

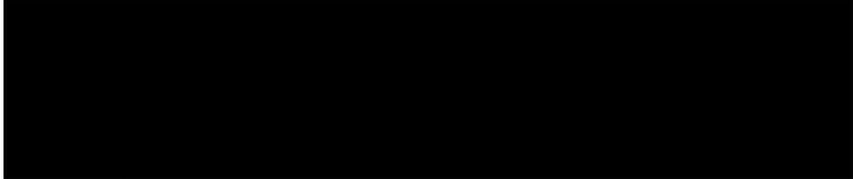


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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: NOV 21 2005  
EAC-03-228-52611

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a software consultant. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 11, 2002. The proffered wage as stated on the Form ETA 750 is \$53,394 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 1998.

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$1.5 million, and to currently employ 26 workers. In support of the petition, the petitioner submitted its annual report for the 2001 fiscal year and its 2002 corporate tax return.

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, on September 29, 2003, 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 specifically requested any evidence of actual wages paid to the beneficiary and additional evidence, such as a statement from the petitioner's financial officer, an annual report for 2002, personnel records, profit/loss statements, or bank account records.

In response, the petitioner submitted excerpts from its 2000 and 2001 corporate tax returns; its bank statements; quarterly tax returns; one pay stub issued by the petitioner to the beneficiary reflecting \$4,500 paid for work performed from November 1 through November 2003<sup>1</sup> and evidence demonstrating that he was working for a different company until April 2003; and a letter from counsel stating that the beneficiary started working for the petitioner in May 2003 based on a completed W-4 form, that executive compensation is flexible and the shareholder would cut his compensation to compensate for reduced profits, and that the petitioner's depreciation expenses should be added back to its net income and total assets, such as marketable securities, should be considered as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns reflect the following information for the following years:

	<u>1999</u> <sup>2</sup>	<u>2000</u> <sup>3</sup>	<u>2001</u> <sup>4</sup>	<u>2002</u>
Net income <sup>5</sup>	\$60,236	\$31,982	\$34,222	-\$6,298
Current Assets	\$n/a	\$n/a	\$n/a	\$42,214
Current Liabilities	\$n/a	\$n/a	\$n/a	\$65,893
Net current assets	\$n/a	\$n/a	\$n/a	-\$23,679

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 20, 2004, denied the petition.

On appeal, counsel asserts that precedent establishes that Citizenship and Immigration Services (CIS) consider the totality of circumstances in evaluating the petitioner's continuing ability to pay the proffered wage and not merely its net profit. Counsel asserts that CIS should consider the petitioner's balances in its bank account as well as a \$100,000 line of credit and references unpublished AAO decisions. Counsel also asserts that CIS should consider the petitioner's "reasonable expectations of a continued increase in business," and cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and *Masonry Master, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) and states that CIS can recognize one-time losses and still approve the petition. Referencing a letter submitted on appeal by Mr. Richard Godes (Mr. Godes), the petitioner's accountant, which states much of the same, counsel asserts:

[The petitioner] also experienced a number of one-time costs and losses that impacted its net taxable income. Specifically, [the petitioner] experienced a \$10,000.00 increase in accounting fees due to inappropriate activities by its prior accountants, as well as a loss of \$113,000.00 due to investments in the IT industry. Such costs and losses, however, have been accounted for. The company has also recently reorganized its accounting data onto a

<sup>1</sup> This was the total amount paid to the beneficiary for the year indicating that he had not been compensated by the petitioner prior to November 2003.

<sup>2</sup> Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. However, since counsel raises the applicability of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), the AAO will examine evidence pertaining to as many years as was brought to our attention.

<sup>3</sup> See note 2, *supra*.

<sup>4</sup> See note 2, *supra*.

<sup>5</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

more efficient computerized recording system. Such actions will help ensure the company's profitability for the foreseeable future.

All IT companies have shown a decrease in gross revenues over the past few years, and most are still trying to return to pre-IT boom revenues streams. In fact, where many companies have transferred operations overseas and/or discontinued activities, [the petitioner] has continued to operate and has shown encouraging signs of economic recovery. The fact is that [the petitioner] is still generating a significant level of revenues for an IT company.

The petitioner submits previously submitted evidence, updated bank account statements, copies of W-2 forms issued by the petitioner to the beneficiary in 2002 and 2003 reflecting wages paid in the amount of \$16,250 and \$25,250 in each respective year, as well as a few pay stubs for 2004. The petitioner also submits a letter from Sovereign Bank stating that the petitioner "has an open line of credit in the amount of \$100,000. Currently 100% is available. The line has not been used yet in 2004. The line was opened in March 1998." Finally, the petitioner submits its 2003 corporate tax return that reflects \$4,832 in net income and -\$2,311 in net current assets.

Counsel refers to decisions issued by the AAO but does not provide published citations. 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).

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.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 or 2002.

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). 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.

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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.

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, counsel's argument 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.<sup>6</sup> 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 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 has not demonstrated that it paid the beneficiary the full proffered wage in 2002 or 2003 but did pay \$16,250 and \$25,250 in each respective year, leaving it obligated to pay the difference between the proffered wage and the wages actually paid, which amounts to \$37,144 in 2002 and \$28,144 in 2003. In 2002, the

<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

petitioner reports a loss and negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. In 2003, the petitioner reports \$4,832 in net income and negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets in that year either.

Counsel asserts that the petitioner's line of credit goes towards establishing its continuing ability to pay the proffered wage beginning on the priority date. In calculating the ability to pay the proffered salary, however, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, as noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner should submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The AAO notes, however, that the petitioner established that the entire line of credit from its date of inception are unused funds available at the time of filing the petition and continue to be based on the letter from Sovereign Bank.

Counsel is correct that CIS evaluates the totality of circumstances in each case to determine if a petitioning entity establishes its continuing ability to pay the proffered wage beginning on the priority date. *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.

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). A review of the petitioner's historical tax reporting shows that its gross revenues and officer's compensation decreases each year from 1999 through 2003. From 1999 through 2001, the petitioner's gross revenues ranged from \$2.5 to \$3 million. In 2002 and 2003, however, the petitioner's gross revenues dropped to \$1.4 and \$1.2 million, respectively, showing a steady decline. The petitioner's officer compensation will be discussed below. Counsel and [REDACTED] claim this the petitioner's recent losses are due to bad investments, inappropriate activities by accountants, and the general decline experienced by the IT industry in recent years. The AAO notes that 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). No evidence was presented concerning "inappropriate activities by accountants," but the AAO will exercise its discretion and consider the remainder of counsel's assertions despite the fact that the record of proceeding does not contain a statement or evidence from the petitioner to corroborate them. 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)).

The AAO finds most compelling counsel's argument in response to the director's request for evidence concerning officer compensation. 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 explicitly stated on the Form 1120 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] holds 100 percent of the company's stock. According to the petitioner's 2002 and 2003 IRS Forms 1120 Schedules E (Compensation of Officers), [REDACTED] elected to pay himself \$40,000 and \$15,000, respectively. We note here that the compensation received by the company's owner during these two years was not a fixed salary. We also note that [REDACTED] to pay himself \$124,000 in 1999, \$120,900 in 2000, and \$120,000 in 2001, which also shows a decline after 2001 and [REDACTED]'s flexibility to receive less compensation.

CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets 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 the present case, however, counsel is not suggesting that CIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the owners have in setting their salaries based on the company's profitability. The AAO notes that Mr. Rao's compensation is determined by the profitability of the corporation and he clearly has flexibility to accept a low compensation since he accepted almost \$100,000 less than the

compensation he was receiving in 1999, 2000, and 2001. None of the officer compensation amounts represent fixed expenses. Although the record of proceeding does not contain a statement from, nor corroborating evidence from Mr. Rao, that he could forego his salary in its totality, if he did not receive any compensation at all in 2002 and 2003, and his compensation for those years were modest, that would provide additional funds of \$40,000 and \$15,000, respectively, towards paying the difference between the wages paid and the proffered wage of \$37,144 in 2002 and \$28,144 in 2003. Based on the unique factual circumstances in the instant matter, the AAO is persuaded by counsel that the petitioner has a reasonable expectation of a continued increase in business and profits based on the applicability of the holding in *Sonegawa*, the fact that it has not dipped into its line of credit, its financial history, and a review of the petitioner's gross profit and the amount of compensation paid out to the employee-owner that confirms that the job offer is realistic and that the proffered salary of \$53,394 can be paid by the petitioner.

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 established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

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. The petition is approved.