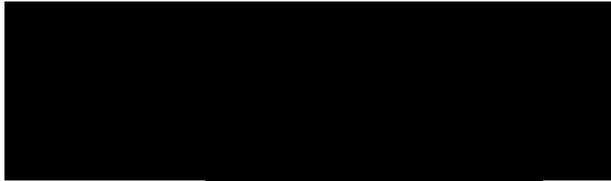


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Services

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Ble

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **JUL 13 2005**
WAC 03 031 54020

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The 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 the [REDACTED] seeks to employ the beneficiary permanently in the United States as a front office 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 asserts that the petitioner has established its continuing financial ability to pay the proffered wage. Counsel also indicates on the notice of appeal that she requests 30-90 days to submit further evidence. As of this date, more than eighteen months later, the record has not received any additional evidence except a copy of a memo issued by William Yates on May 4, 2004. Therefore, the case will be reviewed on the record as it currently stands.

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) provides:

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. 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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$32,300 per annum. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claims to have worked for the petitioner since 2000.

On Part 5 of the petition, the petitioner claims to have been established in 1993, have a gross annual income of \$900,000, no net annual income, and to currently employ eighty workers. In support of its continuing ability to pay the proffered wage, the petitioner initially submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It is noted that the name and employer identification number on the return are the same as those

of the petitioner named in the visa petition, but the address is different. This income tax return reflects that the petitioner files its taxes using a standard calendar year. In 2001, the petitioner reported gross receipts or sales of \$894,363, salaries and wages of \$252,412, and declared a loss of \$320,659 in taxable income before taking the net operating loss (NOL) deduction. Schedule L of the tax return shows that the petitioner had \$27,256 in current assets and \$103,703 in current liabilities, resulting in -\$76,447 in net current assets. As an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ It represents a measure of a petitioner's liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of its federal tax return. If a corporation's year-end net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

It is noted that an attached statement "5" of Schedule L of the petitioner's 2001 tax return states that the petitioner, ██████████ Hotel, carries \$224,674 as a "payroll payable" to "██████████". This sum is included in the petitioner's other liabilities listed as a beginning year total on line 21(b) of "other liabilities" on Schedule L.

The petitioner also submitted a copy of the 2001 federal tax return of a corporation called "██████████ Recreation Company," and a copy of the ██████████ quarterly tax return and wage report for the quarter ending December 31, 2001. This hotel's quarterly wage report includes a notation that the beneficiary received \$5,577 in wages during that quarter. Although these records show that these two entities share the same corporate address as that given on the petitioner's tax return, they bear different federal employer identification numbers. In a cover letter accompanying these and other copies of Internet promotional materials relating to the petitioner and five other hotels, counsel states that the petitioner and the ██████████ Hotel are part of a group of six hotels located in downtown San Francisco.

The director issued a notice of intent to deny the on January 16, 2003. 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 gave the petitioner an additional thirty days to submit further argument or evidence.

In response, the petitioner, through counsel, submitted a "personal guarantee" executed by the president of the petitioner on January 28, 2003, in which he states that he owns the building where the petitioner is located, that he can lower the rent if necessary to pay the beneficiary, and that he has other resources available. The petitioner also resubmitted a copy of its 2001 corporate tax return, a copy of a title insurance preliminary report showing that the petitioner's president and his spouse jointly hold title to the real property where the petitioner is located, a copy of an "opinion of value" report of the petitioning business, issued by the ██████████ Hotel Partners" in July 2000, a copy of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), and a copy of minutes from a

¹ 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.

meeting in December 2002, between the American Immigration Lawyers Association (AILA) and the California Service Center.

On March 3, 2003, the director requested additional evidence from the petitioner pertinent to its continuing ability to pay the proffered wage. The director instructed the petitioner to submit evidence of payment of salary to the beneficiary for the last three months, copies of Wage and Tax Reports (W-2) issued to the beneficiary for 1998 through 2001, and "copies of tax documents" for 1998 through 2001.

In response, the petitioner, through counsel, submitted copies of a payroll record maintained by the [REDACTED] Hotel, Inc., showing the beneficiary's wages of \$4,942.08 paid during a period between January 10, 2003 to March 25, 2003. This payroll record references the petitioner, Fitzgerald Hotel. The petitioner also provided another copy of a supplemental statement of other liabilities included on Schedule L of the petitioner's 2001 federal tax return, showing the liability of \$224,674 for "payroll payable" to the Sheehan Hotel. In a cover letter, counsel states that the [REDACTED] Hotel pays the beneficiary on behalf of the petitioner. Also included in this response are several copies of the beneficiary's Form 1040X, Amended U.S. Individual Tax Return, for the years 1998 through 2001. All are signed by the beneficiary on March 23, 2003. The 2001 amended return claims an additional \$8,000 in miscellaneous income. The second page of this tax return references the income from the [REDACTED]. Copies of the beneficiary's W-2s, issued by Sheehan Hotel, Inc. for the years 1998 through 2001 are also provided. The 2001 W-2 reflects that the beneficiary was paid \$25,304 by Sheehan Hotel, Inc.

On April 17, 2003, the director denied the petition. The director determined that the petitioner's 2001 net income was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage. The director apparently accepted the assertion that the beneficiary is actually employed by the petitioner but concluded that the difference between the actual wages paid, as reflected on the 2001 W-2 issued by Sheehan Hotel, Inc., and the proffered wage could not be met by the petitioner's net income of -\$320,659.

On appeal, counsel resubmits a copy of the beneficiary's amended individual tax return for the tax year 2001, an unsigned copy of the beneficiary's 2002 individual tax return; a copy of an Internal Revenue Service (IRS) computer print-out for 2002 with a notation that the beneficiary's amended return is in processing status; a copy of an IRS printout of a "dummy account" with the beneficiary's social security number, with a notation that that amended return is in processing status; an unofficial transcript from San Francisco State University showing the beneficiary's attendance since the fall of 2001; a copy of a San Francisco State University document showing registration fees and tuition payments made by the beneficiary since July 2002, as well as copies of 2003 receipts for monies paid as tuition and fees to this institution. Counsel also offers a copy of an internal record of the petitioner's operating account showing that it paid the beneficiary \$2,050 for tuition fees by check number [REDACTED]. A second page is also labeled as a copy of the petitioner's operating account showing the beneficiary's name, the date of 1/4/02 and \$2,050 in tuition fees.

These documents are offered by counsel in support of her contention that the petitioner has already paid the proffered wage to the beneficiary. Counsel cites the beneficiary's amended 2001 tax return showing \$33,304 as the adjusted gross income as proof that the petitioner has already paid the proffered wage to the beneficiary.

Counsel also relies upon *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) in support of her assertion that the petitioner's president's offer of a personal guarantee of payment of the proposed wage establishes the petitioner's ability to pay the proffered wage. That case involved the consideration of whether an alien was a "professional" within the meaning of 8 U.S.C. § 1101(a)(32). With reference to the ability to pay the proffered salary, the court noted that a parish church may rely upon the financial support of the parent nation-wide church. In this matter, although the AAO may consider the guidance suggested in that case, it is noted that the rationale of *Full Gospel* is not binding in this regard, in cases arising outside of its own jurisdiction. Moreover, it is questionable whether *Full Gospel's* rationale is still followed in its own jurisdiction. The same district court, in a case involving the determination of whether an alien could be classified as a special immigrant religious worker, more recently found, that as the parent church organization would not be paying the local religious workers' salaries, the assets of the parent church were irrelevant in evaluating a local church petitioner's ability to pay the proffered wage. *Avena v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997).

In this case, it must be emphasized that the Fitzgerald Hotel, is named as the petitioning employer on the immigrant visa petition and is organized as a separate corporation, independently reporting and paying taxes on its income. As shown by its 2001 corporate tax return, it not only reports amounts paid as salaries and wages directly, but also carries a payroll expense as a liability owed to the S██████████ Hotel. The petitioner, as the prospective U.S. employer of the beneficiary, must establish its own continuing ability to pay the proffered salary. In this case, the personal assurances of the petitioner's majority shareholder and president do not demonstrate the petitioner's ability to pay the certified wage of \$32,300 per year. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

See also, 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 that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Moreover, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, a guarantee is a future promise of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa

petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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 paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period.

In this case, as noted above, the only documents that most closely establish that the beneficiary has been employed by the petitioner, but paid on its behalf by the [REDACTED] Hotel, are the payroll stubs from 2003 submitted in response to the director's request for evidence. Earlier documents such as the [REDACTED] Hotel's December 2001 state quarterly wage report or the beneficiary's 2001 W-2 issued by [REDACTED] Hotel, Inc. do not reference the petitioner. Nor does the cumulative payroll liability of \$224,674, claimed by the petitioner on its 2001 tax return as a "payroll payable," clearly demonstrate that the beneficiary's wages were included within its total. The beneficiary's 2001 amended tax return, filed after the request for evidence was issued, does not credibly establish the origin of the beneficiary's wages. Further, the record does not demonstrate that the tuition fees paid to the beneficiary by the petitioner were paid as earnings for services rendered. Moreover, as noted above, the amount claimed by the beneficiary is not corroborated by the evidence submitted on appeal, showing that the petitioner paid only \$2,050 in 2001 for such fees.

It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner must establish its continuing ability to pay a proffered wage beginning at the priority date through its federal tax returns, audited financial statements, or annual reports. Simply going on record without the appropriate documentary evidence, is not sufficient for a petitioner to meet its burden of proof. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation, as asserted by counsel, 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); *Uheda 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. 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.

In the instant matter, the petitioner's 2001 federal tax return shows that neither its -\$320,659 in reported net taxable income, nor its -\$76,447 in net current assets was sufficient to cover the proffered wage during that

period. It is noted that the May 4, 2004, memo from [REDACTED] subsequently submitted by counsel, does not contradict this interpretation. Counsel's reliance on the petitioner's reported total assets of over four million dollars as suggested by her transmittal letter and as reflected on page one of the petitioner's 2001 tax return, is misplaced and is not the same as net current assets referred to in the memo and, which as explained above, represent cash or cash equivalent assets readily available to pay the proffered wage during a given period.

While counsel's assertion that *Matter of Sonogawa*, 12 I&N Dec. 612 (Comm. 1967), is sometimes applicable where the expectations of increasing business and profits overcome evidence of small net income is correct, that case relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

Counsel contends that the petitioner's 2001 financial data, resulting from a bad year for the economy in general as well as the travel industry in particular, should not be determinative of its ability to pay the proffered wage, given the petitioner's length of time in business and the beneficiary's potential to increase profits. In this matter, one corporate tax return for 2001 fails to establish a framework of profitable years as suggested in *Sonogawa*. Further, the hypothesis that the petitioner's confidence in the beneficiary will increase business to such an extent as to demonstrate the petitioner's ability to pay the proffered wage is not particularly supported by the record, which shows that the beneficiary's 2003 compensation for employment had not yet reached the rate of the proffered wage.² The evidence in this case does not demonstrate that such unique circumstances apply to the petitioner so as to compel a similar conclusion as that rendered in *Sonogawa*. It cannot be concluded that a generalized projection of future profitability overcomes the evidence contained in the record. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

Upon review of the evidence and argument contained in the record and submitted on appeal, the AAO concludes that the evidence failed to persuasively demonstrate that the petitioner has had the continued ability to pay the proffered wage.

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.

² It is recognized that the obligation to pay the proffered wage begins with an alien's entrance into the United States pursuant to the issuance of an immigrant visa or adjustment of status to permanent residence. The AAO concurs with this interpretation but notes that the level of salary being paid to an alien may be a relevant factor in determining a petitioner's ability to pay a proffered wage. See 20 C.F.R. § 656.20(c)(2).



ORDER: The appeal is dismissed.