



U.S. Citizenship
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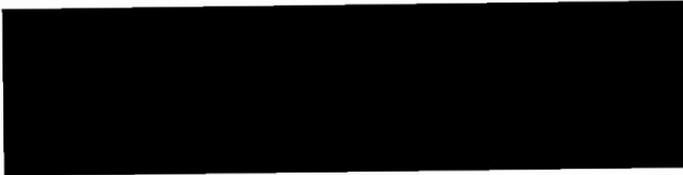
Date: MAR 21 2006

IN RE: Petitioner:
Beneficiary:



PETITION: 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 Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a roofing and siding company. It seeks to employ the beneficiary permanently in the United States as a roofer. 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.

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 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) states:

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 either 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 petition's priority date, which is the date 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). The priority date in the instant petition is March 6, 2001. The proffered wage as stated on the Form ETA 750 is \$57,637.00 per year. On the Form ETA 750B, signed by the beneficiary on January 31, 2001, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on August 27, 2003.

The I-140 petition was submitted on March 30, 2004. On the petition, the petitioner claimed to have been established in 1998 and to currently have six employees. In the items on the petition for gross annual income and for net annual income the petitioner wrote "SEE ATTACHED." With the petition, the petitioner submitted supporting evidence.

The director issued no request for additional evidence.

In a decision dated September 1, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and no additional evidence. Counsel states on appeal that the petitioner's tax returns in the record establish its ability to pay the proffered wage. Counsel states that the petitioner's payments to its owner and to other employees are evidence of its ability to pay the proffered wage. Finally, counsel states that the petitioner "has been in business for a substantial period of time and has a reasonable expectation of continuing in business, paying its staff and functioning effectively." (Brief, September 27, 2004, at 1).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 31, 2001, the beneficiary did not claim to have worked for the petitioner. The record contains a letter dated September 8, 2003 from the petitioner's president stating that the beneficiary has been subcontracting jobs from the petitioner since October 1999, principally building and rebuilding commercial and residential roofs. However, that letter contains no information on the amounts of any payments to the beneficiary for that work, nor does the record contain any other evidence which indicates the amounts of any payments made by the petitioner to the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001 and 2002. The record before the director closed on March 30, 2004 with the submission of the I-140 petition and supporting documentation. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. An S corporation's total income from its various sources are reported on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's interest income is stated on line 4a of the Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>. Similarly, some deductions appear only on the Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), at 22, available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>.

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Line 23 of the Schedule K, for income.

In the instant petition, the petitioner's tax return for 2001 indicates income from activities other than from a trade or business, namely interest income. Therefore the figure for ordinary income on line 21 of page one of the petitioner's Form 1120S tax return for 2001 does not include some of the petitioner's income. For this reason, the petitioner's net income for 2001 must be considered as the total of its income as shown on the Schedule K. The corresponding figure on the Schedule K for 2002 will be considered as the petitioner's net income for 2002. No additional deductions are shown on the petitioner's Schedule K's in the record for 2001 or for 2002.

In the instant case, the petitioner's tax returns show amounts for income on line 23, Schedule K, as shown in the table below:

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$12,005.00	\$57,637.00*	-\$45,632.00
2002	\$3,687.00	\$57,637.00*	-\$53,950.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	\$6,088.00	\$18,093.00	\$57,637.00*
2002	\$18,093.00	\$17,155.00	\$57,637.00*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002.

Counsel asserts that payments to "the owner" in the amount of \$140,000.00 are evidence of additional financial resources of the petitioner. The petitioner's tax returns show deductions for compensation of officers in the amount of \$140,000.00 in 2001 and in that same amount of \$140,000.00 in 2002.

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 basic rule of law concerning corporations 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); *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.

Nonetheless, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. The sole shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Income Tax Return for an S Corporation.

In the instant case, counsel refers to payments in the amount of \$140,000.00 to "the owner." However, the Schedule K-1's attached to the petitioner's Form 1120S tax returns for 2001 and 2002 show that the petitioner's shares are not owned by one individual. The Schedule K-1's show that two individuals each own 33.33333% of the petitioner's shares and that a third individual owns 33.33334% of the petitioners' shares. The individual owning 33.3334% is the petitioner's president.

The evidence does not indicate whether the payments of \$140,000.00 for compensation of officers were made only to the president or whether they were divided among two or more individuals. The petitioner's Form 1120S tax return for 2001 shows deductions for salaries and wages of \$168,550.00, in addition to the \$140,000.00 stated for compensation of officers. The petitioner's Form 1120S tax return for 2002 shows deductions for salaries and wages of \$171,717.00 in addition to the \$140,000.00 stated for compensation of officers in 2002. But the evidence provides no information on the identities of the recipients of those payments for salaries and wages.

The fact that the figures for compensation of officers was the same amount of \$140,000.00 in both 2001 and 2002 suggests that that amount represents fixed salary commitments of the petitioner to its officers, rather than a

distribution of the petitioner's profits. Moreover, the record contains no evidence indicating that one or more of the petitioner's officers would have been willing and able to foregoing some portion of his or her compensation in order to pay the proffered wage to the beneficiary if needed.

Counsel asserts that the petitioner has been in business for a substantial period of time and has a reasonable expectation of continuing in business and of paying its staff. In support of these assertions counsel relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). However, counsel's reliance on *Matter of Sonogawa* is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within 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 \$100,000.00. 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 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.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

Counsel also relies on *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988). The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Moreover, *Full Gospel Portland Church v. Thornburgh* was decided in the United States district court for the District of Columbia. In the instant petition, the petitioner is located in New Jersey. Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a piano teacher. In the instant petition, there is no evidence of additional potential income from any sources other than those shown on the petitioner's Form 1120S income tax returns. The income shown on the Form 1120S tax returns has been fully considered above.

Counsel also asserts that the director based her decision in part on the fact that "the petitioner did not submit any additional evidence to support their ability to pay." (Brief, September 27, 2001, at 1). Counsel then rebuts the director's supposed reasoning by stating that the petitioner's 2001 and 2002 tax returns were attached to the petition. However, counsel misreads the director's decision. The director's decision fully considered the petitioner's Form 1120S tax returns for 2001 and 2002, and found that the information on those returns failed to establish the petitioner's ability to pay the proffered wage in either of those years. The director's statement that the petitioner "did not submit any additional evidence" to demonstrate its ability to pay the proffered refers to the absence of any evidence in addition to the Form 1120S tax returns.

In her decision, the director failed to consider interest income of the petitioner shown on the Schedule K for 2001, but the amount of that interest income was not great enough to affect the director's analysis. The director found that the petitioner's net income was insufficient to establish its ability to pay the proffered wage in 2001 or in 2002. The director correctly calculated the petitioner's year-end net current assets for 2001 and 2002 and similarly found that those figures were insufficient to establish the petitioner's ability to

pay the proffered wage in those years. The director's decision to deny the petition was correct. For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.

