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U.S. Citizenship and Immigration Services

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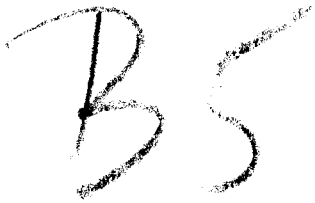

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 0 7 2005
EAC 04 249 50085

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.

Marii Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference 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 is a ceramic components and substrate manufacturer. It seeks to employ the beneficiary permanently in the United States as a design engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 16, 2001. The proffered wage as stated on the Form ETA 750 is $91,333 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of February 1998.

On the petition, the petitioner claimed to have been established in 1989 and to currently employ 15 workers. The petitioner did not list its gross or net annual income. In support of the petition, the petitioner submitted its Form 1120 Corporate tax return for 2001. The tax return reflects the following information:

Net *loss*	$618,466
Current Assets	$192,709
Current Liabilities	$570,908
Net current *liabilities*	$378,199

In addition, the petitioner submitted the Form W-2, Wage and Tax Statement the petitioner issued to the beneficiary in 2000, 2002 and 2003 and the beneficiary's personal income tax return for 2001. The Forms W-2 Wage and Tax Statements and the beneficiary's personal tax return reflect wages of only $27,965 in 2000, $28,200 in 2001, $30,600 in 2002 and $31,800 in 2003, significantly less than the proffered wage. Finally, the petitioner submitted its bank statements for April 2001, May 2001, June 2001, November 2001 and December 2001. These statements reflect balances of $86,456.17, $38,017.24, $59,070.81, $82,184.74 and $176,792.60, respectively.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on February 16, 2005, denied the petition.

On appeal, counsel requests that the director's decision be reversed based on the following: the beneficiary owns $250,000 worth of stock in the petitioning company, the petitioner has assets in excess of $2.5 million and the losses sustained by the petitioner were expenditures for new product development. The petitioner submits a letter from the petitioner's president asserting that the beneficiary "agreed on receiving a [sic] 100 million shares of [the petitioner's] stock (present values $250,000) upon the completion of the development of certain material." The petitioner also submitted a letter from the petitioner's accountant, asserting that he prepared the petitioner's tax returns using generally accepted accounting principals, which do not allow assets to be recorded at fair market value. asserts that such a recording and the inclusion of a building owned by the petitioner's chief executive officer (CEO) would increase the petitioner's assets above its liabilities. In addition, the petitioner submitted a second letter from asserting that the petitioner has met its payroll obligations for 25 years, that it is not uncommon for a business to suffer losses while developing new products and that the petitioner is now in a position to sell a new product for which it has received orders. Finally, the petitioner submits an unaudited income statement for 2004 reflecting a net loss and a balance sheet as of December 31, 2004 reflecting current assets of $2,590,933 and current liabilities of $659,893.

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 employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001, 2002 or 2003. The wages paid were deficient by $63,133, $60,733 and $59,533in those years respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that 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 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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 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.

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. We reject, however, the argument set forth by counsel and that the petitioner's total assets should have been considered in the

determination of the ability to pay the proffered wage. 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.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 during 2001, however, were negative.

The unaudited financial statements that the petitioner submitted on appeal are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In addition, the petitioner's reliance on the balances in the petitioner's bank accounts is misplaced. As stated by the director, bank statements are not among the three types of evidence, enumerated in the regulation at 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, the petitioner has not responded to the director's statement that there is no evidence to suggest that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The accountant's reliance on the assets of the petitioner's CEO is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *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); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). 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).

The fact that the beneficiary has received stock in lieu of wages is also not persuasive. The petitioner provides no reliable means by which we can evaluate the worth of this stock of a non-publicly traded company. Regardless, providing the beneficiary with an interest in the petitioner does not demonstrate the petitioner's own financial

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[1] 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.

solvency. Rather, the consistently low wages combined with the net loss and net current liabilities in 2001 suggest, contrary to the accountant's statement, that the petitioner has not been able to meet its *full* payroll responsibilities. Paying far less than the prevailing wage is not making payroll.

The claim that we should not consider the losses because they represent an investment in product development is not sufficiently supported. *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. Specifically, the record lacks evidence of a history of profitable years for the petitioner.

The petitioner has not demonstrated that it paid the full proffered wage in any year. In 2001, the petitioner shows a net loss and negative net current assets. The petitioner has not demonstrated a net gain or positive net current assets through the submission of tax returns, audited financial statements or annual reports for any subsequent year. Thus, the petitioner has not demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. For the reasons discussed above, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during any year. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.