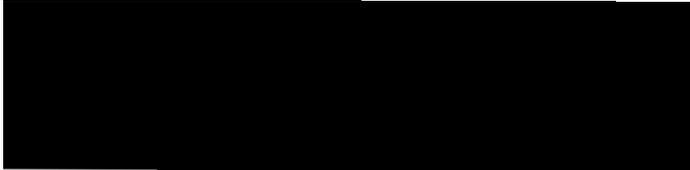


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U.S. Citizenship
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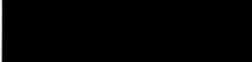
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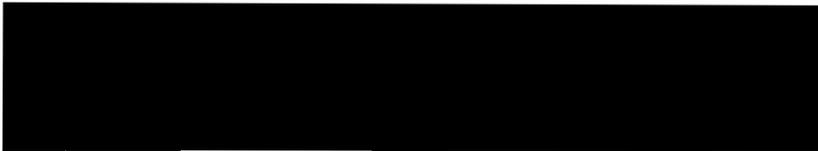
Petitioner:

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.

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a Montessori school. It seeks to employ the beneficiary permanently in the United States as a first grade Montessori teacher. 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 petitioner's business was established in 1979, and, at the time the petition was prepared, employed 14 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 8 C.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 January 30, 2002.¹ The proffered wage as stated on the Form ETA 750 is \$18.06 per hour (\$37,564.80 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief.

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; an explanatory letter dated September 17, 2003; letters from the petitioner's bank dated September 12, and September 16, 2003;² an undated "Certificate of Account Confirmation" for an account owned by [REDACTED] U.S. Internal Revenue Service Form 1120S tax returns³ for 2000, 2001, and 2002; 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 issued a notice of intent to deny the petition. The director requested on December 27, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. Specifically, the director requested the petitioner's U.S. federal tax returns for 2001 and 2002 with schedules as well as the beneficiary's W-2 Wage and Tax Statements for 2002 and 2003.

The director also requested annual reports and/or audited financial statements that may establish the petitioner's ability to pay.

In response to the request for evidence, as already stated in the director's decision in the matter, counsel submitted copies of the following documents: an explanatory letter dated January 24, 2005 from counsel stating that ownership of the petitioner had changed on November 1, 2003; a bill of sale; two Form W-2 Wage and Tax statements for years 2002 and 2003; a U.S. Internal Revenue Service (IRS) Form 1120S tax return for 2003; and, documentation already submitted in this matter concerning [REDACTED]'s credit line and bank balances.

As a preface to the following discussion, successor in interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the

¹ It has been approximately four years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² The September 12, 2003, letter indicated that [REDACTED] has a \$25,000.00 credit line with the bank. The September 16, 2003, indicated that [REDACTED] has a money market account with the bank. No evidence was submitted that these two accounts were corporate business accounts.

[REDACTED] is noted on the returns as the taxpayer. On the I-140, the petitioner is noted as [REDACTED] c. as well as the employer on the labor certification.

petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

According to the documents submitted, the new owner of the business is now [REDACTED], and, that the sale of the business occurred on November 1, 2003. Counsel contends that [REDACTED] is the successor-in-interest to [REDACTED]. While the business sale transaction document, the bill of sale, is on its face erroneous, we will accept counsel's statement since it is supported with other documentary evidence. According to the bill of sale dated November 1, 2003, [REDACTED] is the seller, and, [REDACTED] is the buyer. Neither of these two corporations has been identified in the record. The new owner of the business is [REDACTED] according to his letter dated January 13, 2005.

The director denied the petition on January 31, 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 the petitioner may submit additional evidence to demonstrate that the petitioner has sufficient funds and financial resources to pay the proffered wage. Counsel cites several non-precedent cases in support of this contention. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS 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). The cases cited are non-precedent decisions.

Counsel states on appeal that since the director only referred to the priority year which is 2002, counsel may only (and counsel did only submit) submit evidence to prove the petitioner's ability to pay the proffered wage in year 2002. This is incorrect as discussed below.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴ Therefore, we have examined the record of proceeding and all evidence submitted by counsel that included evidence for years after 2002. The petitioner has the burden to prove in this matter that it has the continuing ability to pay the proffered wage from the priority date in 2002.

Counsel's Assertions on Appeal

Counsel, then contends on appeal, that since the director is not objecting to the petitioner's line of credit or bank account balance evidence submitted, by not expressly objecting to that evidence that CIS has effectively

⁴ 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).

“accepted those sources of funds.” Counsel’s contention that a preponderance of evidence⁵ includes a provision for negative approval by CIS for lack of objection to all evidence submitted by the petitioner in the director’s decision is incorrect. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Further, counsel’s reliance on the balances in the owner of petitioner’s bank accounts and certificate of deposit 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 will be considered below in determining the petitioner’s net current assets. Fourth, it is the petitioner corporation’s, and not the owner’s assets, that are evidence of the ability to pay the proffered wage. The bank account, certificate of deposit and credit line evidence submitted are not in the corporate name, but the owner of the corporation’s own name. Further, the 2002 tax return submitted does not reflect a cash balance of \$100,000.00 as implied by counsel. The petitioner corporation had a negative <\$1,966.62> in cash at year’s end in 2002.

Contrary to counsel’s assertion, Citizenship and Immigration Services (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 states on appeal that the line of credit secured by [REDACTED] as an additional, or alternative method to demonstrate its ability to pay. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner’s net income by adding in the corporation’s credit limits, bank lines, or lines of credit, especially, as in this case, secured by the owner, not the petitioner. A “bank line” or “line of credit” is a bank’s unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron’s Dictionary of Finance and Investment Terms*, 45 (1998).

Counsel states on appeal that the petitioner has been in business for approximately 15 years and the fact that it was purchased is evidence of its continued viability and profitability. According to statements in the record of proceeding, the new owner of the business is [REDACTED]. [REDACTED] in his letter dated January 13, 2004, stated the business suffered a loss in 2003, and, although there was sufficient time to

⁵ See INA § 291, 8 U.S.C. § 1361; 20 C.F.R. § 656.2. See also *Matter of Chawathe*, A 74 254 994 (AAO Jan. 11, 2006).

present tax returns for 2004, no tax return was submitted to show that the business, as counsel contends, became profitable after that loss.

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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the period of years 2002 and 2003 was an uncharacteristically unprofitable period for the petitioner.

The Petitioner's Financial Information and the Ability to Pay the proffered Wage

Counsel has submitted a legal brief and copies of the documents already submitted and mentioned above to accompany the appeal statement.

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 since March 2001. Three Form W-2 Wage and Tax statements were submitted for years 2001, 2002 and 2003 stating wages paid by the petitioner to the beneficiary of \$9,550.00, \$15,750.00 and \$15,750.00 respectively.

In the record of proceeding is a letter from the petitioner dated June 23, 2003, that indicates on that date the petitioner employed the beneficiary in the proffered position at \$18.06 per hour. Also, Surangi Waidyaradne, the purchaser of the business, according to his letter dated January 13, 2005 stated that he is continuing the beneficiary's employment and increasing her salary to \$37,565.00.

As set forth below, the petitioner must demonstrate that it is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date.

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 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. *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 returns⁶ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$37,564.80 per year from the priority date of January 30, 2002:

- In 2002, the Form 1120S stated a loss⁷ of <\$861.06>. The Schedules K⁸ also stated a loss of <\$43,053.00>.
- In 2003, the Form 1120S stated a loss of <\$21,147.06>. The Schedules K also stated a loss of <\$21,147.06>.

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.

⁶ Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. In tax years 2000 and 2001, the Form 1120S stated net income of \$22,258.69 and \$18,424.86 respectively. The Schedule K for 2000 stated net income (Line 1) of \$23,258.69. The Schedule K for 2001 stated net income (Line 1) of \$9,212.43. **There are Schedule "K" forms submitted with petitioner's return for the shareholder owner.** If a "S" corporation has income from multiple sources other than trade or business, that income is stated on Schedule "K." Similarly, additional deductions (i.e. charitable deductions, Section 179 expense deductions, and additional depreciation⁷) and income may be included on Schedule "K." In most instances, the apportioned net income of the petitioner as reported on Line 21 is further reduced by deductions taken on each shareholders Schedule "K." While income or loss is "reported out" from petitioner through the Schedule "K" statements, the income can be, and is in the present case, reduced by additional deductions. Therefore there is no advantage to petitioner through the use of Schedule "K" income or loss figures to determine the ability to pay the proffered wage.

⁷ IRS Form 1120S, Line 21 that states the petitioner's ordinary business income or loss. 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.

⁸ 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, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

- In 2002, the Form 1120S stated a loss of <\$861.06>. The petitioner paid the beneficiary \$15,750.00 in 2002. The proffered wage is \$37,564.80 per year. The sum of the taxable income loss and the wages paid is less than the proffered wage. Consideration of wages paid would not alter this conclusion.
- In 2003, the Form 1120S stated a loss of <\$21,147.06>. The petitioner paid the beneficiary \$15,750.00 in 2003. The proffered wage is \$37,564.80 per year. The sum of the taxable income and the wages paid is less than the proffered wage. Consideration of wages paid would not alter this conclusion.

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 or the difference between wages actually paid and the proffered wage, at any time between the years 2002 through 2003 for which the petitioner's tax returns are offered for evidence. Also, in the subject case the petitioner has not paid the beneficiary the proffered wage in tax years 2002 and 2003 from an examination of the evidence submitted found in the record of proceeding.

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.⁹ 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 1120S 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 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2002, petitioner's Form 1120S return stated current assets of <\$1,966.62> and \$23,161.20 in current liabilities. Therefore, the petitioner had <\$25,127.82> in net current assets. Since the proffered wage is \$37,564.80 per year, this sum is less than the proffered wage. In 2003, petitioner's Form 1120S return stated current assets of \$3,356.00 and \$43,868.00 in current liabilities. Therefore, the petitioner had <\$40,512.00> in net current assets. Since the proffered wage is \$37,564.80 per year, this sum is less than the proffered wage.

Therefore, 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.

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

⁹ 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.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the 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.