



U.S. Citizenship
and Immigration
Services

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FILE:

[Redacted]
EAC 03 004 51147

Office: VERMONT SERVICE CENTER

Date: **OCT 21 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 Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a flower shop. It seeks to employ the beneficiary permanently in the United States as a floral designer. 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.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$16.63 per hour or \$30,266.60 per annum based on a 35-hour week. On the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary claims to have worked for the petitioner since January 1998.

On Part 5 of the petition, filed September 26, 2002, the petitioner claims to have been established in 1991, have a gross annual income of \$505,903, a net annual income of \$10,085, and to currently employ nine workers. In support of its continuing ability to pay the proffered wage, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. 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 \$505,903,

salaries and wages of \$68,302, and declared ordinary income of \$10,085.¹ Schedule L of the tax return shows that the petitioner had \$6,800 in current assets and \$1,783 in current liabilities, resulting in \$5,017 in net current assets. Besides net taxable income, 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.² 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(d) through 6(d) and line(s) 16(d) through 18(d) 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.

The petitioner also submitted a copy of the beneficiary's 2001 individual income tax return. It shows that he reported business income of \$30,310. Schedule C, Profit or Loss From Business, reflects that the beneficiary claimed the petitioner's name and address as his principal business name and business address. No Wage and Tax Statement (W-2) or Form 1099/Miscellaneous Income was submitted by either the petitioner or the beneficiary corroborating how much compensation or wages that the petitioner actually paid directly to the beneficiary. It is noted that there is a letter, dated August 12, 2002, in the record that contains a notarized signature, which is completely illegible. The unknown author certifies that the beneficiary is employed "by our company" with a salary of \$582.05. No other documentation has been submitted.

The director issued a request for additional evidence on September 11, 2003, requesting the petitioner to provide additional evidence in support of its financial ability to pay the proposed wage offer. The director advised the petitioner that the evidence must consist of either annual reports, federal tax returns, or audited financial statements. The director further instructed the petitioner to submit either copies of its 1998, 1999, 2000 and 2002 federal tax returns, copies of Wage and Tax Statements (W-2s) showing wages paid during any time that the petitioner employed the beneficiary, a statement from a financial officer of the company establishing the petitioner's ability to pay the certified wage, or annual reports for 1998, 2001, and 2002, accompanied by either audited or reviewed financial statements.

In response, the petitioner, through counsel, submitted copies of the petitioner's corporate tax returns for 1998, 1999, 2000, and 2002. They show that the petitioner filed as a "C" corporation using a Form 1120, U.S. Corporation Income Tax Return in 1998 and 1999 before electing to become an S corporation on January 1, 2000. Additionally, the petitioner resubmitted copies of its 2001 corporate tax return and the beneficiary's 2001 tax return. The petitioner's tax returns for 1998, 1999, 2000, and 2002 contain the following information:

Year	1998	1999	2000	2002
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¹ For purposes of this review, ordinary income will be treated as net income.

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Gross Receipts or Sales	\$282,816	\$340,305	\$301,058	\$669,661
Salaries and wages	\$51,462	\$ 24,720	\$ 28,870	\$ 78,330
Form 1120, Net Income before net operating loss (NOL) deduction /or Form 1120S, Ordinary Income	-\$36,942	\$ 618	\$ 2,933	\$ 8,699
Current Assets (Sched. L)	\$15,759	not included	\$ 17,002	\$ 28,050
Current Liabilities (Sched. L)	\$ 3,675	not included	\$ 1,292	\$ 1,835
Net Current Assets	\$12,084	n/a	\$ 15,710	\$ 26,215

Counsel's transmittal letter adopts the contentions of the petitioner's accountant, [REDACTED] CPA. In a letter, dated December 3, 2003, submitted with the petitioner's response, Mr. [REDACTED] expresses confidence that the petitioner has the ability to pay the proffered wage and attaches a statement of individual net worth of the principal shareholder and his wife. He also summarizes the petitioner's net current assets and gross receipts for each of the relevant years, states that the corporation paid the prevailing wage to the beneficiary, adds back the depreciation expense to the net income in 1999 and 2000, and states that the petitioner can borrow money on its fixed assets if necessary.

The director denied the petition on March 17, 2004. She rejected consideration of the individual shareholder's personal assets and adding back depreciation to the net income as a non-cash expense. Following a review of the petitioner's corporate tax returns, the director concluded that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage.

On appeal, counsel resubmits copies of the petitioner's 1998-2002 corporate tax returns, as well as the beneficiary's individual 2001 tax return and the principal shareholder's list of personal assets. In addition, counsel provides a copy of the beneficiary's individual 2003 income tax return accompanied by a W-2 issued by the petitioner to the beneficiary. It shows that the petitioner paid the beneficiary \$7,576 in wages in 2003. The beneficiary's 2003 tax return, however, also includes Schedule C showing that the beneficiary claimed additional business income of \$22,770 derived using the petitioner's business name and business address. Neither the petitioner nor the beneficiary submitted a Form 1099/ Miscellaneous Income. It is unclear what kind of business arrangement exists between the petitioner and the beneficiary.

Counsel additionally provides a letter, dated April 15, 2004, from another accountant, [REDACTED] Ms. [REDACTED] extols the beneficiary's floral designing abilities and claims that the petitioner attributes its increase in business in 2003 to the beneficiary's efforts. She asserts that the petitioner plans to have ten to fifteen employees by the end of 2004 and utilize the beneficiary's talents to become an industry leader. Counsel further supplies an undated statement from a branch manager at the Marathon National Bank affirming that the petitioner's present balance in two accounts is \$45,448.45.

On appeal, counsel adopts the previous arguments made in the underlying record and additionally cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Comm. 1967) as a basis to approve the petition because the petitioner's expectations of increasing profits are shown by the projected increase in gross revenue for 2003 as discussed by Ms. [REDACTED] and attributed to the beneficiary's participation in the petitioner's business. Counsel adds that the previous years

were also shadowed by the death of the owner's daughter and that the beneficiary was the only one to help develop the business. No factual corroboration of this statement is found in the record. Such assertions from counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Even if these facts were documented, it is not clear how they would assist CIS in determining whether or not the petitioner had the ability to pay the certified wage.

At the outset, it is noted that the record contains sparse credible evidence that the petitioner has ever directly employed and paid the proffered wage or any wage to the beneficiary. As previously noted, with the exception of the 2003 W-2, the petitioner has provided nothing from its own records to credibly corroborate that it paid compensation to the beneficiary in 2001 or at any other time. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. 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)).

The individual assets of the petitioner's principal shareholder will not be considered in reviewing the petitioner's financial ability to pay the proposed wage offer of \$30,266.60. The petitioner is a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

With respect to the bank account showing a present balance of \$45,448.45, it is unclear when this balance was determined. It may be probative as to the level of the petitioner's cash-on-hand on a particular day, but does not offer a substantive basis upon which to declare that the petitioner has established its financial ability to pay a certified wage during a given period. 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," it remains that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner must offer either annual reports, audited financial statements, or federal tax returns in order to establish its ability to pay a given wage. Bank statements generally show only a portion of a petitioner's assets and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage.

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 credible documentation of wages paid by the petitioner to the beneficiary is the \$7,575.75 paid in 2003 as shown by the W-2.

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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts reached a certain level, standing alone, will not suffice, as the expenses incurred in order to generate such revenue must also be considered. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. We reject, however, counsel's assertion on appeal that the petitioner's fixed assets (shown on line 10A, Schedule L of the Petitioner's 2000 tax return as "buildings and other depreciable assets") should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include such 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. We similarly would reject the rationale that the petitioner's ability to pay should be predicated on its ability to acquire more debt by borrowing on such assets. 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, as noted above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

In the instant matter, consistent with 8 C.F.R. § 204.5(g)(2), the petitioner's federal tax returns are the most competent evidence of its ability to pay the certified wage of \$30,266.60 during the relevant period, beginning at the priority date of January 14, 1998. As shown by the petitioner's 1998 tax return, neither the net income of - \$36,942, nor the net current assets of \$12,084 was sufficient to pay the proffered salary.

In 1999, Schedule L was omitted from the petitioner's tax return, however, as shown above, its net income of \$618 fell far short of the amount needed to pay the proposed wage of \$30,266.60.³

In 2000, neither the petitioner's net income of \$2,933, nor its net current assets of \$15,710 was sufficient to pay the certified wage.

Similarly, in 2001, the wage offer of \$30,266.60 per year could not be covered by either the petitioner's net income of \$10,085 or its net current assets of \$5,017.

Finally in 2002, neither the petitioner's net income of \$8,699, nor its net current assets of \$26,215 was enough to pay the certified wage.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the offered salary. As revealed by its corporate tax returns, the petitioner failed to establish that it could pay the proffered salary out of either its net income or net current assets for any of the period between 1998 and 2002.

While counsel's assertion that *Matter of Sonogawa* 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.

In this matter, the petitioner's tax returns fail to establish a framework of profitable years as suggested in *Sonogawa*. Rather they show a pattern of modest net income, which has never reached the level of the proffered wage. Further, counsel's confidence that the beneficiary will increase business to such an extent as to demonstrate the petitioner's ability to pay the proffered wage does not overcome the historical evidence in the record. 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 demonstrate that the petitioner has had the continued ability to pay the proffered wage.

³ Mr. Noll's letter suggests that the 1999 net current assets were \$10,007. This still represents a \$20,259.60 shortfall when compared to the proffered salary.

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.