



U.S. Citizenship  
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Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 04 2006  
WAC 03 164 52774

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

PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker 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) on appeal. The appeal will be dismissed.

The petitioner is a land and waterscape development firm. It seeks to employ the beneficiary permanently in the United States as a maintenance repairer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 had the continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 March 26, 2001. The proffered wage as stated on the Form ETA 750 is \$16.67 per hour, which amounts to \$34,673.60 per annum. On the Form ETA 750B, signed by the beneficiary on March 20, 2001, the beneficiary claims to have worked for the petitioner since August 1997.

On Part 5 of the visa petition, filed on May 5, 2003, the petitioner claims to have been established in 1997, to currently employ eighteen workers, to have a gross annual income of \$900,000 and to have a net annual income of \$5,000. In support of its ability to pay the beneficiary's proposed wage offer of \$34,673.60 per year, the petitioner initially submitted incomplete copies of its Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001. They reflect that the petitioner files its federal tax returns using a fiscal year running from June 1st to

May 31st of the following year. Thus, the 2000 tax return contains financial data pertaining to the period from June 1, 2000 to May 31<sup>st</sup> 2001. The tax returns contain the following information pertinent to taxable income before the net operating loss (NOL) deduction and special deductions, current assets and liabilities, and net current assets.

	2000	2001
Taxable Income before NOL	\$ 1,801	\$ 1,314
Deduction (Form 1040)		
Current Assets (Sched. L)	\$51,431	\$ 22,826
Current Liabilities (Sched. L)	\$66,908	\$47,798
Net current assets	-\$15,477	-\$24,972

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.<sup>1</sup> Besides net taxable income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On April 14, 2004, the director instructed the petitioner to submit evidence of its ability to pay the proffered salary in the form of federal tax returns, audited financial statements or annual reports covering the period from 2001 to 2003. The director also requested that the petitioner submit copies of the beneficiary's Wage and Tax Statement(s) (W-2s) for 2001-2003, as well as copies of its state quarterly wage reports for all employees for the last four quarters. In response, the petitioner resubmitted a copy of its 2001 corporate tax return, as well as a copy of an unaudited financial statement for the period ending May 31, 2001, and a copy of its 2002 corporate tax return. This tax return, covering the period from June 1, 2002 to May 31, 2003, provides the following information:

	2002
Taxable Income before NOL	\$ 8,039
Deduction (Form 1040)	
Current Assets (Sched. L)	\$ 37,048
Current Liabilities (Sched. L)	\$ 92,008

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Net Current Assets     -\$ 54,960

The petitioner also provided copies of the beneficiary's W-2s for 2001, 2002, and 2003. They show that the petitioner paid the beneficiary as follows:

	Wages
2001	\$ 6,767.75
2002	\$14,676.41
2003	\$18,837.39

Copies of its state quarterly wage reports for each of the quarters in 2003 and the first quarter of 2004, ending on March 31, 2004, were also included in the petitioner's response. The March 31, 2004, wage report indicates that the petitioner paid \$5,106 to the beneficiary for the first three months of 2004.

The director denied the petition on July 20, 2004. He reviewed the petitioner's financial data contained within its 2001 and 2002 corporate tax returns, and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the visa priority date of March 26, 2001.

On appeal, counsel provides an affidavit from one of the principal shareholders and president of the petitioner, Mr. [REDACTED] states that he started the business in 1997 and that the beneficiary was one of the original workers, and continues to be one of 18 employees. He states that the petitioner's gross sales in 2002 were \$838,817 and that his current assets were \$83,130. Mr. [REDACTED] adds that he is providing additional documents to support the viability of the company and that it is a business necessity that the beneficiary be granted the benefit.

Counsel also resubmits copies of the petitioner's corporate income tax returns for 2001, 2002 and 2003, as well as copies of one of the principal shareholder's individual tax returns for 2002, a copy of his July 16, 2004, individual bank statement, and a copy of a December 31, 2003, bank statement for a corporation other than the petitioner. Also provided on appeal is a copy of the petitioner's contractor's license issued in 1997, a 1997 copy of the corporation's articles of incorporation and a copy of a February 13, 2001, amendment to the articles of incorporation changing the corporate name from Stonecreek, Inc. to Stone Creek, Inc.

Counsel asserts that the overall circumstances of the petitioner must be considered in that it has employed the applicant since before 1985 and can continue to operate indefinitely into the future. Counsel maintains that the 2002 gross sales of \$838,817 and assets of \$83,130 supports this argument and demonstrates its profitability. Counsel cites several Board of Alien Labor Certification of Appeals (BALCA) cases that found an ability to pay the certified wage under varying circumstances including employment and payment of wages to the alien.

Counsel's contentions are not persuasive. It is noted that the attribution of the beneficiary's employment since 1985 is only made by counsel, not by the employer. It is further noted that with regard to BALCA decisions, CIS is not bound to regard them as a legally binding precedent, but merely as guidance in some cases. Pursuant to the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), precedent decisions are those decisions so designated and must be published in bound volumes or as interim decisions. The Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review

whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9<sup>th</sup> Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

Relevant to the individual shareholder's income tax return and bank statement and the unrelated corporation's bank statement offered on appeal, it is noted that as 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). As the named corporate petitioner in the visa petition, it must establish its own financial ability to pay the proffered wage of \$34,673.60 per year. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) affirmed the rejection of the offer of the petitioner's director to personally pay the proffered wage stating "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."

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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, as noted above, the record shows that the petitioner employed the beneficiary in 2001, 2002, 2003, and for the first quarter in 2004. In 2001, his W-2 shows that his wages of \$6,767.75 were \$27,905.85 less than the proffered salary. In 2002, his earnings of \$14,676.41 were \$19,997.19 less than the proffered wage, and in 2003, the petitioner paid wages of \$18,837.39 to the beneficiary, or \$15,838.21 less than the certified wage.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross receipts exceeded the proffered wage is misplaced. 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.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. Counsel's reference on appeal that the petitioner's 2002 total assets of \$83,130 (Sched. L, line 15) should have been considered in the determination of the ability to pay the proffered wage is misplaced. 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, as explained above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

As noted above, the petitioner's financial data set forth on its tax returns is based on a fiscal year running from June 1<sup>st</sup> to May 31<sup>st</sup> of the subsequent year. The beneficiary's W-2s reflect wages paid in a calendar year. Although an approximate calculation, if the petitioner's net income was reduced to a monthly average, based on the 2000 and 2001 tax returns, for the calendar year of 2001, its taxable income before the NOL deduction would have been approximately \$1,516.90 (\$750.40 for first 5 months + \$766.50 for subsequent 7 months). This amount was insufficient to pay the \$27,905.85 difference between actual wages paid of \$6,767.75 and the proffered salary of \$34,673.60.

Similarly, for the 2002 calendar year, based on the 2001 and 2002 tax returns, the petitioner's taxable income before the NOL deduction was approximately \$5,236.94 (\$547.50 for first 5 months + \$4,689.44 for subsequent 7 months). This sum was insufficient to pay the \$19,997.19 shortfall resulting from the comparison of the proffered salary and the actual wages paid of \$14,676.41.

As all three years of tax returns show net current assets reflected as losses, it can be concluded that the evidence fails to demonstrate the petitioner's ability to pay the proffered wage of \$34,673.60 in 2001 or 2002. Because the 2002 tax return reflected only the first five months of the petitioner's 2003 income, a similar calculation cannot be made for 2003. As noted above, however, although the petitioner paid wages to the beneficiary, they were \$15,838.21 less than the proffered wage.

Counsel refers to the overall circumstances of the petitioner. It is noted that in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, related 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 Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the three corporate tax returns contained in the record show very modest net incomes accompanied by net current assets reflected as increasing losses. The AAO cannot conclude that the petitioner has not demonstrated that unique business circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate a *continuing* ability to pay a certified wage beginning at the priority date. Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered salary as of the March 26, 2001, priority date of the petition.

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.