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

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 01 2004

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.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

The petitioner is a general contracting firm. It seeks to employ the beneficiary permanently in the United States as a cost estimator. 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 appeal, counsel submits a brief and additional evidence.

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:

> *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 March 19, 2001. The proffered wage as stated on the Form ETA 750 is $15.00 per hour, which amounts to $31,200 annually. In Part 5 of the visa petition, the petitioner claims to have been established in 1987, have two employees, earn a gross annual income of $725,000, and have a net annual income of $19,676. Part B of the ETA 750, signed by the beneficiary, does not indicate that the petitioner has employed the beneficiary.

As evidence of its ability to pay the beneficiary's proposed wage offer of $31,200 per year, the petitioner initially submitted a copy of the sole proprietor's U.S. Individual Income Tax Return for 2000 and 2001. The 2000 tax return reflects that the sole proprietor declared no dependents and -$3,162 as his adjusted gross income, including a business net income of $6,130. The 2001 tax return indicates that the sole proprietor reported no dependents and $18,286 as his adjusted gross income, including a business net income of $19,676. The petitioner included copies of four checks issued to the beneficiary in May, June, and August of 2002. It is not clear what these

payments are supposed to represent. The petitioner also submitted a copy of a construction proposal, dated August 8, 2002, for

On April 14, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered salary. The director specifically requested that the petitioner provide copies of its signed federal tax returns, audited financial statements or annual reports for 2002, copies of its state quarterly wage reports for the last four quarters, and a summary of the sole proprietor's monthly household living expenses.

In response, the petitioner[1], through counsel, submitted a copy of Form 1120S, U.S. Income Tax Return for an S Corporation for 2002 that was filed on behalf of "PLD Construction Company, Inc (PLD)." The street address on the tax return is the same as that given for the petitioner on the visa petition, except that the suite number is "1," instead of "13." The identifying information on the first page of the tax return indicates that the entity incorporated March 26, 2001 and elected to become an S corporation on May 1, 2002. The tax return reflects that PLD uses a standard calendar year to file its taxes, and that of Ste. is a 51% shareholder. In 2002, it reported ordinary income of $8,861. Schedule L of the tax return, which shows a corporation's current assets and current liabilities reflects that PLD had $7,672 in current assets and reported no current liabilities in 2002, resulting in $7,672 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] Besides net income, CIS will review a petitioner's net current assets as a measure of its liquidity on a given date, because it reflects a readily available resource out of which the proffered wage may be paid. If a corporate petitioner'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 also supplied a summary of the sole proprietor's monthly living expenses totaling $2,698 per month or $32,376 per year. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. As noted above, sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Counsel also submitted copies of two business checking account statements. The record shows that one account was maintained under the petitioner's name at the First Community Bank, account number 46503686, covering a period from January 31, 2001 to January 31, 2003, when this account was closed. Beginning with the April 2002 statement, the funds held in this account appear under the Pacific Western National Bank letterhead, suggesting a

---

[1] The petitioner identifies itself on the visa petition as "Dillon Construction Company."

[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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

merger or acquisition of the First Community Bank. The ending balances in this account, during 2001, range from a high of $57,081.90 to a low ending monthly balance of -$1,391.02. The record also reflects that beginning in June 2002, a second account was maintained at the Pacific Western National Bank in the name of "PLD Construction Company Inc. under account number 46507843. From June 2002 to October 2002, account number 4 had balances ranging from a high of $4,970.79 to a low of $490. From the statements provided relevant to account number 46503686, the high monthly ending balance was $4,673.71 and the low was $32.06, before it was subsequently closed in January 2003.

It is noted that in response to the director's request for evidence, the petitioner failed to submit copies of state quarterly wage reports, but submitted copies of a state "Report of Independent Contractors" and copies of federal Form 1099-Misc, issued to various entities in 2002, reflecting non-employee compensation. One of the Form 1099s, reflects that the petitioner paid $4,4148.83 to "Guy Etziony." It is not clear if this individual is connected to the beneficiary.

On July 16, 2003, the director requested further evidence from the petitioner clarifying the relationship between the petitioner named on the visa petition and PLD. The director requested a copy of PLD's annual report, articles of incorporation, and current state business license. The director also noted that the petitioner's tax documentation referenced two different companies. He also directed the petitioner to provide a thorough explanation regarding this matter in addition to the requested documentation. In response, the petitioner, through counsel, failed to provide a copy of PLD's articles of incorporation, but submitted a copy of a state general contractor's license, issued to PLD on May 15, 2002, and various copies of other state and federal forms. The petitioner's "Fictitious Business Name Statement," filed with Riverside County, California on January 17, 2001, indicates that the registrant is PLD doing business under the fictitious name of the petitioner at the same location Item 5 of this form states that the registrant had not yet begun to transact business under the fictitious business name. In item 9, the registrant did not check the box indicating a change in type of organization, but rather indicated that it was starting a new business as of November 30, 2000.

The petitioner also included its federal Form SS-4, "Application for Employer Identification Number," dated January 4, 2001, which similarly indicates that PLD's trade name is the petitioner's name, that the date the business was started or acquired was November 30, 2000, and that the date that wages or annuities were paid or would be paid is February 2, 2001. A state form called an "S Corporation Election of Termination/Revocation" reflects that December 4, 2000 was the date that PLD reported a new federal S corporation election. This form also states that PLD is not "the continuation of any form of predecessor," that PLD was incorporated on November 17, 2000, and that the effective date for the income year began November 17, 2000 and ended December 31, 2000. In contrast, PLD's 2002 federal income tax return, as noted above, reflects that PLD was incorporated on March 26, 2001, and elected to become an S corporation on May 1, 2002. A state domestic stock declaration, dated February 14, 2001, indicates that a tax return will be filed for the year ending December 31, 2000 and identifies Patrick Lee Dillon and his spouse as the only officers and directors of PLD as of the December 4th, 2000, the date of stock acquisition.

By cover letter, dated August 3, 2003, which accompanied the petitioner's response to the director's second request for additional evidence, counsel asserts that the petitioner's ability to pay the proffered wage is established by the petitioner's cash resources as shown in its bank account statements. In support of this contention, counsel

resubmits copies of the petitioner's and PLD's bank account statements that were previously provided in response to the director's first request for additional evidence, as well as a copy of an AAO decision from January 11, 2002 in which the appeal was sustained.

The director denied the petition, determining that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning at the priority date of March 19, 2001.

On appeal, counsel again provides copies of the bank checking account statements previously submitted to the record and argues that the petitioner maintained a minimum balance of at least $3,000 per month in 2001 to cover the beneficiary's proffered wage when considered as a monthly salary of $2,400 per month. Counsel also claims that the petitioner's cash assets as reflected in the 2002 bank statements could cover the difference between the proffered wage and the petitioner's net income reported on the 2002 federal tax return filed by PLD.

First, as noted above, the evidence provided in response to the director's request for clarification of the relationship between the petitioner and PLD did not fully substantiate that they should be treated as the same entity. The sole proprietor's 2001 income tax return showed that the petitioner was organized as a sole proprietorship. Other than listing the documents provided with the response, no thorough explanation of the petitioner's relationship with PLD was offered in response to the director's request for evidence issued in July 2003. Moreover, the conflicting dates of business acquisition, incorporation, election as an S corporation, and statements that it is not a continuation of a predecessor entity, as well as the maintenance of two separate business accounts raises questions as to whether PLD Construction Company, Inc. should be treated as the same or a different entity as the petitioner. Although the discrepancies might have been resolved by a reasonable explanation, as the record currently stands, the evidence suggests that the petitioner may have continued as a separate business organized as a sole proprietorship. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988). It is further noted that corporation is a separate and distinct legal entity from its owners or shareholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

That said, counsel's assertion relating to the petitioner's 2001 bank account statements is not persuasive. As previously noted, the record indicates that the petitioner reported its income as a sole proprietorship, so, at least for 2001, the sole proprietor must show that he can cover existing business expenses as well as pay the proffered wage out of his adjusted gross income or other available funds. In addition, a sole proprietor must show that he can sustain himself and any dependents. In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income. Although, in cases of sole proprietorships, consideration of outside cash assets may be more readily included as they are not always immediately apparent on an individual tax return, in this case, even without considering the sole proprietor's pro rata share of annual

household living expenses of $32,376[3], the proffered wage of $31,200 exceeds the sole proprietor's 2001 adjusted gross income of $18,286 by $12,914. Moreover, the record fails to indicate that other resources could consistently sustain this amount plus, for example, one-half of the household living expenses. In this respect, even reducing these combined amounts to a monthly sum of approximately $2,425, the 2001 bank statements issued by First Community Bank, show that the petitioner's monthly ending balances failed to cover this shortfall in three months during 2001.

Counsel submits a copy and asserts that an AAO decision issued January 11 2002, in which a petitioner's bank balances figured in the approval of the case, supports his claim that the petitioner has established its continuing ability to pay the proffered salary. It is noted that all of the facts of that case are not before us now and such a decision is not considered a binding precedent. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its 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). Moreover, the petitioner in the previous AAO decision appeared to have had significant net current assets far exceeding the proffered wage. It was also specifically noted that the petitioner's bank balances provided enough funds in every month to cover the proffered salary. Here, as noted above, the petitioner's funds fell short in three months in 2001.

It is noted that bank statements are not among the three types of fundamental 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," particularly in reference to 2002 in this case, where it is alleged that the petitioner became a corporation, the petitioner has not persuasively 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. Bank statement balances represent only part of a petitioner's financial status and do not reflect all relevant liabilities that may affect a corporate petitioner's ability to pay a proffered salary. It is also noted that no evidence was submitted to demonstrate that the funds reported on PLD's 2002 bank statements somehow reflect additional available funds that were not shown on the correlating tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Counsel's assertions in this regard do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the alien beneficiary during that period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered as *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record did not establish that it employed and paid the beneficiary during any of the relevant period.

If the petitioner does not establish that it may have employed and paid the beneficiary wages during the relevant period, CIS will next 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

[3] The sole proprietor filed his 2001 Form 1040 tax return as a married individual filing separately.

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 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

In this case, as noted above, even if PLD is considered as the petitioner, its 2002 federal tax return shows that its net income was only $8,861, which represents $22,339 less than the beneficiary's proffered annual salary. Further, as set forth above, PLD's 2002 net current assets of $7,672, as reflected on Schedule L, were also insufficient to cover the proffered wage.

Counsel contends that the AAO should consider the petitioner's financial status within the context of *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) in that the petitioner has a reasonable expectations of future profits. Referring to the petitioner and PLD interchangeably, counsel asserts that the petitioner has incurred uncharacteristic and unusual expenses in attempting to expand. Counsel resubmits PLD's 2002 tax return on appeal in support of this claim. Counsel also invokes the effect of the September 11, 2001 tragedy on the general U.S. economy as specifically affecting the petitioner as a general contractor. Finally, he also asserts that hiring the beneficiary, following an unsuccessful attempt to recruit a qualified U.S. worker, will significantly impair its prospects to expand. Counsel submits copies of some of the documentation that supported the petitioner's application for a labor certification from the Department of Labor.

It is noted that the petitioner's ability to obtain a labor certification for the position of a cost estimator is not relevant to CIS' authority to review a prospective employer's ability to pay the proffered wage. *See Ubeda v. Palmer,* and *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra.* The record does not support counsel's assertion that significant hardship will result if the petition cannot be approved. In this instance, the petitioner has provided no detail or documentation that substantiates how the beneficiary's employment will significantly improve the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the tax returns, which, if the petitioner and PLD are considered the same entity, show that the reported income has modestly risen since 2000 without the beneficiary's employment.

Counsel is correct that *Matter of Sonegawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small net income. *Matter of Sonegawa,* 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, a total of three federal tax returns, which were submitted as evidence of the petitioner's ability to pay the beneficiary's proffered annual salary of $31,200, do not show sufficient net income or net current assets to

cover the beneficiary's wage offer and do not establish a any significant framework of profitability against which unique detrimental circumstances can be measure. Despite counsel's general observations about the effect of 9/11 and his expressions of confidence about the petitioner's reputation as a contractor in Southern California, the no evidence has been specifically provided to demonstrate that unusual and unique circumstances exist in this case, which parallel those in *Sonegawa,* or that the level of income asserted in both 2001 and 2002 is somehow uncharacteristic within a framework of profitable years. Moreover, according to the tax returns, the year 2000 appeared to be the low point of the petitioner's fortunes with a modest improvement in net income in the succeeding two years. But it doesn't rise to the level of the facts presented in *Sonegawa.* The AAO cannot conclude that the petitioner's projection of future earnings and profitability overcomes the AAO's decision to affirm the director's denial. *See Matter of Great Wall,* 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

Accordingly, based on the evidence contained in the record and the foregoing discussion, the AAO concludes that the petitioner has failed to persuasively establish that it and PLD should be viewed as the same entity. Moreover, the petitioner has failed to present sufficiently convincing evidence to demonstrate its continuing ability to pay the proffered wage as of the priority date of the petition.

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.