U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

JAN 23 2007

FILE: WAC 05 052 51276 Office: CALIFORNIA SERVICE CENTER Date:

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a vegetarian cook. 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the issues in this case are whether the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether it has demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 750 labor certification.

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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements

> of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 Department of Labor. 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 February 8, 2002. The proffered wage as stated on the Form ETA 750 is $688.50 per week, which equals $35,802 per year. The Form ETA 750 states that the position requires two years of experience as a vegetarian cook.

On the petition, the petitioner stated that it was established on April 20, 2001. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Northridge, California. The petitioner did not state the number of workers that it employs, or its gross annual income or net annual income in the spaces provided on the Form I-140 visa petition as originally submitted. In a subsequent submission the petitioner stated that its gross annual income is $172,910, its net annual income is $102,226,[1] and that it employs five workers.

On the Form ETA 750, Part B the beneficiary, who signed that form on January 30, 2002, stated that he had worked from June 1992 to August 1994 as a vegetarian cook for India's Tandoori Authentic Indian Cuisine restaurant in Tarzana, California. The beneficiary did not claim to have worked for the petitioner.

In the instant case the record contains (1) the petitioner's 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) letters from commercial lenders pertinent to the petitioner's credit lines, (3) letters pertinent to the petitioner's owner's credit lines, (4) photocopied pages of a "Liquid CD" savings account of the petitioner's owner and owner's spouse, (5) letters pertinent to the petitioner's owner's personal bank accounts, and (6) a letter dated July 9, 2005 from an Enrolled Agent. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record also contains (1) a letter dated September 12, 1994 from India's Tandoori restaurant, the beneficiary's alleged previous employer, stating that the beneficiary worked for that restaurant as a chef preparing vegetarian dishes from June 1, 1992 to August 30, 1994, and (2) a letter dated August 17, 2005, also from India's Tandoori restaurant, and essentially identical to the September 12, 1994 letter, but specifying that the beneficiary worked 40 hours per week. The record does not contain any other evidence relevant to the beneficiary's claim of qualifying employment experience.

---

[1] Reference to the petitioner's 2004 tax return shows that it did, in fact, report gross receipts or sales of $172,910 during that year. That same return shows that the petitioner, rather than declaring net income of $102,226 during that year, as the petitioner's submission indicates, declared a loss of that same amount.

The petitioner's tax returns show that it is a corporation, that it incorporated on April 20, 2001, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2002 the petitioner declared a loss of $11,582 as its ordinary income. At the end of that year the petitioner had current assets of $125,673 and current liabilities of $67,671, which yields net current assets of $58,002.

During 2003 the petitioner declared a loss of $323,161 as its ordinary income. At the end of that year the petitioner had current assets of $135,540 and current liabilities of $70,417, which yields net current assets of $65,127.

During 2004 the petitioner declared a loss of $102,226 as its ordinary income. That return also showed that the petitioner declared a section 1231 gain of $5,372 during that year for a total net loss of $96,854 during that year. At the end of that year the petitioner had current assets of $17,530 and no current liabilities, which yields net current assets of $17,530.

The suffix Enrolled Agent, or EA, after a person's name indicates that the person is permitted to represent taxpayers in matters before IRS. The July 9, 2005 letter from an Enrolled Agent in this case states that he is the petitioner's accountant. That letter lists the petitioner's owner's bank accounts and various credit lines, those of the petitioner and the petitioner's owner, as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Enrolled Agent concludes that the petitioner has the ability to pay the proffered wage.[2]

The director denied the petition on July 30, 2005. On appeal, counsel again cited the petitioner's available credit as evidence of its ability to pay the proffered wage. Counsel also cited the August 17, 2005 employment verification letter, which was submitted on appeal, as sufficient evidence of the beneficiary's qualifying employment.

This office agrees with counsel's contention that the evidence submitted demonstrates that the beneficiary has the requisite two years of qualifying employment experience and that the petitioner, therefore, has demonstrated that the beneficiary is qualified to fill the proffered position. The remaining issue is whether the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), 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 with no legal obligation to pay the wage."

---

[2] Although the Enrolled Agent is free to comment on the evidence provided the Enrolled Agent's personal opinion that the evidence demonstrates the petitioner's ability to pay the proffered wage is not convincing evidence. To accept it as such would be to abrogate this office's responsibility in favor of a third party.

As the owners, stockholders, and others are not obliged to pay the petitioner's debts the income and assets of the owners, stockholders, and others are their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.[3]

Reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.[4] Third, the bank statements submitted pertain to personal accounts of the petitioner's owner, held either solely or with his spouse, and do not represent funds available to the petitioner, as was explained above.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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);

---

[3] The evidence that the commercial lenders relied upon in issuing credit to the petitioner might be sufficient, if it were before us, to convince this office that the petitioner is financially robust. Absent that evidence, however, this office will not predicate its decision on the conclusion of the lenders. Again, to do so would be to abrogate the responsibility of this office in favor of third parties. The decision of this office will be based on the evidence of record.

[4] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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 CIS should have considered income before expenses were paid rather than net income. 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[5] shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is $35,802 per year. The priority date is February 8, 2002.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of $58,002. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of $65,127. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

[5] The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

During 2004 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of $17,530. That amount is insufficient to pay the proffered wage. The petitioner is unable to show its ability to pay the proffered wage during 2004 out of either its profit or its end-of-year net current assets.

Because the petitioner's profits and net current assets were insufficient to show its ability to pay the proffered wage during only one of the three salient years this office will examine, in addition, whether the totality of the evidence in this matter is sufficient, pursuant to the reasoning of the opinion in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), to demonstrate the petitioner's ability to pay the proffered wage.

Matter of Sonegawa, 12 I&N Dec. 612 (Reg. Comm. 1967) relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, 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 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 that petitioner's sound business reputation and outstanding reputation as a couturière.

If losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage.

Here, however the petitioner is a new business. It filed the Form ETA 750 less than a year after it incorporated. The evidence does not demonstrate that it has ever posted a profit. Although it had gross receipts of more than $800,000 during 2002 and almost $750,000 during 2003, its gross receipts during 2004 fell to $172,910. That drop in receipts does not indicate that the petitioner's business is healthy. During 2002 it paid salaries and wages of $66,933. That amount fell to $18,238 and $20,640 during 2003 and 2004, respectively. That drop appears to indicate that the petitioner has been eliminating staff, rather than adding staff. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2002, 2003, and 2004 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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.