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**U.S. Citizenship
and Immigration
Services**

BE



FILE: WAC-02-155-51267 Office: CALIFORNIA SERVICE CENTER Date: **JUL 06 2005**

IN RE: Petitioner:
Beneficiary:

PETITION: 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 an appeal was dismissed by the Administrative Appeals Office (AAO). The petition is again before the AAO on petitioner's Motion to Reopen or Reconsider. The motion will be granted. The decision of the AAO to dismiss the appeal will be affirmed. The petition will remain denied.

The petitioner is a computer sales and service company. It seeks to employ the beneficiary permanently in the United States as a Middle East computer sale business 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is September 22, 1998. The proffered wage as stated on the Form ETA 750 is \$6,165.80 per month, which amounts to \$73,989.60 annually. On the Form ETA 750B, signed by the beneficiary on September 10, 1998, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on April 8, 2002. On the petition, the petitioner claimed to have been established on February 16, 1993, to currently have eleven employees, and to have a gross annual income of \$3,845,456.00. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated June 12, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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 and continuing to the present.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by CIS on July 12, 2002.

In a decision dated August 6, 2002, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submitted a brief and additional evidence.

In a decision dated February 26, 2004, the AAO determined that the evidence did not establish the petitioner's ability to pay the proffered wage during the relevant period, and dismissed the appeal.

With the petitioner's motion to reopen, counsel submits additional evidence. Most of the evidentiary documents submitted with the motion are duplicates of documents submitted previously. Newly submitted with the motion are the following: a printout dated March 24, 2004 from an Internet Web page entitled "salary.com" describing salary and commission practices for sales persons; a copy of a statement dated February 28, 2002 for an account of the petitioner at the [REDACTED], Portland, Oregon; and a copy of an unemployment compensation notice issued to the petitioner on December 31, 2001 by the California Employment Development Department.

Counsel states in his motion that bank statements in evidence show ending balances which establish the petitioner's ability to pay the proffered wage. Counsel also states that the petitioner has been in business for more than eleven years and has been a stable and profitable company, even during periods when large computer firms and large communication companies have been reporting losses.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part as follows:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states as follows:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [CIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner submits new evidence with its motion. Therefore the motion may be considered as a motion to reopen. However, the evidence submitted with the motion contains no significant information beyond the evidence which had been submitted for the record prior to the AAO's decision. The printout of an Internet Web site page provides basic information on salary and commission practices for sales persons, but those practices are not at issue in the instant petition. A copy of a statement dated February 28, 2002 for a bank account of the petitioner provides information on one additional month for that account. The statement for February 28, 2002 shows an ending balance of \$228, 568.82. Copies of statements for four other months in 2002 were submitted previously. The dates and ending balances on the previously-submitted statements are

as follows: March 31, 2002, with an ending balance of \$270,195.09; April 30, 2002, with an ending balance of \$319,136.52; May 31, 2002 with an ending balance of \$344,804.45; and July 31, 2002, with an ending balance of \$485,250.06. Since the relevant period in the instant petition is from September 22, 1998 until the beneficiary obtains lawful permanent residence, the submission of one additional monthly statement in evidence provides no significant additional support to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The other evidentiary document newly submitted with the motion is a copy of an unemployment compensation notice issued to the petitioner on December 31, 2001 by the California Employment Development Department. That notice shows information on the petitioner's total taxable wages from July 1, 2000 through June 30, 2001 and on the petitioner's unemployment account balances. The latter information is not at issue in the instant petition, and the information on the petitioner's taxable wages is presumably already reflected in expenses on the petitioner's federal tax returns for 2000 and 2001, copies of which were previously submitted in evidence.

For the foregoing reasons, when considered as a motion to reopen, the petitioner's motion fails to overcome the previous decision of the AAO.

The petitioner's motion is also captioned as a motion to reconsider. The motion asserts that the decision of the AAO was incorrect based on the evidence of record at the time of that decision. The motion fails to cite specific legal authority, but it makes an argument grounded on the principles of the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The motion therefore meets the minimum requirements of a motion to reconsider. In deciding the motion, the entire record will therefore be evaluated.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant petition, on the Form ETA 750B, signed by the beneficiary on September 10, 1998, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex.

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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. 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.

In the instant case, the petitioner's tax returns in the record show no income from sources other than from a trade or business. Therefore the figures for ordinary income will be considered as the measure of the petitioner's net income. The petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation state the amounts for ordinary income on line 21 as shown in the table below.

Tax year	Ordinary income	Wage increase needed to pay the proffered wage	Deficit
1998	\$37,354.00	\$73,989.60*	-\$36,635.60
1999	\$25,664.00	\$73,989.60*	-\$48,325.60
2000	-\$57,126.00	\$73,989.60*	-\$131,115.60
2001	not submitted	\$73,989.60*	no information
2002	not submitted	\$73,989.60*	no information

* The full proffered wage, since the record lacks evidence of any wage payments made to the beneficiary.

The above figures fail to establish the petitioner's ability to pay the proffered wage during any of the years at issue in the instant petition.

The record before the director closed on July 12, 2002 with the submission of the petitioner's response to the RFE. The RFE had requested evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. As of July 12, 2002, the petitioner's federal income tax return for 2001 should have been available. Nonetheless, that return was not submitted in response to the RFE, nor has it been submitted for the record on appeal or for the instant motion.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus,

the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
1998	\$93,344.00	\$41,163.00	\$73,989.60*
1999	\$41,163.00	\$51,886.00	\$73,989.60*
2000	\$51,886.00	-\$11,661.00	\$73,989.60*
2001	not submitted	not submitted	\$73,989.60*
2002	not submitted	not submitted	\$73,989.60*

* The full proffered wage, since the record lacks evidence of any wage payments made to the beneficiary.

The petitioner's net current assets for the beginning of 1998 were greater than the proffered wage, but its net current assets for the beginning of 1999 and the beginning of 2000 were less than the proffered wage. The above figures fail to establish the petitioner ability to pay the proffered wage in 1999 and 2000. Moreover, no tax return of the petitioner for the year 2001 was submitted in evidence.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

In the instant case, the bank statements submitted prior to the AAO's decision were for the months of March, April, May and July of 2002. Although each of those bank statements shows an ending balance in an amount at least three times the annual proffered wage, those bank statements fail to offer any support to establish the petitioner's ability to pay the proffered wage in 1998, 1999, 2000 and 2001. As noted above, with the instant motion the petitioner submitted a copy of a bank statement for February 2002, which was for the same account as covered by the other bank statements. But that additional statement provides no additional evidence relevant to the years prior to 2002.

Counsel's reliance on the principles of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only 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 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, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that the years 1998 through 2001 were uncharacteristically unprofitable years for the petitioner.

The instant motion was filed on March 25, 2004. As of that date, the petitioner's tax returns for 2001 and for 2002 should have been available, yet they were not submitted. No obligation exists in the regulations for a petitioner to update the record during the pendency of appeals and motions. However a fuller record of the petitioner's tax returns would have provided a broader basis on which to evaluate counsel's assertions that the petitioner is a stable and consistently profitable business.

In his brief, counsel states "the total compensation of a sales manage position in computers and technology firm [sic] is based on 50/50% rule, I.e. 50% of the total compensation is base salary and the other 50% is commission based on the new revenue that the employee (the beneficiary) is expected to bring." (Brief, March 24, 2002, at 2). Counsel then states, "t|herefore the total compensation offered \$73,989.60 is broken into, Base salary of \$36,994.8 [sic] and commission of \$36,994.8 [sic]."

As noted above, on the Form ETA 750, the petitioner states the proffered wage as \$6,165,80 per month, which is equivalent to \$73,989.60 per year. Nothing on the ETA 750 indicates that any part of the proffered wage is to be paid in the form of commissions or that any part of the proffered wage is otherwise contingent upon the beneficiary achieving a certain level of annual sales. Counsel's statements about the beneficiary's expected earnings from commissions suggest that the job offer on the ETA 750 may not accurately reflect the terms of the petitioner's job offer to the beneficiary.

The regulation at 20 C.F.R. § 656.20 states in relevant part as follows:

(c) Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that:

- (1) The employer has enough funds available to pay the wage or salary offered the alien;
- (2) The wage offered equals or exceeds the prevailing wage determined pursuant to Sec. 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work;
- (3) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis; . . .

If the petitioner intends to pay the beneficiary based on commissions, the petitioner's job offer on the Form ETA 750 would violate subparagraph (3) of 20 C.F.R. § 656.20(c).

Counsel's statements about the "50/50% rule" are apparently offered as an explanation of the petitioner's ability to pay the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbenu*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's assertions are partially supported by information in the printout dated March 24, 2004 mentioned above from an Internet Web page entitled "salary.com" describing salary and commission practices for sales persons. However, the

record lacks detailed evidence of sales revenue upon which might be based any projection of future revenue resulting from the hiring of the beneficiary. The hypothesis of increased income to the petitioner does not outweigh the evidence presented in the corporate tax returns.

In counsel's Motion to Reopen and Reconsider dated August 30, 2002 counsel asserts that adding shareholders' distributions to the taxable income for the years at issue would show operational profits sufficient to establish the petitioner's ability to pay the proffered wage. Similarly, in a letter dated August 30, 2002, an accountant states that shareholder distributions in the form of salaries should be added to the petitioner's taxable income to show the petitioner's operational profitability.

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); *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.

Nonetheless, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. The majority shareholders of a corporation have 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 explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. The Form 1120, Schedule E provides for itemizing the amount of compensation for each officer, along with each officer's social security number, percent of time devoted to the business, percent of corporation stock owned, and amount of compensation.

In the instant case, the petitioner's tax returns show the following amounts paid for compensation of officers: \$96,000 in 1998; \$117,000.00 in 1999; and \$108,000.00 in 2000. Adding those figures to the figures for the petitioner's net income for those years produces figures for total available income of \$133,354.00 in 1998, and \$142,664.00 in 1999. Those figures are higher than the proffered wage of \$73,989.60. For the year 2000, the amount of \$108,000.00 paid in officers' compensation resulted in a negative figure for net income of -\$57,126.00 that year. Adding that negative figure to the figure for officers' compensation yields the figure of \$50,874.00 for total available income in 2000, a figure which is less than the proffered wage of \$73,989.60. The petitioner's figure for officers' compensation in 2000 therefore fails to establish the petitioner's ability to pay the proffered wage in the year 2000.

For the foregoing reasons, the evidence on the amounts of compensation paid to officers of the petitioner fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In its decision dismissing the appeal, the AAO correctly evaluated the petitioner's tax returns and other evidence in the record, and found that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The assertions of counsel in the instant motion and the evidence newly submitted with the motion fail to establish reasons for changing the decision of the AAO.

In summary, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 motion is granted. The prior decision of the AAO to dismiss the appeal is affirmed. The petition remains denied.