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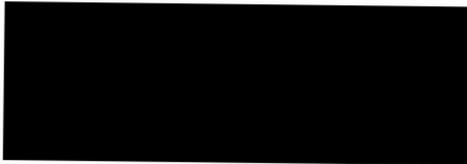
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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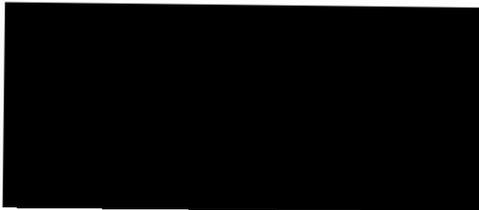
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IN RE: Petitioner:
Beneficiary:



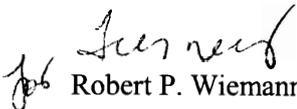
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner, [REDACTED] is a retailer of furnishings and furniture. It seeks to employ the beneficiary permanently in the United States as a warehouse manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 August 13, 2004, former counsel appealed the director's decision and subsequently provided a brief and additional evidence, maintaining that the petitioner had established its continuing financial ability to pay the proffered wage. The director sent a letter to counsel, dated November 8, 2004, stating that counsel's response was received after the denial was issued and advised counsel that he may make a motion to reopen and reconsider. Counsel responded by filing a motion to reopen and reconsider questioning the meaning of the director's correspondence since the response to the director's request for additional evidence had been timely submitted.

In view of these exchanges, and in the interest of justice, the AAO requested current counsel to submit copies of all materials filed in connection with this appeal so that a decision may be rendered on the merits based on the entire record.

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) provides:

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. 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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 20,

2001. The proffered wage as stated on the Form ETA 750 is \$21.61 per hour, which amounts to \$44,948.80 per annum. On the Form ETA 750B, originally signed by the beneficiary on April 18, 2001, the beneficiary claims to have worked for the petitioner since November 2000. It is noted that the biographic questionnaire (G-325A) submitted with the beneficiary's application for permanent residence also reflects the same dates of employment with the petitioner. The G-325A is signed but not dated by the beneficiary, but accompanied the application for permanent residence, which was filed on May 27, 2003.

Part 5 of the preference petition, filed on May 27, 2003, indicates that the petitioner was established in 1998, currently employs sixteen workers, has a gross annual income of \$1,600,000, and an annual net income of \$17,000.

In support of its continuing ability to pay the proffered wage, the petitioner initially submitted a partial copy of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2002. It reflects that the petitioner files its taxes using a standard calendar year. The 2002 return contains the following information:

	2002
Ordinary Income ¹	\$ 16,286
Current Assets (Sched. L)	\$ 97,322
Current Liabilities (Sched. L)	\$ 53,514
Net Current Assets	\$ 43,808

Besides net income, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as an alternative method to demonstrate its ability to pay the certified wage. Net current assets are the difference between a petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on line(s) 1 through 6 of Schedule L of the federal tax return. The current liabilities are shown on line(s) 16 through 18 of Schedule L. 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.

On April 20, 2004, the director issued a request for additional evidence of the petitioner's continuing ability to pay the proffered salary beginning on the priority date of April 20, 2001. She specifically requested that the petitioner provide a copy of its 2001 federal income tax return and advised that as an alternative, the petitioner might submit an annual report for 2001. The director further requested a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001 if the petitioner employed him during that period.

¹ For the purpose of this review, ordinary income will be treated as net income.

² 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.

In response, the petitioner, through former counsel (hereinafter "counsel"), provided copies of the petitioner's 2001 and 2003 corporate tax returns. They reflect the following:

	2001	2003
Ordinary Income ³	\$ 8,055	\$ 44,316
Current Assets (Sched. L)	\$ 57,299	\$154,176
Current Liabilities (Sched. L)	\$ 38,184	\$ 60,407
Net Current Assets	\$ 19,115	\$ 93,769

The petitioner also provided copies of the Internal Revenue Service (IRS) printouts reflecting the filing of the petitioner's quarterly federal tax returns for the quarters ending June 2001 through December 2003, as well as the IRS printouts of the petitioner's corporate income tax return for 2001 and 2002. A copy of the beneficiary's 2003 W-2 was also submitted. It shows that the petitioner paid \$12,045 in wages to the beneficiary. Finally, the petitioner submitted copies of the 2001-2003 federal income tax returns for another corporation identified as [REDACTED] which reveals the same shareholders as those who are named on the petitioner's tax returns, but which was incorporated after the petitioner and which uses a different employer identification number.

On July 14, 2004, the director denied the petition. She concluded that the petitioner had failed to establish its continuing financial ability to pay the certified salary beginning on the priority date of April 20, 2001. She determined that neither the petitioner's 2001 net income of \$8,055, nor its net current assets \$19,115 demonstrated the level of financial resources necessary to pay the proffered wage of \$44,948.80 during that year.

On appeal, counsel resubmits copies of the tax returns, IRS printouts, and a copy of the beneficiary's 2003 W-2, previously provided to the record, as well as additionally offering a copy of a local mercantile tax return and business license application reflecting its 2003 local tax obligations. Counsel recounts the procedural history of the case and describes the petitioner's recruitment effort of other available workers and asserts that the evidence establishes that the petitioner has demonstrated its ability to pay the proffered wage.

Counsel also relies upon a copy of a letter, dated August 11, 2004, from an accountant, [REDACTED], CPA, which is offered on appeal. Mr. [REDACTED] states that the two shareholders of the petitioner bought out the other two shareholders of [REDACTED] for \$30,000 in 2001. He maintains that but for this purchase, the money would have been available to cover the beneficiary's proposed wage, and that with the addition of the petitioner's 2001 net income of \$8,055, the depreciation of \$7,565, and including the \$12,045 actually paid to the beneficiary as wages, sufficient funds would have been available to pay the full wage offer. Mr. [REDACTED] concludes that with the increase in business in 2001, the company had the need and resources to employ the beneficiary.

Counsel's assertions are not persuasive. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible documentary evidence that it employed the beneficiary at a

³ For the purpose of this review, ordinary income will be treated as net income.

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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner's ability to pay the proffered wage will be deemed to be established for that period. In this matter, no evidence that the petitioner has employed the beneficiary has been provided, other than a Form W-2 indicating that the petitioner paid the beneficiary a portion of the proffered wage, namely \$12,045, during 2003.

It is noted that Mr. [REDACTED] erroneously identified the beneficiary's wages of \$12,045 as representing his compensation in 2001, rather than 2003 as the record reveals. It is noted that the director's request for additional evidence specified the beneficiary's 2001 W-2, but the petitioner responded by providing the W-2 for 2003. That said, the director's request for additional evidence should have stipulated that any relevant period that the petitioner employed the beneficiary from 2001 onward should be documented with the provision of W-2s and/or 1099s reflecting such compensation so that appropriate consideration may be given to those amounts.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, as discussed above, CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses that are already shown as allocated on the tax return. Counsel cites no legal authority in support of the contention that the revision of such figures should be considered by adding designated amounts back to the net income or to the asset allocation shown on Schedule L of the petitioner's tax return. While Mr. [REDACTED] hypothesis that if the purchase had not taken place the purchase funds could have been used to support the ability to pay the proffered wage, it remains that they represent expended funds. In examining a petitioner's ability to pay a beneficiary, as well established by judicial precedent, CIS may rely on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage. *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*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net taxable 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.

It is noted that the depreciation expense taken by a taxpayer recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents an real expense of doing business, whether it is spread over more years or concentrated into fewer. The court in *Chi-Feng Chang* noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 536.

It is further noted that as a corporation, the named petitioner is a separate and distinct legal entity from its shareholders or other corporations such as [REDACTED] so the 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. The debts of the corporation are not the debts of the shareholders or owners. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). Absent direct evidence of pre-existing corporate or contractual obligations which establish that [REDACTED] Inc., is liable for payment of wages on behalf of the petitioner, the financial information of [REDACTED] will not be considered. As the named corporate petitioner in the visa petition, the petitioner must establish its own financial ability to pay the proffered wage of \$44,948.80 per year. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) affirmed the rejection of the offer of the petitioner's director to personally pay the proffered wage stating "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 this case, while the petitioner's tax return for 2003 demonstrates that its net current assets of \$93,769 could cover the certified wage during 2003, as the record currently stands, neither the petitioner's net income of \$8,055 in 2001 or \$16,286 in 2002 were sufficient to pay the proposed wage offer. Similarly, it is noted that the petitioner's net current assets of \$19,115 and \$43,808 in 2001 and 2002, respectively, were short of the necessary funds to pay the proffered wage.

In some cases, pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the petitioner's ability to pay the certified wage may be based on the expectations of increasing business. *Matter of Sonegawa* may be applicable where the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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. In this case, three income tax returns showing increasing but modest net incomes. As the record currently stands, it cannot be concluded that this represents a framework of profitability analogous to that discussed in *Sonegawa* or that the petitioner has demonstrated that such unique business circumstances exist in this case, which parallel the facts set forth in that case.

As noted above, the case will be remanded for the purpose of requesting evidence of payment of wages to the beneficiary. The petitioner may elect to provide additional evidence relevant to its continuing ability to pay the proffered wage. It is further noted that one of the petitioner's principal shareholders and the beneficiary bear the same family name. While this may be coincidental, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). The director should inquire into this matter to determine whether any familial or financial or other connection exists between the beneficiary and the petitioner or its shareholders. If circumstances warrant, an advisory opinion from the DOL should be solicited before making a decision. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986).⁴

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation consistent with this opinion and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

⁴ In *Matter of Silver Dragon Chinese Restaurant*, the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful, job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.