U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 19 2005

EAC-03-213-51335

IN RE: Petitioner:
Beneficiary: [redacted]

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

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 dry cleaning business that provides alterations. It seeks to employ the beneficiary permanently in the United States as a tailor-alterations. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by 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. The director 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is $9.97 per hour ($20,737.60 per year). The Form ETA 750 states that the position requires two years experience.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of $236,932, and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 4, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted its 2002 corporate federal tax return and its owner's 2001 individual income tax return with an accompanying letter from counsel explaining that the petitioner's net

income reflects sufficient funds to pay the proffered wage if depreciation expenses are added back and consideration is given to the beneficiary's contribution to generating revenue.

On August 20, 2003, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director noted that the 2001 individual income tax return was insufficient evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date since the petitioner is incorporated and thus its owners' personal assets may not be considered. The director specifically requested the petitioner's 2001 corporate federal tax return, any evidence of wages actually paid to the beneficiary by the petitioner, annual reports for 2001 and 2001 accompanied by audited or reviewed financial statements, or a statement from its chief financial officers; or profit/loss statements, bank account records, or personnel records as supplementary evidence. The director noted that the petitioner's net income and net current assets were negative in 2002 and did not demonstrate its continuing ability to pay the proffered wage.

In response, the petitioner submitted its 2001 federal corporate tax return and its owner's 2002 individual income tax return. Counsel's accompanying letter states that the beneficiary is not yet employed by the petitioner; that the petitioner's owner's profits from its other businesses show enough funds to pay the offered wage; that "[t]he job of alteration tailor is a profit center for the employer, and can be expected to increase total income because of the additional services available"; that the director's reliance upon *Matter of M*, 8 I&N Dec. 24 (BIA 1958) has distinguishing facts making it inapplicable to the instant case; and that *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) applies to the instant case.

The director denied the petition on June 18, 2004, finding that the evidence submitted with the petition and in response to its request for evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date relying upon points made in her request for evidence.

On appeal, counsel reasserts prior assertions, asserts that the petitioner's total assets should be considered, and cites various cases for the premise that a petitioning entity's owner's personal assets may be considered when evaluating a petitioner's continuing ability to pay the proffered wage.

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. The petitioner has not demonstrated that it paid the beneficiary any wages and counsel has conceded that the petitioner did not employ the beneficiary until 2004 because she did not have employment authorization until then.

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 contrary to counsel's assertions. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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. The court in *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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $20,737.60 per year from the priority date.

In 2001, the Form 1120S stated net income[1] of -$4,308.
In 2002, the Form 1120S stated net income of -$7,500.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the 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 idea that the petitioner's total assets, such as shareholders' equity in the form of capital stock and paid-in capital, should have been considered in the

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[1] Ordinary income (loss) from trade or business activities as reported on Line 21. 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.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005). The petitioner's income is exclusively from trade or business and thus its net income is derived from line 21 of page one of its Form 1120S.

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.[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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets during 2001 were $554.
The petitioner's net current assets during 2002 were $2,184.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts that the petitioner's owner's personal assets should be considered since the owner's individual income tax returns illustrate that the owner derives substantial income from two other S corporations. However, because a corporation is a separate and distinct legal entity from its owners and shareholders, 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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."

While counsel accurately distinguished the factual holdings in *Matter of M*, 8 I&N Dec. at 24, *Matter of Aphrodite Investments, Ltd.*, and *Matter of Tessel*, 17 I&N Dec. at 631, the structuring of a corporation and shielding of owners and investors from liability is a basic principal of corporate law[3]. None of the petitioner's

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[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.

[3] According to Black's Law Dictionary, "Piercing the corporate veil" is a judicial process whereby the court will disregard the usual immunity of corporate officers or entities from liability for wrongful corporate activities. It is a doctrine that holds that the corporate structure, with its attendant limited liability for stockholders, may be disregarded and personal liability imposed on stockholders, officers and directors in the case of fraud or other wrongful acts done in the name of the corporation. The court, however, may look beyond the corporate form only for the defeat of fraud or wrong of the remedying of injustice. *Hanson v.*

owner's other businesses are liable to pay the proffered wage. The petitioner's owner is not responsible for the proffered wage. Only the petitioning entity is liable for paying the proffered wage. Thus, only the petitioner's financial resources will be considered.

Counsel also cites *Matter of Sonegawa,* 12 I&N Dec. at 612 and *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1049 for her assertion that case law requires CIS to pierce the corporate veil. However, *Sonegawa* deals with a sole proprietorship so CIS properly considered the personal resources of the individual owner of the business in that case[4]. Additionally, counsel's quote from *Elatos* was out of context. The petitioner in *Elatos* asked CIS to consider its gross income instead of its net income, and the judge determined that like in *Sonegawa*, CIS properly considers net income for both individuals and corporations. Thus, contrary to counsel's appellate assertion, neither *Elatos* nor *Sonegawa* holds that CIS may pierce the corporate veil when its comes to determining a petitioning entity's continuing ability to pay the proffered wage beginning on the priority date.

Counsel also cites to Board of Alien Certification Appeals (BALCA) cases for her assertion that CIS should pierce the corporate veil in determining a petitioner's continuing ability to pay the proffered wage beginning on the priority date. However, counsel does not state how the Department of Labor's (DOL) BALCA precedent is binding on the AAO. 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, BALCA 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, one of the BALCA cases relied upon by counsel, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

Counsel also cites to *Full Gospel Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1998) as relevant to her assertion that "court decisions have found that ability to pay can be shown by availability of personal resources." The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of its sponsored alien. Here, however, the petitioner is a corporation, not a church.

Bradley, 298 Mass. 371, 381, 10 N.E.2d 259, 264. There is no indication of wrongdoing in the instant case that CIS should pierce the corporate veil and consider the personal resources of an S corporation's owners. Black's Law Dictionary 1147-1148 (6th ed., West 1990).

[4] A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). 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. 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).

Likewise, counsel's reliance upon *O'Conner v. Atttorney General of U.S.*, (Civ. No. [redacted] D. Mass., 1987) is inapplicable since the petitioner in that case was a sole proprietorship. As noted above, CIS does consider the personal resources of a sole proprietorship, but not of corporations. Counsel's reliance upon *Matter of Silver Dragon Chinese Restaurant*, 191 I&N Dec. 401 (BIA 1986) is mistaken since that case has nothing to do with ability to pay but rather the *bona fides* of a job offer based upon a sponsored alien's relationship to a petitioning entity and thus has no applicability to the specific issue being adjudicated in these proceedings, namely a petitioning entity's continuing ability to pay the proffered wage beginning on the priority date.

Counsel asserts that *Sonegawa's* holding applies to the instant petition generally. *Sonegawa*, however, 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 or 2002 were uncharacteristically unprofitable years for the petitioner.

Counsel also argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers[5]. Although counsel states that the petitioner's business principally relies upon its tailoring services, no statement was made by the petitioner and no evidence was presented that most of the petitioner's income comes from its tailoring services. The assertions of counsel 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

There are other considerations for S corporations, however. 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

[5] The AAO notes that in *Sonegawa*, both the petitioner and the beneficiary had public notoriety, unlike in the instant petition.

explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. 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] (Mr. [redacted] holds 100 percent of the company's stock. According to the petitioner's 2001 and 2002 IRS Forms 1120 line 7 (Compensation of Officers), Mr. [redacted] elected to pay himself nothing in both years. CIS is not examining the personal assets of the petitioner's owner, but, rather, the financial flexibility that employee-owners have in setting their salaries based on the profitability of their corporation. In the instant case, there is no officer compensation to consider since Mr. [redacted] did not receive any.

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 failed to establish that it has the ability to pay the salary offered as of the priority date of the petition and continuing to present.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner 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.