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U.S. Citizenship
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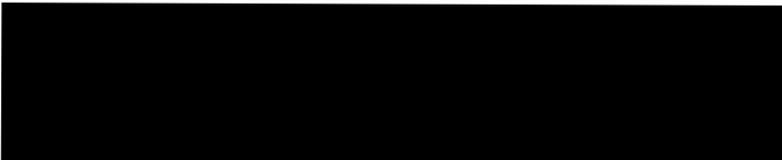
IN RE:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile sales and restoration company. It seeks to employ the beneficiary permanently in the United States as a restoration mechanic. 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 a brief and additional evidence.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18 per hour, which amounts to \$37,440 annually. On the ETA 750, Part B, the beneficiary indicated that he had worked for the petitioner since April 2000.

On the petition, the petitioner indicated it was established in 1998, has two employees, and a gross annual income of \$220,2336 for the first five months of 2003, and \$61,575 net annual income for the first five months of 2003. The petitioner submitted two pages of its 2001 and 2002 IRS Forms 1120, as well as a balance sheet dated May 31, 2003.

On November 19, 2004, the director issued a Notice of Intent to Deny (NOID) the petition. The director stated that the petitioner had to submit evidence that the beneficiary had completed and received his high school diploma, and evidence as to the petitioner's ability to pay the proffered wage. With regard to the petitioner's ability to pay the proffered wage, the director requested evidence such as federal tax returns, audited or reviewed financial statement or annual reports for the years in question. The director also stated that evidence such as balance sheets, profit/loss statements and or accountant's compilation reports might be considered as long as one

of the three forms of evidence, i.e., federal tax returns, audited financial statements or annual reports are also submitted. The director also stated that since the beneficiary had worked for the petitioner since 2001, the petitioner should submit the beneficiary's W-2 forms.

In response, the petitioner submitted a copy of the certification from the Ministry of Education of Argentina as to the beneficiary's completion of high school, as well as transcripts with translations. The petitioner also submitted its federal corporate income tax returns for the years 2000 to 2002.¹ Finally the petitioner submitted a Form 1099-MISC for the beneficiary that established the beneficiary earned \$37,000 in 2004. Counsel stated that items such as inventory, assets, and a loan to the sole shareholder of the company contribute to the petitioner's ability to pay the proffered wage. Counsel also examined the petitioner's shareholder's assets, including a loan to the shareholder, and real estate assets, in his examination of the petitioner's ability to pay the proffered wage.

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 March 23, 2005, denied the petition. The director examined the petitioner's federal income tax returns as well as the petitioner's net income and net current assets for tax years 2000 to 2002. The director stated that the petitioner's net income and net current assets were insufficient in tax year 2000 to pay the proffered wage and that the petitioner had negative net income in tax years 2001 and 2002. The director also noted that in years 2001 and 2002, the petitioner had negative net current assets. The director determined that although the petitioner established that it had paid the proffered wage in 2004, it had not established its ability to pay the proffered wage as of April 30, 2001, and through 2002 and 2003.²

On appeal, counsel states the director miscalculated the petitioner's net current assets. Counsel states that the petitioner can establish its ability to pay the proffered wage in one or more of three separate avenues, namely if its net income met or exceeded the proffered wage, if the petitioner had net current assets that met or exceeded the proffered wage, and if it paid the beneficiary the proffered wage during the relevant years.

Counsel then identifies the petitioner as a sole proprietorship and cites *Ohsawa America* 1988-INA-240 (BALCA Aug.30, 1988) and also *Ranchito Coletero*, 2002 INA-105 (BALCA Jan. 8, 2004). Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that this case stands for the proposition that although the employer had been showing prior losses and a negative working capital, the panel found sufficiency of funds where the company's accountant showed that the employer had increased sales and reduced operating losses, and that the major shareholder, who had indicated a willingness to continue to fund the company, had personal net worth of over \$4 million. Counsel states that although that case involved a corporation, it supports the proposition that the personal assets should be considered. In citing *Ranchito Coletero*, 2002 INA-105 (BALCA Jan. 8, 2004), counsel states this case held that a sole proprietorship's overall fiscal circumstances should be considered when assessing an employer's

¹ Counsel stated that the petitioner's tax returns run from March 31, 2000 to October 31, 2001, from November 1, 2001 to October 31, 2002, and November 1, 2002 to October 31, 2003. The petitioner's 2000 tax return thus covers the April 30, 2001 priority date.

² The director's comments on the petitioner establishing its ability to pay the proffered wage based on wages it paid the beneficiary in 2004 are incorrect. The AAO will discuss the petitioner's ability to pay the proffered wage more fully further in these proceedings.

ability to pay the proffered wage. Counsel states that the petitioner is owned by a sole proprietor, and therefore CIS should consider the overall fiscal circumstances, as well as focus on the petitioner's taxes and losses.

Counsel submits a letter from an unidentified accountant with The Tax Group, Miami, Florida. According to the letter writer, the document is an explanation of the balance sheets of the petitioner for the years ending October 31, 2001, October 31, 2002, and October 31, 2003.³ In this document, the accountant appears to identify the petitioner's net current assets for the tax year ending October 31, 2001 as \$42,592, however the accountant disregards the figures noted as notes payable and also states that loans from shareholders would not be considered liabilities. The accountant also stated that for tax year 2002 the petitioner's ending inventory of \$47,500 is not reflected on the balance sheet, and when considered, raises the petitioner's current assets to \$100,192.

Counsel then examines the petitioner's tax returns and appears to use the figures suggested by the accountant's letter. Counsel states that the petitioner's correct net income for the year 2000-2001 is \$118,428, and the net current assets are \$42,592. Counsel also makes further comments on the director's decision. For tax year 2000-2001, counsel states that the director incorrectly identified the petitioner's taxable income as its net income. Counsel states that the petitioner's net income and net current assets met and exceeded the proffered wage in 2000. With regard to the petitioner's financial resources in tax year 2001-2002, counsel states that the gross income for 2001 is \$967,074, the petitioner's net income for 2001 is \$131,100; and the net current assets for 2001 is \$88,356. Again counsel states that the petitioner's net income and net current assets met and exceeded the proffered wage in 2001. Counsel also states that for tax year 2002-2003, the director identified a net loss of -\$28,477. Counsel states that this figure is the petitioner's taxable income. Counsel identifies the petitioner's gross income as \$790,195; its net income as \$291,297 and the petitioner's current assets as \$123,812. Counsel states that the petitioner again met and exceeded the proffered wage in tax year 2002.

Counsel also notes that the director failed to consider the property where the petitioner is located that is owned by the sole proprietor of the petitioner. Counsel states that the value of this property must be considered by Citizenship and Immigration Services (CIS) when estimating the petitioner's ability to pay the proffered wage, as well as the personal property of the sole proprietor.

With regard to the beneficiary's wages, counsel states that although the beneficiary has been employed by the petitioner since the year 2001, the petitioner cannot provide the beneficiary's W-2 forms because the petitioner has paid the beneficiary in cash. Counsel resubmits the Form 1099-MISC previously submitted to the record that indicated the petitioner paid the beneficiary \$37,000 in 2004.

On appeal, counsel describes the petitioner's owner as a sole proprietor. By extension, counsel states that the petitioner is a sole proprietor. However, the petitioner is not a sole proprietor. The petitioner's business structure, as established by its federal income tax Form 1120 filings, is that of a corporation, not a sole proprietor. Counsel's comments that the petitioner's shareholder and owner's assets can be considered as a source of additional funding for the proffered wage. While the personal assets of a sole proprietor may be considered, along with household expenses when determining a sole proprietor's ability to pay the proffered wage, this is not the case with petitioners structured as corporations. 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

³ The record only reflects the petitioner's balance sheet for tax year 2003 submitted on appeal. However, counsel resubmits the petitioner's federal income tax returns.

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 references to BALCA decisions that involved sole proprietorships are equally non-persuasive. First, counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, counsel also states that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. In the instant petition, however, the petitioner shows continuous and increasing losses, and higher salaries paid out than revenue received so an increase in operating losses as well. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

On appeal, counsel also submitted a letter from an accounting group that provided comments on the petitioner's financial assets as indicated on the petitioner's balance sheets. The accounting group's statement is not persuasive for two reasons. First, the record does not reflect the petitioner's balance sheets for all three relevant tax years. Second, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that counsel submits on appeal does not make clear how they were produced and only states "the balance sheet of the business, which was prepared for tax purposes and not for financial purposes, being both systems on opposite sides." Thus, the accountant's statement is not sufficient to demonstrate the 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 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. Although the beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner from April 2000 to the present, the petitioner's employment records only document his employment for tax year 2004. This Form MISC-1099 indicates the beneficiary received \$37,000, which is \$400 less than the proffered wage. Therefore the petitioner did not pay the beneficiary the proffered wage as of the April 2001 to the present. The petitioner thus has the obligation to pay the entire proffered wage as of the 2001 priority date to tax year 2004. For tax year 2004, the petitioner has to establish that it is capable of paying the difference between the beneficiary's actual wages and the proffered wage.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng* at 537

The petitioner is structured as a corporation. Contrary to counsel's assertions, the petitioner's net income is the sum shown on line 28, taxable income before NOL deduction and special deductions on its IRS Form 1120. In tax years 2000, 2001, and 2002, the petitioner's net income is \$5,747, -\$27,784, and -\$28,477. None of these sums are sufficient to pay the proffered wage in these three tax years.

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. In addition, 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 through 6. Its year-end current liabilities are shown on lines 16 through 18. Contrary to the accountant's explanation submitted on appeal, the AAO does not consider other items listed on the Schedule L as part of the petitioner's current assets and current liabilities when it calculates the petitioner's net current assets. 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 tax returns reflect the following information for the tax years 2001, 2002, and 2003:

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.

	2001	2002	2003
Taxable income ⁵	\$ 5,747	\$ -27,784	\$ -28,477
Current Assets	\$ 87,440	\$ -10,436	\$ 1,507
Current Liabilities	\$ 72,448	\$ 66,896	\$ 151,437
Net current assets	\$ 14,992	\$ -77,332	\$ -149,930

The petitioner has not demonstrated that it paid any wages to the beneficiary during tax year 2000-2001. In 2000-2001, as previously illustrated, the petitioner shows a net income of \$5,747, and net current assets of \$14,992, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2001-2002, as previously illustrated, the petitioner shows a net income of -\$27,784, and negative net current assets of \$77,332, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2001-2003, as previously illustrated, the petitioner shows a net income of -\$28,477, and negative net current assets of \$149,930, and has not, therefore, demonstrated the ability to pay the proffered wage. Furthermore the accountant's references on appeal to loans to shareholders and inventory not noted on the Schedule L that would alter the petitioner's net current assets in the years 2000 to 2002 are not given any evidentiary weight, as they are presented as part of an unaudited financial statement. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the 2001 priority date to the present.⁶

As stated previously, the assets of the petitioner's owner or shareholder are not viewed as sources of additional funds with which to pay the proffered wage. Thus, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.

⁵ As previously stated, the petitioner's net income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

⁶ As noted previously, the petitioner submitted documentation as to wages paid to the beneficiary in tax year 2004 that was \$400 less than the proffered wage. However, the petitioner did not submit its 2004 tax return to the record, and thus the AAO cannot analyze whether the petitioner had sufficient net income or net current assets in 2004 to pay the difference between the beneficiary's actual wages and the proffered wage.