

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

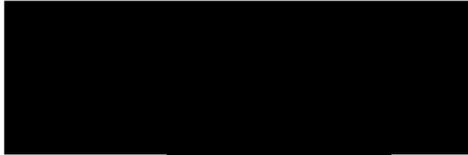
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



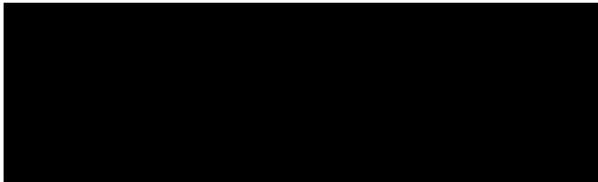
FILE: [REDACTED] WAC 06 035 53197

Office: TEXAS SERVICE CENTER Date: OCT 01 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

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 *fr*
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a wardrobe designer for men and women. It seeks to employ the beneficiary permanently in the United States as a tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the visa petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 18, 2006 denial, the single issue in this case is whether or not the petitioner established its continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$15.25 per hour or \$31,720 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's brief, a copy of the petitioner's 2004 Form 1120, U.S. Corporation Income Tax Return, a copy of the petitioner's 2005 Form 1120S, U.S. Income Tax Return for an S Corporation, previously submitted copies of the petitioner's 2001 through 2003 Forms 1120, a copy of the 2003 Form W-2, Wage and Tax Statement, issued by the petitioner on behalf of the petitioner's owner, a copy of the 2005 Form W-2, issued by the petitioner on behalf of the petitioner's owner, a partial copy of the 2005 Form 1040, U.S. Individual Income Tax Return, for the petitioner's owner, a letter, dated May 12, 2006, from [REDACTED] EA, of [REDACTED] and Associates, Accounting Network & Wasson Income Tax Service, a letter, dated May 13, 2006, from the petitioner's owner, and a copy of an AAO non-precedent decision. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2004 Forms 1120 reflect a taxable income before net operating loss deduction and special deductions or net incomes of -\$5,456, \$19,699, -\$29,959, and \$31,759, respectively. The petitioner's 2001 through 2004 Forms 1120 also reflect net current assets of -\$8,633, \$13,868, -\$38,693, and \$179, respectively.

The petitioner's 2005 Form 1120S reflects an ordinary income or net income of \$635,863 (from Schedule K) and net current assets of \$335,018.

The 2003 and 2005 Forms W-2, issued by the petitioner on behalf of its owner, reflect wages earned by the petitioner's owner of \$1,042,000 in 2003 and \$1,005,237.50 in 2005.

The partial copy of the 2005 Form 1040 for the petitioner's owner reflects an adjusted gross income of \$1,747,988.

The letter, dated May 12, 2006, from Saraj Sharma states:

The corporate tax returns show payment of executive compensation in the amount of \$825,000 for 2001, \$950,000 for 2002, and \$1,480,000 for 2004, which substantially exceeds the offered wage. Other salaries and wages paid for this period were \$87,424 for 2001, \$34,000 for 2002, \$1,393,000 for 2003, \$57,928 for 2004, and \$99,006 for 2005.

The corporation's ability to pay the offered wage of \$31,720 per year is reflected by its payment of salaries substantially exceeding that amount. The sole shareholder of the corporation is [the petitioner's owner]. It is the corporation's regular accounting practice to pay the sole shareholder as much compensation as possible to minimize taxable income to the corporation and avoid double taxation. For that reason, the corporation's ability to pay the wage offered to [the beneficiary] may not be apparent in the net income shown in the tax returns.

For all the above reasons, it is my conclusion that the corporation's tax returns for the years 2001, 2002, 2003, 2004, and 2005 reflect sufficient financial ability to pay [the beneficiary] the offered salary of \$31,720 per year.

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 letter, dated May 13, 2006, from the petitioner's owner states:

I am the sole shareholder of the corporation. It has been the corporation's regular accounting practice to pay the sole shareholder as much compensation as possible to minimize taxable income to the Corporation and avoid double taxation. For that reason, the corporation's ability to pay the wage offered to [the beneficiary] may not be apparent in the net income shown in the tax returns. [The petitioner] has been taxed as a "C" corporation for income tax purposes. If I wished, I could have reduced my compensation in order for the corporation to pay [the beneficiary's] salary. . . .

For all the above reasons, the corporation has sufficient financial resources to pay the salary offered [the beneficiary] of \$31,720 per year for the position of Custom Garment Designer.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$31,720 based on its officer compensation and on its expectation of increases in business and profits. Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in support of his contention.

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

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed on April 16, 2001, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W2 or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, for any of the pertinent years (2001 through 2005). Therefore, the petitioner has not established that it employed the beneficiary from the priority date of April 17, 2001 and continuing to the present.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that

CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *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.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate that its net incomes in 2001 through 2004 were -\$5,456, \$19,699, -\$29,959, and \$31,759, respectively. The petitioner could not have paid the proffered wage of \$31,720 from its net income in 2001 through 2003. However, the petitioner could have paid the proffered wage of \$31,720 from its net income in 2004.

In 2005, the petitioner filed its tax returns as an "S" corporation. 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 the instant case, the petitioner's 2005 net income from Schedule K was \$635,863. The petitioner could have paid the proffered wage of \$31,720 from its net income in 2005.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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.² 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 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. The petitioner's net current assets in 2001 through 2005 were -\$8,633, \$13,868, -\$38,693, \$179, and \$335,018, respectively. The petitioner could not have paid the proffered wage of \$31,720 in 2001 through 2004 from its net current assets, but could have paid the proffered wage of \$31,720 from its net current assets in 2005. It is noted that the petitioner has already demonstrated that it had sufficient funds to pay the proffered wage in 2005 from its net income.

In light of the above, the petitioner's net income or net current assets are insufficient in 2001 through 2003. Thus, the petitioner must demonstrate that other funds were available in those years to pay the proffered wage of \$31,720.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage of \$31,720 based on its officer compensation and on its expectation of increases in business and profits. Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in support of his contention.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120, U.S. Corporation Income Tax Return, and on Form 1120S, U.S. Income Tax Return for an S Corporation. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock. According to the petitioner's 2001, 2002, and 2003 IRS Forms 1120 Schedule E (Compensation of Officers), [REDACTED] elected to pay himself \$825,000, \$950,000, and \$0, respectively. In 2003, the Form W-2 for [REDACTED] shows wages issued to [REDACTED], by the petitioner, of \$1,042,000. The total salaries and wages paid in 2003 include the amount paid to [REDACTED] of \$1,042,000 as represented on his Form W-2. We note here that the compensation received by the company's owner during these years were not fixed salaries and amounted to a minimum of \$825,000 each year.

CIS has long held that it 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 the present case, however, counsel is not suggesting that CIS examine the personal assets of the petitioner's owner, but, rather, the financial flexibility that the employee-owner has in setting his salaries based on the

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.

profitability of the corporation. Clearly, the petitioning entity is a profitable enterprise for its owner. It is noted that the corporation earned a gross profit of \$1,138,938 in 2001, \$1,286,737 in 2002, \$1,835,341 in 2003, \$1,973,200 in 2004, and \$914,408 in 2005 (August 1, 2005 through December 31, 2005). We concur with the arguments presented by counsel on appeal. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owner confirms that the job offer is realistic and that the proffered salary of \$31,720 can be paid by the petitioner.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

While the petitioner has overcome the director's basis of denial, the petition is not approvable on the record as it now stands.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(ii) *Other documentation* – (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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is April 17, 2001.

Citizenship and Immigration Services (CIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, 1015, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess two years of experience in the job offered of a tailor. Block 15 does not state any additional requirements.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of tailor must have two years of experience in the job offered.

In the instant case, counsel claims to have included a letter verifying the beneficiary previous experience with the initial submission of the visa petition. However, that letter is not in the record of proceeding, and it is noted that the director did not request this evidence. Therefore, the petitioner has not established that the beneficiary met the experience requirements of the labor certification at the time of filing the visa petition.

The director must afford the petitioner reasonable time to provide evidence that the beneficiary meets the requirements of the labor certification to include a letter from the beneficiary's prior employer that meets the regulations at 8 C.F.R. § 204.5(l)(3)(ii)(A). The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's April 18, 2006 decision is withdrawn. The petition is remanded to the director to be adjudicated on its merits and for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.