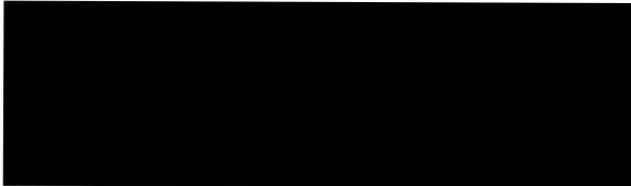


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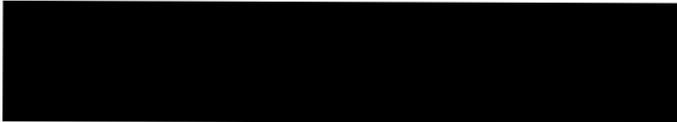
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FILE: WAC 04 132 52399 Office: CALIFORNIA SERVICE CENTER Date: MAY 04 2006

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

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 cursive script, appearing to read "Michael Wiemann".

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 an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Italian style. 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.

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. 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 February 4, 1999. The proffered wage as stated on the Form ETA 750 is \$17.85 per hour (\$37,128.00 per year). The Form ETA 750 states that the position requires three years experience.

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

With the petition, former 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; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on August 7, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested the petitioner's U.S. federal tax returns, annual reports or audited financial statements for 1999, 2000, 2001, 2002 and 2003. Also, the director requested California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees."

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted the above.

The director denied the petition on November 12, 2004, 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 the petitioner has established the ability to pay the proffered wage. Counsel asserts that *Matter of Sonogawa*, applies under the evidence presented. Also, counsel asserts that the "historical track record of profitability," cash on hand, officer's compensation, and expectations of profits all evidence the ability to pay the proffered wage.

Counsel has submitted the following documents to accompany the appeal statement: a letter from the owner of petitioner; a bank statement; an appraisal report; payments to corporate officers; a compiled financial statement; and, the ranking of the petitioner's business.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary. The petitioner paid the beneficiary \$7,708.75 in 2003; \$13,864.25 in 2002; \$17,837.25 in 2001; \$21,913.95 in 2000; and, \$4,768.00 in 1999. The petitioner has not paid the proffered wage of \$37,128.00 per 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. *Supra* 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 Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns<sup>1</sup> demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$37,128.00 per year from the priority date of February 4, 1999:

- In 1999, the Form 1120 stated a taxable income loss<sup>2</sup> of <\$63,995.00><sup>3</sup>.
- In 2000, the Form 1120 stated a taxable income loss of <\$12,703.00>.
- In 2001, the Form 1120 stated a taxable income loss of <\$41,206.00>.
- In 2002, the Form 1120 stated a taxable income loss of <\$8,356.00>.
- In 2003, the Form 1120 stated taxable income of \$23,618.00.

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 taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 1999 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.<sup>4</sup> 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 1999, petitioner's Form 1120 return stated current assets of \$9,919.00 and \$115,380.00 in current liabilities. Therefore, the petitioner had <\$105,461.00> in net current assets. Since the proffered wage is \$37,128.00 per year, this sum is less than the proffered wage.
- In 2000, petitioner's Form 1120 return stated current assets of \$3,000.00 and \$109,279.00 in current liabilities. Therefore, the petitioner had <\$106,279.00> in net current assets. Since the proffered wage is \$37,128.00 per year, this sum is less than the proffered wage.

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<sup>1</sup> The petitioner's taxable year is April 1 to March 31st.

<sup>2</sup> IRS Form 1120, Line 28.

<sup>3</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

<sup>4</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2001, petitioner's Form 1120 return stated current assets of \$8,844.00 and \$63,655.00 in current liabilities. Therefore, the petitioner had <\$54,811.00> in net current assets. Since the proffered wage is \$37,128.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of \$25,837.00 and \$63,956.00 in current liabilities. Therefore, the petitioner had <\$38,113.00> in net current assets. Since the proffered wage is \$37,128.00 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120 return stated current assets of \$36,724.00 and \$53,260.00 in current liabilities. Therefore, the petitioner had <\$17,000.00> in net current assets. Since the proffered wage is \$37,128.00 per year, this sum is less than the proffered wage.

Therefore, for the period 1999 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 his 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,<sup>5</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

The petitioner's owner in his letter dated December 14, 2004, stated that officer compensation and payments made noted on the tax returns as loans to shareholders are evidence that the petitioner has the ability to pay the proffered wage. The petitioner noted payments were made to the shareholders 1999 to 2002 to buy out the other shareholders' interests in the petitioner. These payments are not probative of the ability to pay the proffered wage. The funds used for the buy-outs are not available to pay the proffered wage. Further, the amount of officer compensation was not much greater than the proffered wage. That the officers would have accepted the remainder as compensation for their investment and efforts is not reasonable to believe. Such a premise needs to be established by competent evidence, and it does not exist in the record of proceeding. 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). The officers receiving the compensation were not the sole owner/stockholder or majority owner/stockholder, as the current sole shareholder stated that he bought the other shareholders out over a period of six years. The totality of other information in the record, principally the tax returns above examined, does not support the fact that the petitioner is a profitable enterprise.

Counsel asserts that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), applies under the evidence presented. Counsel contends that the "historical track record of profitability," cash on hand, and expectations of profits all evidence the ability to pay the proffered wage. Counsel includes among her contentions cash stated on Schedule "L" of the tax returns submitted. Correlating the cash amounts stated in counsel's contention with the petitioner's tax return for each year, it is clear that counsel is suggesting combining petitioner's taxable income each year with the cash also received by the business for that year as stated on Schedule "L" as current assets. CIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. To do so would be duplicative of petitioner's taxable income. Also, on Schedule "L" it is the net current asset figure that is important as calculated above. Again, counsel is disregarding the use of Schedule "L", that it is

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<sup>5</sup> 8 C.F.R. § 204.5(g)(2).

a balance sheet that shows both current assets and current liabilities. Therefore, the cash and other current assets are reduced as is calculated above to reach the net current asset figure.

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in an unprofitable period in 1999, 2000, 2001, 2002, and, insufficiently profitable in tax year 2003 to pay the proffered wage. For the four years examined years 1999 through 2002, there was a taxable income loss in each year of <\$63,995.00>, <\$12,703.00>, <\$41,206.00>, and <\$8,356.00>. For 2003 the petitioner made \$23,618.00 in profit that is insufficient to pay the proffered wage. The net current asset values for those years is consistently negative, <\$105,461.00>, <\$106,279.00>, <\$54,811.00>, <\$38,113.00>, and, <\$17,000.00.

*Matter of Sonegawa, Supra.* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 *Sonegawa* 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 *Sonegawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner. Counsel asserts that there is an expectation of business profits but the evidence submitted for five years of operations does not support this statement. By the evidence presented, the petitioner has not proven its ability to pay the proffered wage.

The petitioner states that he is willing to use his personal assets, and attaches the appraisal of his residence and personal bank savings to pay the proffered wage. Contrary to counsel's primary 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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 has submitted a compiled financial statement as of August 31, 2004 for the business to show the ability to pay the proffered wage. A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business

are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in CIS deliberations in these matters. The statements presented were not audited.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the five corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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.