the \$9,592 reported as wages on the beneficiary's individual tax return for 2001.

liabilities, yielding -\$81,676 in net current assets. Counsel also submitted copies of the beneficiary's 2000 and 2002 W-2s. The 2002 W-2 shows that the petitioner paid the beneficiary \$5,400 in wages. In support of the petitioner's ability to pay the proffered wage, counsel further offered copies of two check card/credit line accounts held by the petitioner's sole shareholder individually, as well as a copy of an unaudited profit and loss statement for "Goldshide Properties" for the five-month period ending May 30, 2003, and a letter from an accountant, [REDACTED] CPA." [REDACTED] suggests that in considering the petitioner's ability to pay the proffered wage, the petitioner's depreciation and interest expenses should be added back to its net income, as well as a distribution made in 2001. She also indicates that the petitioner's gross sales have been increasing and that the tax return was calculated on a cash basis, which doesn't take into account the same data that an accrual method would, such as accounts payable and receivable. Counsel refers [REDACTED] letter in asserting that the petitioner's actual strength is found by considering these other figures even when the petitioner's low net income is also reflected on the corporate tax return. Counsel cites no legal authority upon which this theory is based.

At the outset, it is noted that counsel's reliance on the individual check card/credit lines 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 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). It is further noted that not only is it unclear how a profit and loss statement of [REDACTED] relates to the petitioning corporation, but it is also noted that according to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

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 may have 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. To the extent that a petitioner may have employed the beneficiary at an annual rate less than the proffered wage, consideration will be given to those amounts. In the instant case, the difference between the proffered wage of \$47,257.60 and the actual wages paid to the beneficiary in 1998 was \$32,957.60. In 1999, the petitioner paid the beneficiary \$34,257.60 less than the proffered salary. In 2000, his wages were \$34,357.60 less than the proffered wage. In 2001, even considering the uncorroborated wages of \$9,592 reflected on the beneficiary's individual tax return, it was \$37,665.60 less than the proffered wage. The beneficiary's 2002 W-2, submitted on appeal, also reflects that the petitioner paid the beneficiary \$41,857.60 less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, as suggested by the petitioner's accountant. 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. It is further noted that the reliance on the petitioner's election of a cash basis of accounting instead of accrual basis of accounting is misplaced. Precedent does not distinguish the results of a petitioner's tax returns based upon its election of an accounting methodology. Counsel cites no legal authority in support of this proposition.

As set forth above, in 1998, neither the petitioner's \$16,753 in net income, nor its -\$5,501 in net current assets could cover the difference (\$32,957.60), between the proffered wage of \$47,257.60 and the actual wages of \$14,300 paid to the beneficiary in 1998.

In 1999, the difference (\$34,257.60) between the proffered wage and the \$13,000 in wages that the petitioner actually paid to the beneficiary could not be met by either the petitioner's net income of \$9,609 or its net current assets of -\$18,352.

Similarly, in 2000, the difference between the proffered wage and the actual wages paid to the beneficiary was \$34,357.60. Neither the petitioner's net income of \$24,541, nor its net current assets of -\$15,990 could cover this shortfall.

In 2001, the difference (\$37,665.60) between the beneficiary's actual wages paid by the petitioner, as suggested by his 2001 tax return, and the proffered wage could not be paid out of either the petitioner's net income of \$20,189 or its net current assets of -\$48,567.

Finally, as indicated by the petitioner's 2002 corporate tax return and the beneficiary's 2002 W-2 issued by the petitioner, it can be concluded that neither the petitioner's net income of \$32,905, nor -\$81,676 in net current assets could cover the difference of \$41,857.60 between the proffered wage and the actual wages paid to the beneficiary.

As suggested by the accountant, sometimes a petitioner's expectations of increasing business and profits can overcome evidence of small profits. This was found by the Regional Commissioner in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), where a petitioner had filed during an uncharacteristically unprofitable or difficult year within 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. In this case, although the petitioner has generated increased gross sales in each successive year, it has also incurred increased expenses. The evidence fails to indicate that a framework of sufficiently profitable years has been established or that there are unique circumstances applicable in this case, which parallel those in *Sonegawa*.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the certified wage beginning on the priority date. In this case, the priority date is January 8, 1998. The pertinent evidence fails to persuasively establish that either the petitioner's net income or its net current assets could pay the difference between the proffered wage and the beneficiary's actual wages in any of the relevant years. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.