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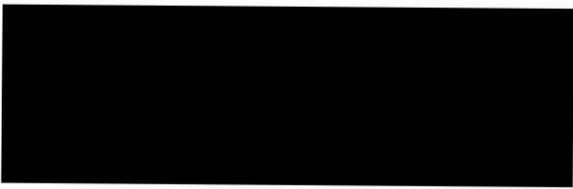
Petitioner:

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, Director
Administrative Appeals Office

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

The petitioner is a chain of Dunkin donuts. It seeks to employ the beneficiary permanently in the United States as a retail chain store area supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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.

On appeal, counsel submits a brief statement and additional evidence.¹

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 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, 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* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 9, 2001. The proffered wage as stated on the Form ETA 750 is \$114,469.30 per year. On the petition, the petitioner claimed to have been established in 1999, but did not provide information on the gross annual income, net income and number of employees. According to the tax returns in the record, the petitioner was elected as an S corporation on December 31, 2000 and the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on May 21, 2003, the beneficiary did not claim to have worked for the petitioner.

The petitioner submitted the petition with Form 1120S tax return for 2001 and 2002 filed by the petitioner. On April 29, 2004, because the director deemed the evidence submitted insufficient to demonstrate the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

petitioner's continuing ability to pay the proffered wage beginning on the priority date, 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 submit additional evidence to establish that the petitioner had the ability to pay the proffered wage or salary of \$114,469.30 as of April 9, 2001, the date of filing and continuing to the present. The director also requested the petitioner provide information on the current number of employees, the proffered position and copies of the beneficiary's W-2 forms.

In response, the petitioner submitted the petitioner's tax returns for 2001 and 2002, the individual tax return for 2001 filed by the petitioner's owner and the petitioner's bank account statements.

On August 30, 2004, the director denied the petition, finding that the petitioner's 2001 federal tax return shows a net income of \$46,662 and net current assets of \$(336,215), and therefore, did not establish that it had the ability to pay the proffered wage beginning on the priority date.

On appeal counsel asserts that with the gross receipts of \$1,188,695 and a net income of \$46,662, plus labor cost of \$399,609 paid, depreciation of \$15,000, and current assets of \$1,079,000 in 2001 the petitioner demonstrated its ability to pay the proffered wage. Counsel also claims that the petitioner is one of a group of four related S corporations, all of which are owned and controlled by Mr. [REDACTED] and the group's total net income of \$121,813 should be considered.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 submit the beneficiary's W-2 forms or any other evidence of the beneficiary's compensation from the petitioner although counsel claims that the beneficiary is working for the petitioner and paid with cash. However, the assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the petitioner has not established that it hired and paid the beneficiary the proffered wage or any part of it. Counsel advises to consider cost of labor as a part of the petitioner's ability to pay. However, in general, 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.

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 as the petitioner urges us to consider on appeal. 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). Counsel claims on appeal that the petitioner generated gross receipts in the amount of \$1,188,695. Counsel implies to consider the petitioner's gross receipts in determining its ability to pay the proffered wage. Counsel's reliance on the petitioner's gross receipts, depreciation, and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to officers in excess of the proffered wage is insufficient.

Counsel's reliance on depreciation in determining the petitioner's ability to pay 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. 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 evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 and 2002. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$114,469.30 per year from the priority date.

In 2001, the Form 1120S stated net income² of \$46,662.

In 2002, the Form 1120S stated net income of \$145,957.

Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the proffered wage, however, the petitioner established that its net income reflected on Line 21 of Form 1120S for 2002 was sufficient to pay the beneficiary the 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.³ 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 the total of a corporation's end-of-year net current assets and

² Ordinary income (loss) from trade or business activities as reported on Line 21.

³ 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.

the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. Counsel asserts in his brief accompanying the appeal that the petitioner's 2001 tax return clearly reflects total current assets of \$1,079,000. Counsel misinterprets the tax return and the analysis employed by CIS. Calculations based on the Schedule L's attached to the petitioner's tax return for 2001 yield that the petitioner had current assets of \$58,041 (cash of \$(13,251) on line 1 of Schedule L plus other current assets of \$71,292 on line 6) and current liabilities of \$394,256 (mortgages, notes, bonds payable in less than 1 year of \$75,658 on line 17 plus other current liabilities of \$318,598 on line 18), therefore, net current assets were \$(336,214) in that year. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage for the year 2001.

Therefore, 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 wages paid to the beneficiary, or its net income or net current assets. The petitioner had not established its ability in 2003 because of its failure to submit regulatory prescribed evidence for the year. The director's RFE dated April 29, 2004 expressly requested additional evidence to establish the petitioner's ability to pay the proffered wage as of April 9, 2001, the date of filing and **continuing to the present**. (emphasis added). The record before the director closed on July 26, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the federal tax return of the petitioner for 2003 should have been available as the most recent return. However, the petitioner did not submit its tax return for 2003, nor it explained why the tax return was not submitted. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax return. The 2003 tax return would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Counsel asserts on appeal that Mr. [REDACTED] owns a group of four corporations, i.e. the petitioner, [REDACTED], [REDACTED], and [REDACTED] with the group's total net income of \$121,813 and argues that the director failed to adequately consider the total net income of the group in determining the petitioner's ability 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." In the instant case, the petitioner is a separate and distinct legal corporation. Therefore, neither assets of Mr. [REDACTED] nor of the three corporations cannot be considered in determining the petitioner's ability to pay the proffered wage.

Counsel argues on appeal that the petitioner's monthly bank balances establish that it has the financial ability to pay the proffered wage. Counsel refers to decisions of the AAO dated April 17, 1995 and August 16, 1995 concerning balances in a petitioner's bank account. 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, unpublished 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). Counsel's reliance on the balance in the petitioner's bank account in the instant case is

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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel contends that the petitioner's financial situation is consistent with the seminal case of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). *Matter of Sonogawa* 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year in a framework of profitable or successful years for the petitioner.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by 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.