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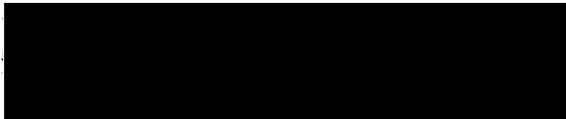
FILE: [Redacted]
SRC-02-270-53221

Office: TEXAS SERVICE CENTER Date: **SEP 20 2005**

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 Director, Texas Service Center, denied the immigrant visa preference petition. A subsequent appeal was rejected as untimely by the Administrative Appeals Office (AAO) and the matter is again before the AAO on motion to reopen. The motion to reopen is granted. The appeal will be dismissed. The petition remains denied.

The petitioner is a distributor of chemical products. It seeks to employ the beneficiary permanently in the United States as a buyer/wholesaler. 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 submitted a brief and additional evidence.

The AAO rejected the petitioner's appeal because the director's mailroom date stamped it later than its due date. On motion to reopen, counsel submits its tracking confirmation from the United States Postal Service website with a tracking number associated to a copy of a label addressed to Citizenship and Immigration Services (CIS). A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Because the motion to reopen provides documentary evidence that the appeal was in fact received by CIS on time, the motion is granted and the AAO will adjudicate the petitioner's appeal on its substantive merits.

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) 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 2, 2001. The proffered wage as stated on the Form ETA 750 is \$4,406.17 per month, which amounts to \$52,874.04 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of December 1999.

On the petition, the petitioner claimed to have been established in 1998 and to have a gross annual income of \$346,913. In support of the petition, the petitioner submitted evidence that JJR Importacao & Exportacao, Ltda (JJR) is 100% owner of the petitioner's capital stock and translated copies of JJR's Brazilian tax returns and personnel records. The petitioner also submitted bank statements from its business checking account in the United States from December 2001 through April 2002 and its U.S. corporate income tax return filed on Form

1120 for 2001. The petitioner also submitted airway bills, freight charges, bills of sale, purchase invoices, and packing slips and lists.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 3, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested W-2 forms for the petitioner's employees in 2001 and 2002, its quarterly wage reports, additional bank statements, and stated that "[d]ocuments from affiliated companies cannot be used to establish the petitioner's ability to pay."

In response, counsel asserted that the proffered wage could be paid through a combination of sources: "\$21,342 paid directly from [the petitioner], and the balance of \$31,530.00 from wire transfers received from the company in Brazil." Additionally, counsel asserts that the petitioner has been in business since 1998 and there is no evidence that its business would not continue. Counsel states that there are no W-2 or quarterly wage reports to submit since "[t]he payments made were to purchasing agents as commissions." Additionally, counsel states that JJR is not an affiliate but "wholly-owns" the petitioner, "whose sole purpose is to research, bid on, and purchase medical and lab equipment for the foreign parent." Thus, counsel asserts that JJR's financial viability should be considered as part of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the director's request for evidence, the petitioner submitted its Form 1120 Corporate tax return for 2002. The petitioner's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ¹	\$4,124	\$29,514
Current Assets	\$6,315	\$36,930
Current Liabilities	\$0	\$0
Net current assets	\$6,315	\$36,930

In addition, counsel submitted copies of the petitioner's checking account statements for the period from January 2001 through December 2002, letters concerning wire transfers, and evidence previously submitted.

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, on February 28, 2003, denied the petition. The director determined that the petitioner's net income was insufficient to establish its ability to pay the proffered wage; that no evidence was established that the commissions were paid to contractors performing the same job the beneficiary will perform and were subsequently terminated; or that the petitioner's ending bank balances provided sufficient funds to cover the proffered wage.

On appeal, counsel asserts the following in pertinent part:

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

[JJR] has sub-contracted various companies, and private individuals, only occasionally using full-time employees, finding this to be the most cost effective way to establish an American presence, as employees from JJR were not readily available for transfer as had the originally been the intention [sic]. JJR, is as a 20-year-old company well capitalized and well established in Brazil, with contacts throughout Latin America. While searching for a qualified individual [to assume the proffered position], JJR, through [the petitioner], has done a substantial amount of business . . . since their inception in 1998, using various employees, independent contractors and sub-contractors . . .

Citing *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), counsel asserts that hiring the beneficiary will pay for itself since he would increase the petitioner's profits. Counsel also asserts that JJR and the petitioner are "inexorably tied" to each other and "their financial characteristics are one in the same," and thus JJR's assets and financial situation should be considered.

Counsel's reliance on the assets of JJR is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *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 who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). 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.

Counsel's reliance on the balances in the petitioner's bank accounts is also 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 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 L that will be considered below in determining the petitioner's net current assets.

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 or 2002.

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. *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 exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of 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.

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. 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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In both years, the petitioner's net income and net current assets are less than the proffered wage, and it has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. *Matter of Sonogawa*, 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 *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

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

No unusual circumstances have been shown to exist in this case to parallel those in [REDACTED] nor has it been established that 2001 or 2002 were uncharacteristically unprofitable years for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated with documentary evidence that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Finally, counsel advised that the beneficiary would replace subcontractors. The record does not, however, name these workers, state their wages, verify their employment, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the subcontractor(s) involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

The AAO notes that the only assertions made in this case concerning the petitioner's proposition to replace subcontractors with the beneficiary and that the beneficiary would generate increased revenue for the petitioner came from counsel. 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). The record of proceeding does not contain any corroborating evidence of the petitioner's use of subcontractors. It is noted that the petitioner's tax returns reflect \$21,342 in wages/salaries paid in 2001, nothing paid as "cost of labor," which typically reflects a business entity's use of independent contractors, and only \$5,114 as "other deductions." No 1099 forms were submitted to substantiate the claim of using independent contractors, nor cancelled paychecks, nor invoices, contracts, or other evidence that could provide independent corroboration of this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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 petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it 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 motion to reopen is granted. The appeal is dismissed. The petition remains denied.