



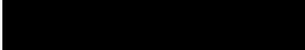
U.S. Citizenship
and Immigration
Services

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FILE: 

Office: VERMONT SERVICE CENTER

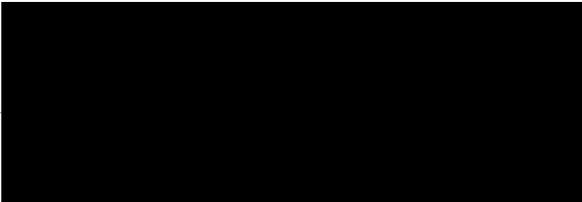
Date: JUN 16 2005

IN RE: Petitioner:
 Beneficiary:



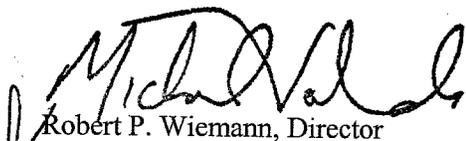
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a machine shop¹. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the counsel submits a brief, additional evidence, and, he requests an oral argument.

The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 5, 2001. The proffered wage as stated on the Form ETA 750 is \$41,000.00 per year. The Form ETA 750 states that the position requires two years experience.

¹ The machine shop as described on Form ETA 750A is intended to be part of an existing gasoline station and auto service facility.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a support letter from the petitioner, a copy of petitioner's Form 1120S U.S. Corporation Income Tax Return for 2001, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center on May 12, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

“Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$41,000.00 as of April 5, 2001, the date of filing and continuing to the present.”

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1120S tax returns for year 2001 and 2002. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$41,000.00 per year from the priority date.

- In 2002, the Form 1120S stated a taxable income loss² of <\$12,965.00>.³
- In 2001, the Form 1120S stated a taxable income loss of <\$21,564.00>.

Additionally in response to the above Request for Evidence, counsel asserted “... Petitioner's sole shareholder [would] ... personally guaranty that Petitioner will pay the beneficiary's salary....” Counsel suggested that there is sufficient “total income” to pay the proffered wage by adding the depreciation deduction taken by petitioner with the compensation/salary of the sole shareholder and officer of the corporation.⁴

The director denied the petition on November 4, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts:

² IRS Form 1120S, Line 21.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁴ Contrary to counsel's primary assertion, Citizenship and Immigration Services (CIS), formerly the Service or 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). Counsel is requesting the Service to view the depreciation deduction and the salary expense as positive assets that instead of lowering taxable income would increase it. Counsel also makes a continuing assertion in his response and appeal that there exists sufficient cash on hand from various sources that is outlined later in this discussion.

“There is a reasonable expectation of increased business and profits and there is sufficient cash on hand to pay the proffered wage....”⁵

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. The petitioner did not employ the beneficiary according to the record of proceedings.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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. Petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage as in this case.

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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's 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.

Examining the two Form 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets exceeded its current liabilities.

⁵ Counsel makes a similar contention that officer's salary/compensation could be used as an asset to pay the proffered wage, but does not dispute the director's finding on this issue that "... the compensation of officers represents monies already expended by the corporation...." and, therefore, not an asset.

⁶ 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.

- In 2002, petitioner's Form 1120S return stated current assets of \$77,648.00 and \$54,188.00 in current liabilities. Therefore, the petitioner had \$23,460.00 in current net assets for 2002. Since the proffered wage was \$41,000.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120S return stated current assets of \$90,541.00 and \$59,159.00 in current liabilities. Therefore, the petitioner had a \$31,382.00 in current net assets for 2001. Since the proffered wage was \$41,000.00 per year, this sum is less than the proffered wage.

In the subject case, as set forth above, petitioner did not have taxable income or net current assets to pay the proffered wage at any time between the years 2001 and 2002 for which petitioner's tax returns are offered for evidence.

With the I-290B Form dated December 4, 2003, and counsel's brief, the petitioner has also submitted on appeal the following:

- An affidavit of the sole shareholder of petitioner dated December 4, 2003;
- An job experience verification letter from the prior employer of the beneficiary;
- An undated Pro Forma⁷ balance sheet "at November 30, 2003" prepared by an accounting firm;
- Complied financial statements of the petitioner as of December 31, 2001, and December 31, 2002, dated February 25, 2003, and as of September 30, 2003 dated October 27, 2003;
- Amended Form 1120S U.S. Income Tax Returns for tax years 2001 and 2002⁸ undated and unsigned.
- Petitioner's business checking (regular account) bank statements for the period November 2002 through October 2003, and, Petitioner's lottery account⁹.
- A deposit of \$50,000 made December 4, 2003, in the name of petitioner in an account separate from petitioner's regular checking account.
- A personal asset statement of the sole shareholder of petitioner and his wife.
- A "Guaranty of Payment" dated December 4, 2003, between the petitioner and the sole shareholder in his individual capacity.¹⁰

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date.¹¹ The elements are mentioned above.

⁷ A projection or estimate of what may result in the future from actions in the present. It is an estimate of how the business will turn out if certain assumptions are achieved.

⁸ There is no change in the amounts of taxable income stated on Line 21, or in current assets and current liabilities amounts on Schedule "L" of the amended tax returns for years 2001 and 2002.

⁹ It is assumed that petitioner's lottery account is received from lottery ticket sales received as agent for a state lottery, and, they are not taxable revenues to which petitioner has a claim except for sales commissions if any.

¹⁰ According to a personal asset statement of the sole shareholder of petitioner and his wife submitted into evidence, all personal assets are owned jointly, however only petitioner signed the personal guaranty.

¹¹ Counsel had contended earlier in the proceedings that the depreciation deduction should included in the calculation of the ability to pay the proffered wage on the priority date but it is absent from counsel's statement on appeal or in his brief. No precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054

Petitioner has prepared a number of documents as dated December 4, 2003, that is the date of the appeal filed in this matter. It is clear that the documents were prepared to support petitioner's appeal, and, that they did not exist before that date. The purpose of the request for evidence issued by the Service Center on May 12, 2003, was to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

We will examine petitioner's documents dated December 4, 2003, for what evidence they may provide. Their evidentiary value is lessened by the lateness of their introduction into this proceeding for the present appeal.

The documents listed above were not created in the ordinary course of business but in response to deficiencies in the financial condition of petitioner. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).¹²

Counsel submits an affidavit of the sole shareholder of petitioner dated December 4, 2003. The affiant affirms that the affiant owns the petitioner; that it is currently doing business as a service and repair station; it states the amount of investment in the business, and, also states the he requires the services of the beneficiary to launch a new service to be offered by the business, that is reconditioning cylinder heads of engines. Based upon the financials of the petitioner as submitted by petitioner, the petitioner did not have the ability to pay the proffered wage from the priority date of the Alien Labor Certification. Petitioner is looking forward from these losses to a time when the business will be profitable.

As stated on page two of an undated pro forma balance sheet "at November 30, 2003" prepared by petitioner's certified public accountants as submitted into evidence:

"[The business owner] ... is convinced that a cylinder reconditioning operation will produce substantial additional income, which when added to the present operation will turn a loss situation into a profitable venture...."

Petitioner is providing detail and documentation through a pro forma balance sheet prepared by its accountants to explain how the beneficiary's employment as an auto mechanic will produce petitioner's profits after he is employed to provide a business service that petitioner does not now provide. As noted above a pro forma balance sheet is a projection or estimate of what may result in the future from a business' actions in the present. It is an estimate of how the business will turn out if certain assumptions are achieved.

¹² That is, the "Guaranty of Payment," deposit of \$50,000 into a separate account, and other actions memorialized by documents dated after the priority date.

Counsel cites *Matter of Sonegawa* to support this contention, which is of a business “turn-around” when petitioner may become profitable. *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 or 2002 were an uncharacteristically unprofitable year for the petitioner. Petitioner’s has submitted into evidence an undated pro forma¹³ balance sheet “at November 30, 2003” prepared by petitioner’s certified public accountants that states “... the present operation [of petitioner] will turn a loss situation into a profitable venture. “ Contrary to the holding of *Matter of Sonegawa*, the subject petition was filed during characteristically unprofitable years for petitioner’s business, and not in a framework of profitable or successful years. Counsel’s hypothesis, that there were expectations of profits, cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Within the pro forma balance statement as mentioned above is a calculation of the profits that a reconditioning cylinder heads of engines will provide to petitioner. No substantiation has been presented to show what profits comparable businesses achieve, and, since this is a new service to be provided in this location, what business risks must be overcome. Proof of ability to pay begins on the priority date, that is, April 5, 2001, when petitioner’s Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner’s taxable income is examined from the priority date. It is not examined contingent upon some event in the future.

Counsel has submitted petitioner’s business checking bank statements for the period November 2002 through October 2003. Counsel contends the petitioner “...has sufficient cash on hand.” Counsel submits the banking statements to demonstrate:

In support of the actual cash on hand, the Company has enclosed monthly bank statements showing a monthly balance of approximately \$29,910 which is greater than the monthly salary of approximately \$3,416 offered to the beneficiary....”

Counsel’s reliance on the balances in the petitioner’s bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay a proffered wage. While this regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show

¹³ A projection or estimate of what may result in the future from actions in the present. It is an estimate of how the business will turn out if certain assumptions are achieved.

the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule.

A deposit of \$50,000 made December 4, 2003, in the name of petitioner in an account separate from petitioner's regular checking account. According to counsel that amount represents paid-in capital¹⁴ paid by the sole shareholder to petitioner. Counsel cites no legal precedent for the consideration of paid-in capital, as readily available corporate funds that can be used to pay the proffered wage. According to regulation,¹⁵ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. Counsel is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result. Paid-in capital is not a current asset, or taxable income available to pay the proffered wage.

Counsel submits a personal asset statement of the sole shareholder of petitioner and his wife. The affidavit submitted by the shareholder states:

"I believe that the Company's and my personal net worth, if needed, will be able to fund the business and ... [pay the beneficiary's] salary until the reconditioning of cylinder heads becomes profitable..."

Along with this statement, counsel submits a "Guaranty of Payment" dated December 4, 2003, between the petitioner and the sole shareholder in his individual capacity. Contrary to the above offers, Citizenship and Immigration Services (CIS), formerly the Service or 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), and *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.

Lastly, as noted elsewhere in this discussion, counsel asserts that officer's salary/compensation could be used as an asset to pay the proffered wage. However, counsel is not making the argument that this compensation is discretionary. A review of all the documents submitted by counsel does not reveal that the sole shareholder and president of the petitioner declared that he would be willing to forego salary/compensation to pay the proffered wage.¹⁶ The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Examining the corporation's 2001 and 2002 tax returns, and as later amended, shows that the compensation of officer expenses items remained at the same levels in tax years 2001 and 2002 after the amendments, with salary and wages increasing by a factor of three from 2001 to 2002. Also, the pro forma financial statements for 2003 do not show any projected decrease in officer compensation.

¹⁴ Additional capital contributed to a corporation without the issuance of stock.

¹⁵ 8 C.F.R. § 204.5(g)(2), *Supra*.

¹⁶ The compensation of the officer who is the sole shareholder was \$64,500 and \$68,500 in years 2001 and 2002, 1.7 times the proffered salary, excluding any compensation that might have been received as salary by the officer.

From the totality of the financial information and circumstances presented by petitioner, the corporation was unprofitable, and, therefore the viability of the enterprise is in question. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.