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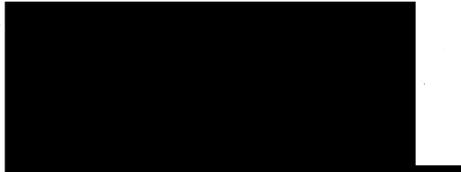
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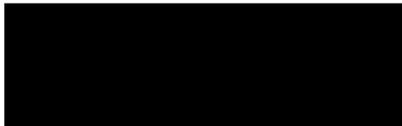
WAC 05 048 54274

Office: CALIFORNIA SERVICE CENTER

Date: DEC 05 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a corporation that operates an Indian restaurant/catering business. It seeks to employ the beneficiary permanently in the United States as a banquet manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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.

According to the petition, the business was established in 2000, and, at the time of preparation of the petition employed 5 individuals.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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. See 8C.F.R. § 204.5(d). 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$866.02 per week (\$45,033.04 per year). The Form ETA 750 states that the position requires two years experience, and, a two-year associates degree in hospitality, commerce, or business..

On appeal, counsel submits a legal brief and additional evidence.

As a preface to the following discussion, counsel states in her brief that because the director did not mention a Citizenship and Immigration Services (CIS) memorandum in the decision that therefore, the director failed to regard or apply the content of the memorandum in the decision to this matter. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

When petitions on their face, do or do not demonstrate eligibility for the preference visa classification sought, the director may review and act upon the petition as submitted. On appeal, counsel submitted a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, (Yates' memorandum) that states in pertinent part " ... If the required initial evidence does not establish ability to pay, the CIS adjudicator may deny the petition since the petitioner has not met his or her burden to establish eligibility for the requested benefit."

Counsel asserts that since the petitioner has paid the beneficiary \$10,875.00 year in 2005, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts since the petitioner has submitted one pay statement, counsel urges CIS to consider that what she has termed the test in the Yates' memorandum is satisfied. Counsel is asserting that one pay stub issued to the beneficiary four years after the priority date demonstrates the petitioning entity's ability to pay.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, " ... [t] he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. Counsel's interpretation of the language in that memorandum is overly broad and it does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates' memorandum as counsel urges, then in this particular factual context, the interoffice guidance memorandum would usurp the clear language in the regulation without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 26, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2005, when counsel claims the petitioner actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001, 2002, 2003 2004, 2005 and continuing to the present. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Here, there is no evidence the petitioner paid the proffered wage in any year

examined.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form 1120 tax returns for 2001, 2002 and 2003; articles of incorporation; six photocopies of the premises; a restaurant menu; a support letter from the petitioner; an exhibit statement; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director denied the petition on June 1, 2005, 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 that by her calculations of the petitioner's current net assets the petitioner evidenced the ability to pay the proffered wage.

Counsel cites the case of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) for the proposition that "...even when a company is operating with little profit, they [the company] may show expectations of continued increase in business and profits."

Counsel asserts that the director denied the petitioner the opportunity to provide evidence of future profits. Counsel contends that because the owner of the petitioner is a "high net worth individual" the petitioner should have been granted an opportunity to provide further evidence.

Counsel has submitted the following documents to accompany the appeal statement: a pay stub for the beneficiary; a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, and, a CIS Interoffice Memorandum on requests for evidence; a copy of the case *Matter of Sonogawa*; and, an exhibit schedule previously submitted.

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. No evidence was introduced that the petitioner paid the beneficiary the proffered wage.

A Form G-325A found in the record of proceeding submitted by the beneficiary states the beneficiary was employed by the Majestic Hotels Ltd., Punjab, India from January 1999 to June 2004, and, that from June 2004 to the present (i.e. November 22, 2004) was not employed. According to counsel, the beneficiary is currently employed by the petitioner. A pay stub was introduced for the period May 13, 2005 to May 26, 2005, evidencing wages paid of \$10,875.00 year to date. Since the record closed in June 2005, there is no regulation prescribed evidence available to analyze whether the petitioner is able to pay the difference between the wages actually paid to the beneficiary and the proffered wage in that year.

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. *Id.* at 1084. The court specifically rejected the argument that 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* at 537.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$45,033.04 per year from the priority date of April 26, 2001:

- In 2001, the Form 1120 stated net income¹ of \$6,152.00.
- In 2002, the Form 1120 stated net income of \$31,404.00.
- In 2003, the Form 1120 stated net income of \$13,706.00.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has net income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

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. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, the petitioner's Form 1120 return stated current assets of \$18,440.00 and \$3,026.00 in current liabilities. Therefore, the petitioner had \$15,414.00 in net current assets. Since the proffered wage is \$45,033.04 per year, this sum is less than the proffered wage.
- In 2002, the petitioner's Form 1120 return stated current assets of \$19,353.00 and \$1,962.00 in current liabilities. Therefore, the petitioner had \$17,391.00 in net current assets. Since the proffered wage is \$45,033.04 per year, this sum is less than the proffered wage.

¹ IRS Form 1120, Line 28 that states the petitioner's taxable income before net operating loss deduction and special deductions, which will be referred to as net income in these proceedings.

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.

- In 2003, the petitioner's Form 1120 return stated current assets of \$8,942.00 and \$2,850.00 in current liabilities. Therefore, the petitioner had \$6,092.00 in net current assets. Since the proffered wage is \$45,033.04 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in her brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

In the totality of all the evidence submitted in this case, or the years 2001 through 2003, the taxable income for the petitioner increased somewhat from \$6,152.00 to \$31,404.00, and then decreased significantly to \$13,706.00. As stated on appeal, counsel asserts that by her calculations of the petitioner's current net assets the petitioner evidenced the ability to pay the proffered wage. Counsel states that the petitioner's net current assets were \$103,875.00, \$136,596.00 and \$127,693.00 for 2001, 2002 and 2003 respectively. It is clear that counsel's computations of the petitioner's current net assets are at variance with the calculations stated above. In no year did the petitioner demonstrate net current assets sufficient to pay the proffered wage. The net current asset value for those years is positive. For the years 2001, 2002 and 2003 it was \$15,414.00, and, it increased to \$17,391.00, then declined to \$6,092.00 in net current assets during this period.

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.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonogawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner. Counsel asserts that the petitioner shows "expectations of continued increase in business and profits." However upon closer examination, as mentioned above, the petitioner has not proven its ability to pay the proffered wage. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not

³ 8 C.F.R. § 204.5(g)(2).

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)).

Counsel asserts that the director denied the petitioner the opportunity to provide evidence of future profits.⁴ Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. Furthermore, 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).

Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a banquet manager will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel contends that because the owner of petitioner is a "high net worth individual" the petitioner should have been granted an opportunity to provide further evidence. Although counsel has not further elaborated upon this statement, by implication, counsel is requesting that the owner of petitioner's personal assets or the assets of other commonly controlled organizations be considered as evidence to pay the proffered wage. Contrary to counsel's assertion, 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. 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."

Counsel's contention cannot be concluded to outweigh the evidence presented in the three corporate tax returns as submitted by petitioner that demonstrates that petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.

⁴ Both the AAO and CIS will always accept and review any evidence submitted by a petitioner although its probative value will be determined within the particular factual circumstances of the case. The AAO reviews appeals on a de novo basis. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). It is worth emphasizing that that each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). We note that the petitioner did not submit its 2004 tax return on appeal.