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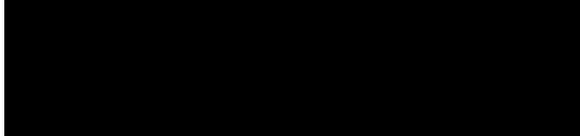
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAR 02 2005
WAC 03 033 50388

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

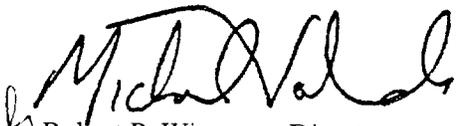
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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) at the director's request for a confirmation of his decision to deny the petition previously denied but reopened and reconsidered. The director's decision will be affirmed and the petition will be denied.

The petitioner is a garment and contract sewing manufacturer. It seeks to employ the beneficiary permanently in the United States as a dressmaker and custom sewer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director initially determined that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and he 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 nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 4, 2001. The proffered wage, per month, as stated on the Form ETA 750 is \$2,602, which amounts to \$31,224 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on February 2, 2000, to have a gross annual income of \$1,748,237, and to currently employ 211 workers¹. In support of the petition, the petitioner submitted a G-28; a labor certification seeking a worker with two years experience in the occupation tailor, dressmaker and custom sewer; counsel's letter in support of the petition asserting a "pre-depreciation profit

¹ Counsel has since acknowledged that that number represented those working at some point over the course of a year but that petitioner employed just 58 workers total at the relevant time period. However, he maintains that the sole shareholders of the petitioner, an S-corporation, are also the sole shareholders of an affiliated Sub-S corporation that had employed 46 additional workers, for purposes of the 100-worker rule under 8 C.F.R. § 204.5(g)(2).

[\$34,427] exceeds the proffered annual wage” despite a net loss of \$68,772 reported on its 2001 S-corporation tax return, which also reported “outside labor costs” of more than \$1 million; a 2001 federal 1120S income tax return; and a translated letter from Korea by the beneficiary’s former employer stating that the beneficiary had worked for it as a sewing and sample maker from March 1, 1993, to July 31, 2000.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage as of the priority date; and because of another pending visa petition the petitioner had on another dressmaker’s behalf, proffering the same wage, the director treated the proffered wage as doubled, or \$62,448, the director on January 16, 2003, issued a notice of intent to deny.

On February 13, 2003, the petitioner’s chief financial officer certified under 8 C.F.R. § 205.4(g)(2) that the company employed over 100 workers and had always met its payroll obligations. On February 24, 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, and denied the petition, which the petitioner appealed.

Thereafter, instead of forwarding the appeal to the AAO, the director on his own motion reopened his earlier decision to allow the petitioner more time to present its case. Eventually the director once again denied the petition and has forwarded the case to the AAO for confirmation.²

When the director reopened proceedings on May 28, 2003, he sent a request for evidence (RFE) on ability to pay, to which counsel responded by submitting Form 1120S returns for 2000, 2001, 2002; an illustrative graphic display of 200-percent accelerated depreciation; state corporate records for both the petitioner and the affiliated corporation, Song’s Fashions, Inc., incorporated organized on April 22, 2002; 2001 and 2002 income tax returns of the two sole shareholders of both the petitioner and corporations³; quarterly wage and withholding reports for 2001 and 2002 for Song’s Fashions; and state quarterly wage and withholding reports for the petitioner for 2001 and 2002.

The petitioner’s tax returns reflect the following information for the following years:

	2000	2001	2002
Net income	\$97,171	(\$68,722)	\$95,011
Current Assets	\$56,884	\$0	\$ 8,566
Current Liabilities	\$13,570	\$21,782	\$ 6,895
Net current assets	\$47,553	(\$21,782)	\$ 1,671

² The director had issued the notice of intent to deny based upon ability to pay, and undisclosed information, involving a separate petition filing for another beneficiary. The director had given the petitioner 30 days to present more evidence, prompting counsel to ask for 90 day. The service center’s decision was poorly worded stating, “The submitted sufficient evidence [sic] has not overcome the grounds for denial.” Counsel inferred from this that ability to pay was no longer an issue, leaving by process of elimination only the beneficiary’s qualifications at issue.

³ Both Song’s Fashions, Inc., and the petitioner are using the same employer account number on their separate quarterly reports while using different employer identification numbers on their S-corporation income tax returns, according to the owners’ 2002 Form 1040 tax returns.

In addition, counsel submitted the petitioner's quarterly wage reports for 2001 and 2002. The quarterly wage reports, however, do not show the beneficiary received any wages. And only in the first quarter of 2002 do the records show that the petitioner employed 100 or more employees.

On September 24, 2003, the director issued a new decision, stating that the service center was provisionally denying the petition before sending the file on to the AAO for confirmation or reversal.

In the decision, the director reiterated the factors considered in his earlier decision, initially restating parts of the earlier decision, that neither the petitioner's 2001 net income of negative \$68,722, and the shareholder's 2001 Form 1040 income of a negative \$941 established the petitioner's ability to pay. He also disregarded the \$1,148,704, reported on the return, for cost of labor, noting counsel's failure to show that the petitioner and Song's Fashion, Inc. were affiliated in 2001, and that the petitioner had reported \$41,600 for salaries and wages while claiming to have 211 employees.

In counsel's brief of December 29, 2003, supplementing one filed March 21, 2003, with the appeal, he asserts the director committed error on the petitioner's ability to pay, specifically contending that:

1. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), cited in *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F. 2d 1305 (9th Cir. 1984), is dispositive of the ability to pay issue, given the petitioner's net loss in 2001 and net profits immediately prior to and following 2001. Counsel attributes the reversal in the petitioner's revenues in 2001 to the terrorist attacks of September 11, 2001.
2. The director should have considered outside sources of income, citing *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1989).
3. The petitioner's 2001 Form 1120S shows it paid wages of \$1,190,044, not \$41,340.
4. The director failed to make allowances for accelerated depreciation in determining the petitioner's 2001 net income.
5. Given the corporate affiliation between the petitioner and Song's Fashion's, Inc., the petitioner was entitled to impute the affiliates employee base as its own in applying the 100-worker rule.

However, the *Sonogawa* is distinguishable from the instant case in that *Sonogawa* is about a petition filed during uncharacteristically unprofitable or difficult years within a time frame of mainly profitable or successful years. There, the petitioner was a fashion designer whose work had been featured in national, general circulation magazines, a clientele that included a Miss Universe, movie actresses, society matrons and some who had made lists 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. Thus, *Sonogawa* turns on a petitioner's reputations in business and high fashion.

The petitioner in *Sonogawa* had been in business for over 11 years and, in the year of the petition, changed business locations and had to pay double rent on both the old and new locations for five months, had large moving costs and a business downturn. The Regional Commissioner determined that the petitioner had a reasonable prospect for expecting a successful business turn-around.

If a company's losses and low profits may be uncharacteristic, brief and anomalous within a larger framework of many profitable years, making a recurrence of bad years unlikely, a company's immediate losses can be overlooked in deciding ability to pay. Here, however, the petitioner is new in business and has had one loss year and two of modest profit. To assume the business will flourish in such circumstances, therefore, would tend to be speculative.

Counsel cites *Full Gospel* in asserting the director may not have had substantial evidence to support his determination. Thus, he contends that the petitioner and Song's Fashion, Inc. should be treated as one, given their common ownership and the same account numbers used for quarterly tax returns. If jointly considered, it could provide the petitioner with more than 100 workers, helping the petitioner establish its ability to pay.

However, counsel fails to establish that Song's Fashion and the petitioner are the same company, such as might be the case were both companies to use the same employer identification numbers on their tax returns. The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

Contrary to counsel's primary assertion, Citizenship and Immigration Services (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. It is further noted that there is nothing in the governing regulation at 8 C.F.R. § 204.5 that allows CIS to consider the assets or resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar v. Ashcroft*, 2003 WL 22203713 at 3 (D. Mass. Sept. 18, 2003).

The purpose of 8 C.F.R. § 204.5(g)(2) is to allow organizations that employ at least 100 workers to submit a statement from a financial officer stating that the U.S. employer is able to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. See *Employment-Based Immigrants*, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). Although the director retains the discretion to reject the assurances of a financial officer in some cases, this alternative recognizes that large employers may have large net tax losses but remain fiscally sound and retain the ability to pay the proffered wage.

The fact that the two corporations happen to be owned by the same individual is immaterial to this proceeding; each corporation is a separate legal entity and, for legal purposes, the finances of each corporation are isolated from the other. Because the petitioner is a corporation, the assets of its owner and of any affiliated entity cannot be considered when evaluating the petitioner's finances.

Further, the petitioner admits that, by itself, it employs a workforce of fewer than 100, thus rendering further analysis on the 100-employee rule moot.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal

income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent.

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.

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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2001, however, were negative. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net loss of \$68,772, net current assets of a negative \$21,782, not, therefore, demonstrating the ability to pay the proffered.

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner was incorporated in 2000, providing the petitioner too short a history to gainsay its financial strength and viability and to assume that it has the ability to pay the proffered wage.

⁴ 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.

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 met that burden. The director's decision on motion to reopen and reconsider will not be confirmed. The petition will be approved.

ORDER: The director's decision on the motions is affirmed. The petition is denied.