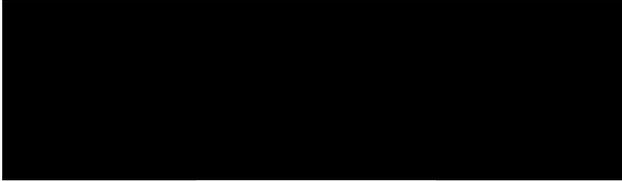


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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 21 2005
WAC 03 034 54426

IN RE: Petitioner: [Redacted]
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:



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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a dyeing and printing garment corporation. It seeks to employ the beneficiary permanently in the United States as a dyeing supervisor. 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, the 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 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. The petitioner must also demonstrate that 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 as of the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 23, 2001. The proffered wage as stated on the Form ETA 750 is \$24.02 per hour (\$49,961.60 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor, U.S. Internal Revenue Service Form tax return for 2001; a California Employment Development Department Form DE-6, Quarterly Wage Report for all the petitioner's employees; a compiled financial statement; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), on January 9, 2003, and February 27, 2004, the Director requested pertinent evidence of the

petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested copies of the petitioner's 2001, 2002 and 2003 U.S. federal tax returns; and, copies of annual reports and audited financial statements for those same years.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for years 2000, 2001, 2002 and 2003.

The director denied the petition on July 15, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the petitioner is a large company employing 90 to 100 workers. Further, counsel contends that the Director did not "review the company's detailed cash flows shown on the entire income tax return."

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the 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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax returns¹ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$49,961.60 per year from the priority date of March 23, 2001:

- In 2003, the Form 1120 stated a taxable income loss² of <\$46,993.00>³.
- In 2002, the Form 1120 stated a taxable income of \$653,268.00.
- In 2001, the Form 1120 stated a taxable income of \$603,220.00.

¹ Tax returns provided for years prior to the priority date do not have probative value to determine the ability to pay the proffered wage from that date but are reviewed by CIS and the AAO for what evidence they may provide.

² IRS Form 1120, Line 28.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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. There was no evidence that the petitioner employed the beneficiary.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage in year 2003.

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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120 return stated current assets of \$1,569,618.00 and \$2,901,561.00 in current liabilities. Therefore, the petitioner had <\$1,331,943.00> in net current assets. Since the proffered wage was \$49,961.60 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$1,137,075.00 and \$2,339,195.00 in current liabilities. Therefore, the petitioner had <\$1,202,120.00> in net current assets. Since the proffered wage \$49,961.60 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120S return stated current assets of \$987,698.00 and \$2,072,899.00 in current liabilities. Therefore, the petitioner had <\$1,085,201.00> in net current assets. Since the proffered wage was \$49,961.60 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in his statements in the record of proceeding and in the brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel cites no legal precedent for the contention, and, according to regulation,⁵ copies of annual reports,

⁴ 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.

⁵ 8 C.F.R. § 204.5(g)(2).

federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Petitioner's counsel and accountant advocates the addition of depreciation taken as a deduction of \$903,700.00 in the year 2003 tax return to eliminate the abovementioned deficiencies in year 2003. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel advocates the use of the cash balance of the petitioner's business accounts to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of 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," 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, no evidence was submitted to demonstrate 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.

Also, counsel suggests that the amount of the gross earnings of the petitioner and the large payroll lends credence to the petitioner's ability to pay the proffered wage. As already stated above, in *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages paid to others cannot be used to prove the ability the ability to pay the proffered wage.

Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets, including annual compensation, 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 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."

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and net current assets is therefore duplicative, at least in part.

Further, even if considered separately from net income and net current assets, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer pay to its employees in cash while continuing in business. They are not, therefore, a clear index of a company's ability to pay additional wages.

Examining the financial statement submitted by petitioner, it has little probative value since it is neither an audited or reviewed statement. The accounting service severely qualified the financial statement. The unaudited Profit and Loss statements that petitioner submitted 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 compiled 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. Thus, the unaudited Profit and Loss statements are of little evidentiary value in this matter.

A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. The statements presented were not audited.

Also since it has been paid, the officer's compensation is an expense. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. In this case, the record contains no documentation or other competent evidence that demonstrates the "100 % shareholder's" willingness to reduce his own salaries. Further, since the officers have made no commitment or offer to reduce their compensation by anything in evidence, counsel is merely speculating upon what could have happened in the past (but did not) and what may or may not happen in the future. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of*

Obaighbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As is described above there are several alternative methods in which the petitioner may demonstrate its ability to pay the proffered wage. In this case, taxable income in years 2001 and 2002 demonstrates that the petitioner had the ability to pay the proffered wage from the priority date. In 2003, the petitioner suffered a taxable income loss. The petitioner has forthrightly explained his current business downturn and presented complete tax returns and wage statements that substantiate its condition,

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in a profitable period in 2001 and 2002. For the years 2001 through 2002, the taxable income for the petitioner was \$603,220.00 and \$653,268.00 respectively. Therefore, the average income for those two years was over 12 times the proffered wage. The taxable income for year 2003 is negative, <\$46,993.00>. Gross receipts are down too in that year, from \$11,542,955.00 in 2001 to \$7,624,416.00 in 2003. Deductions are much higher in year 2003 relative to year 2001, on a ratio of 1.75 in 2001 to 2.32 in 2003. Therefore lower gross receipts coupled with higher deductions, (business expenses), appear to account for the loss in 2003 and, the converse experience, the profits earned in 2001 and 2002.

Counsel and petitioner's point to the occurrence of a depreciation deduction taken in 2003 of \$903,700.00 explaining it as a "paper" deduction or an accounting device that in no way reduces the cash on hand and income of the petitioner. As stated above, case precedent is against this contention. However, looking at the finances of petitioner from year to year, it is evident that the size of the deduction is an unusual occurrence in the three years examined. In tax year 2003, it was \$903,700.00. In tax year 2002, it was \$719,613.00. In tax year 2001, it was \$788,610.00. The depreciation expense increased in one year (from 2002 to 2003) by a factor of 1.26. Counsel also states in a letter dated May 12, 2004, "In year 2003, there was a claim against the petitioner in the amount of \$4 million which was not cleared until now, so the company's gross sales for the year of 2003 was \$7.6 million...." However there was no documentary proof to substantiate this occurrence that would have affected gross receipts in 2003. 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)).

Matter of Sonogawa, 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 *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Unusual and unique circumstances have been shown to exist in this case to parallel those in *Sonegawa*, to establish that the tax year 2003 examined was an uncharacteristically unprofitable period for the petitioner.

The evidence presented in the corporate tax returns and in the record of proceedings as submitted by petitioner shows that the petitioner has demonstrated its ability to 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained.