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U.S. Citizenship and Immigration Services

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FEB 01 2007

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 04 190 50307

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, Chief
Administrative Appeals Office

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

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese chef. 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 additional evidence and asserts that the petitioner has established its continuing financial ability to pay the proffered wage.

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) provides:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 19, 2001. The proffered wage as stated on the Form ETA 750 is $36,000 per annum. The ETA 750B, signed by the beneficiary on November 15, 2001, does not indicate that the beneficiary has worked for the petitioner.

Part 5 of the preference petition, filed on June 23, 2004, indicates that the petitioner was established on January 30, 2001, claims a gross annual income of $40,484,000, a net annual income of $27,177, and currently employs three workers.

In support of its continuing ability to pay the proffered wage, the petitioner initially submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, and 2003. The tax returns indicate that they were filed using a standard calendar year. They reflect the following:

	2001	2002	2003
Ordinary Income[1]	$1,961	-$37,004	-$27,177
Current Assets (Sched. L)	$6,037	$ 9,010	$ 3,798
Current Liabilities (Sched. L)	$1,129	$ 3,555	$ 5,321
Net Current Assets	$4,908	$ 5,455	- $ 1,523

As noted above, besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] They represent a measure of a petitioner's liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1(d) through 6(d) and line(s) 16(d) through 18(d) of Schedule L of its federal tax return. If a corporation's year-end net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

On November 23, 2004, the director issued a notice of intent to deny the petition based on his preliminary determination that none of the three federal tax returns demonstrated that the petitioner had sufficient resources to have paid the proffered wage of $36,000 per year in 2001, 2002 or 2003. The petitioner was afforded an additional thirty days in which to submit additional evidence or argument to support the approval of the petition.

In response, the petitioner, through counsel, asserted that the petitioner had the continuing ability to pay the proffered wage because it had received loans from the shareholders as noted on line 19 of Schedule L of the corresponding tax returns for 2001, 2002 and 2003, ranging from a balance of $43,205 to $137,433. Counsel maintains that the beneficiary's expertise has been an important asset to the petitioner through increases in gross income and sales. Citing *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), counsel suggests that the director focus on the beneficiary's ability to generate additional revenue for the petitioner's business. Counsel also relies on *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967), in support of the claim that the increase in growth and profit since the petitioner's inception can also form a basis for the petition's approval.

On January 21, 2005, the director denied the petition. The director again determined that the petitioner's 2001, 2002, and 2003 tax returns failed to indicate that the petitioner's financial resources were sufficient to have covered the proffered salary in any of the relevant period of time. The director also noted that the existence of loans advanced by the sole shareholder to support the petitioner's business expenditures, as shown as a long-term liability on Schedule L of the corresponding tax returns was not probative of the petitioner's ability to pay the annual $36,000 certified wage. With reference to the petitioner's expectations of future profits based on the

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[1] For the purpose of this review, ordinary income will be treated as net income.

[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.

principles set forth in *Matter of Sonegawa,* the director noted that the three tax returns did not profile a well-established petitioner such that the petition should be approved based on the financial information presented. The director further noted that the tax returns showed that the petitioner reported no wages paid in 2001, $900 in wages paid in 2002, and $7,600 wages paid in 2003, thus indicating part-time or intermittent employment of workers. The director also concluded that the petitioner's relatively short six-year length of operations (based on the original employer's beginning date of 1998 as set forth in the tax returns) and modest range of gross sales from $10,764 in 2001 to $36,737 in 2003 was not analogous to the facts in *Sonegawa* and did not support approval of the petition.

On appeal, counsel resubmits pertinent copies of the tax returns previously provided, as well as copies of the purchase and sale documents to the current petitioner who appears to be a successor-in-interest to the original employer named on the labor certification. We believe additional explanation and documentation such as copies of business licenses and corporate documents should have been provided to the record to clearly establish the respective identities of the original and successor-in-interest petitioners and shareholders of the respective businesses, but do not find it necessary to remand for this purpose as the appeal will be dismissed for the reasons discussed below.

Counsel renews the arguments submitted in response to the director's notice of intent to deny the petition. He additionally cites a 2003 AAO case for the assertion that the normal accounting practices of a business can be considered in determining its ability to pay the proffered wage. In support of considering the loans advanced from its shareholder as a normal practice of this petitioner's operations, counsel further cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA) for the proposition that if the petitioner is a sole proprietorship, then the sole proprietor's individual assets should be considered toward an ability to pay the proffered wage. Counsel suggests that the loan amounts should be considered as additions to the petitioner's cash on hand. He additionally urges that the beneficiary's training and expertise as a Chinese chef should be justified in considering it as an additional reason for the petitioner to have an expectation of future profits based on the principles outlined in *Matter of Sonegawa.*

Counsel's assertions are not persuasive. 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 or earlier administrative decisions of the AAO 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, relevant to *Ranchito Coletero*, the analysis applied to a sole proprietorship, which is an entity that is indistinguishable from the assets and liabilities of its individual owner, is not directly applicable to the instant petition, which deals with a corporation.

It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

> The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.
>
> The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

> A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.
>
> In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

See also, Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). The *Sitar* court considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court 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."

Similarly, any reliance on the assertion that the shareholder loan amounts, reflected as long-term liabilities on Schedule L , should be considered as additional evidence of the petitioner's ability to pay the proffered wage is misplaced. Such evidence represents the petitioner's acquisition of debt and concurrent obligation to repay, and, therefore, must also be considered as a liability affecting the petitioner's financial profile.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period. In this case, the record does not indicate that the petitioner has employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will also 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*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net taxable 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.

With respect to the beneficiary's potential to generate income as being included as part of the examination of the petitioner's ability to pay the proposed salary, it is noted that *Masonry Masters Inc. v. Thornburgh, supra,* primarily held that INS [now CIS] had erred in insisting on evidence of the petitioner's ability to pay anything more than the prevailing wage at the time of the application for labor certification. At the conclusion of the decision, the court opined that CIS' focus on requesting an income statement from the petitioner appeared to assume that the worker would contribute nothing to the income. The court noted that it would be helpful if CIS revealed its theory as to how it assessed the ability to pay a wage. In this case, there is not sufficient evidence to conclude that counsel's hypothesis of the automatically positive effect of the beneficiary's employment would be justified or if so, to what extent.

In this case, in 2001, neither the petitioner's net income of $1,961 nor its net current assets of $4,908 could cover the proffered annual salary of $36,000. In 2002, each of the petitioner's net income of -$37,004 and its net current assets of $5,455 were not sufficient to pay the proposed wage offer. In 2003, neither the petitioner's net income of -$27,177 nor its net current assets of -$1,523 was enough to pay the proffered wage. The tax returns do not establish that the corporate petitioner had the continuing financial ability to pay the certified wage of $36,000 per annum.

Similarly, we do not find that an approval based on *Matter of Sonegawa, supra,* is appropriate in this case. As noted by the director, *Matter of Sonegawa* involved an appeal that was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the three tax returns contained in the record do not represent a framework of profitable years analogous to the *Sonegawa* petitioner. The highest net income reported has been $1,961. The highest level of net current assets has been $5,455. Both amounts are far less than the proffered wage of $36,000 per year. The petitioner's gross sales amounts have also been modest and, as noted by the director, the level of reported wages have never reflected even a cumulative payroll equivalent to the beneficiary's individual proposed wage as set forth on the ETA 750. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa.*

Accordingly, based on the evidence contained in the record and after consideration of the information and arguments presented on appeal, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.