U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

JUN 15 2004

FILE: EAC 02 211 50166 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a textile import/export firm. It seeks to employ the beneficiary permanently in the United States as a production manager. As required by statute, the petition is accompanied by an individual labor certification, approved by the Department of Labor. The director determined that the petitioner had failed to establish its continuing ability to pay the proffered salary as of the visa priority date.

On appeal, the petitioner, through counsel, asserts that the director erred in evaluating the petitioner's financial ability to pay the beneficiary's proffered wage.

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 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) 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . 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)].

Eligibility in this matter is based, in part, upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is February 22, 1999. The beneficiary's salary as stated on the labor certification is $91,458 per annum, based on a 40-hour week. The Immigrant Petition for Alien Worker (I-140) indicates that the petitioner was established in 1994 and currently has five employees. Form ETA 750, Part B, signed by the beneficiary, reflects that he has worked as a production manager for the petitioner since March 1997. The record also indicates that the petitioner is organized as a corporation.

The I-140 was filed on June 6, 2002. The petitioner initially submitted no evidence of its ability to pay the proffered wage. On December 23, 2002, the director requested additional evidence to support the petitioner's ability to pay the beneficiary's annual wage offer of $91,458 beginning as of "the date the ETA-750 was filed, and continuing to the present." The director then advised the petitioner that the "evidence should be in the form of a U.S. federal income tax return, with all schedules and attachments, for [the petitioner's] business for the year of filing." The director instructed the petitioner to submit copies of the beneficiary's Wage and Tax Statements (W-2s) if the petitioner employed the beneficiary, as well as evidence establishing the beneficiary's qualifying work experience and educational credentials.

Relevant to the petitioner's ability to pay the beneficiary's wage, counsel's response included a copy of the petitioner's 1999 corporate federal tax return. No other financial information for any other year was submitted. It is noted that even if the petitioner's evidence had established its ability to pay the proffered wage in 1999, absent any other proof establishing the petitioner's financial ability to pay the proffered wage in subsequent years, the petition would not be approvable. It is also noted that the director did advise the petitioner that the evidence should reflect the petitioner's ability to pay the proffered wage from the priority date and "continuing to the present." The regulation at 8 C.F.R. § 103.2(b)(14) provides that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

The petitioner's Form 1120, U.S. Corporation Income Tax Return for 1999 reflects that the petitioner uses a standard calendar year to file its return. Schedule K of the petitioner's 1999 tax return further indicates that there are two 50% shareholders of the petitioning corporation who also receive compensation as officers. As one of these officers, the beneficiary received $24,000 in 1999. The other officer, Harun A. Bilecek, identified on the I-140 as the President of the petitioning business, received $33,028 in 1999.

The petitioner's 1999 corporate tax return also reflects that it had gross receipts or sales of $1,512,959, $57,028 in total officers' compensation, $4,116 as salaries and wages, and declared a taxable income before net operating loss deduction (NOL) and special deductions of $3,996. Schedule L shows that the petitioner had $213,494 in current assets and $177,434 in current liabilities, resulting in net current assets of $36,060. Net current assets identify a petitioner's liquidity as of the end of the tax year as reflected on Schedule L of a corporate tax return. CIS will consider net current assets, as set forth on the Schedule L balance sheet, in reviewing a petitioner's ability to pay a beneficiary's proposed wage offer because it represents the level of cash or cash equivalents that would reasonably be available to pay the proffered wage.

The director denied the petition, determining that the evidence failed to establish that the petitioner had the ability to pay the proffered wage. The director noted that the petitioner's 1999 corporate tax return failed to show that either the petitioner's net income of $3,996 or its net current assets of $36,060 could cover the beneficiary's proposed salary of $91,458. The director also noted that the beneficiary's payment of $24,000 as a corporate officer is $67,458 less than the proffered salary. He additionally concluded that this shortfall could not be met by either the petitioner's net income or its net current assets and that the petitioner had submitted no other evidence in support of its ability to pay the proffered wage.

On appeal, counsel offers several different interpretations of the petitioner's ability to pay the proffered wage. She submits a letter, dated March 4, 2003, from [redacted] a certified public accountant. Mr. Kurtner, referencing different figures reflected on Schedule L of the petitioner's 1999 corporate tax return, states that a combination of such amounts such as shareholder loans of $18,522 and unappropriated retained earnings of $9,821, would increase the petitioner's net worth sufficiently to establish its ability to pay the beneficiary's proposed salary. Counsel also submits a copy of an agreement executed in December 1998, between the petitioner and "[redacted]" enabling the petitioner to acquire [redacted] accounts receivables. Counsel asserts that these accounts receivables, reflected as $195,325 at the end of 1999, would have been available to be treated as a guarantee for a substantial line of credit. Counsel also claims that if the petitioner's inventory of samples were liquidated, it would provide additional funds to pay the proffered wage. Counsel additionally maintains that the President of the petitioning business could borrow against one of his individual credit cards to support the petitioner's ability to pay the beneficiary's proffered wage. A partial copy of a First USA Bank credit card statement is submitted on appeal. It doesn't identify the account holder's name. Counsel's assertions are not persuasive.

At the outset, it is noted that in reviewing a 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. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's

corporate income tax returns, rather than on the petitioner's gross income. The court refused to consider income before expenses were paid. 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 Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983); *Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989).

In this case, as determined by the director, the petitioner's declared net income of $3,996, as stated on its 1999 federal tax return, was well short of the beneficiary's proffered salary of $91,458. Nor could it cover the difference between what the beneficiary received as officer compensation and the proffered salary. The petitioner's net current assets, as shown on Schedule L of its 1999 tax return, were also insufficient to cover the beneficiary's proposed salary or even the $67,458 difference between the actual compensation paid and the proffered wage. It is further noted that the court in *Sitar v. Ashcroft,* WL 22203713 (D. Mass Sept. 18, 2003), in finding that a petitioner had failed to establish its ability to pay a beneficiary's proffered salary, concluded that [CIS] need not examine unappropriated retained earnings as part of the evaluation of the petitioner's financial status.

With respect to the personal assets of an individual director of a petitioning business, the *Sitar* court stated that "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." *Id.*at *3. This relates to the basic principle that corporations are separate and distinct legal entities from their owners and shareholders. Thus, 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. *See Matter of Aphrodite Investments, Ltd.,* 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel,* 17 I&N 631 (Act. Assoc. Comm. 1980).

Counsel's assertion that the petitioner's assets assure a business line of credit available from a lending institution to pay the proffered salary is also unconvincing. It may give some indication of a petitioner's creditworthiness, but it also represents an obligation that must be repaid if used as an additional cash resource. It is essentially a lending institution's unenforceable commitment to make a loan up to a specified maximum amount for a specified time period. Comparable to the limit on a credit card, CIS will not treat a line of credit as cash or as a cash asset, as it represents a potential increase in a petitioner's liabilities as a means of paying the proffered wage. Similarly, the claim that the petitioner's trade receivables of $195,325 would specifically guarantee or secure a substantial line of credit or loan is also unpersuasive, as any secured loan also encumbers the collateral. Finally, consideration of these accounts receivable has already been factored into the calculation of the petitioner's net current assets as disclosed on Schedule L of the petitioner's 1999 tax return.

As to the annual liquidation of samples held by the petitioner in order to provide an additional cash resource, as postulated in a letter from Ardie Ulukaya, a president of another import/export firm in the New York garment district, one may question what expense must be incurred in order to generate a sustainable resource. With the exception of the 1999 tax return, it is noted that the petitioner has offered little evidence consistent with the regulatory requirements. The regulation at 8 C.F.R. § 204.5(g)(2) requires audited financial statements, federal tax returns or annual reports as probative and competent evidence of a petitioner's ability to pay the proffered wage. The regulation also requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage. (Emphasis added). In this case, as noted previously, the record contains no evidence

relating to any subsequent years that would persuasively establish the petitioner's continuing ability to pay the proffered wage.

Following a review of the petitioner's federal tax return, as well as further argument and evidence presented on appeal, it is concluded that the petitioner has not convincingly established that it has had a continuing ability to pay the proffered wage as of the visa priority date.

Beyond the decision of the director, it is noted that the approved labor certification requires that the alien beneficiary have a baccalaureate degree in economics, commerce, business, or a related field. Although a credential evaluation is contained in the record, there are no copies of school transcripts in this file, which were specifically requested by the director on December 23, 2002. As noted above, the failure to submit requested evidence can result in the denial of the petition. *See* 8 C.F.R. § 103.2(b)(14).

The record of proceeding in this case also raises a fundamental question as to whether the petition is based on a bona fide job offer.

As noted above, the petitioner's 1999 corporate tax return discloses that the beneficiary holds a 50% ownership interest in the petitioning business.[1] In *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in the 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 Dept. 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.

In *Hall v. McLaughlin,* 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his application for labor certification. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

Although this appeal is being dismissed on other grounds, it is noted that the facts revealed by the record reflecting the beneficiary's ownership interest in the petitioning business may potentially represent an impediment to the approval of an employment based visa petition filed by this petitioner on behalf of this alien that is based on a labor certification. Further investigation may be warranted, including consultation with 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.

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[1] According to the New York State Division of Corporations' website, the beneficiary is actually the CEO or Chairman.