

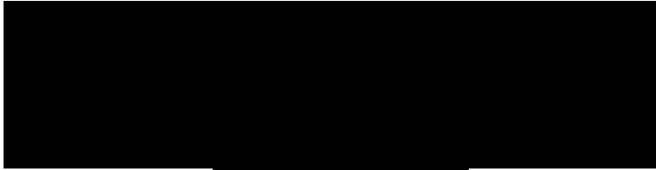


U.S. Citizenship
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By



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Office: TEXAS SERVICE CENTER

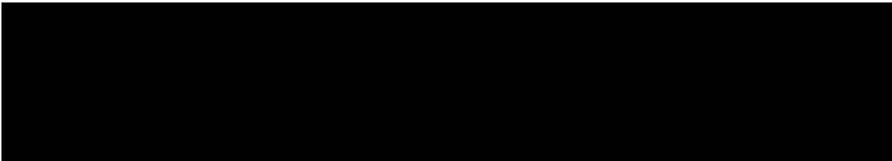
Date: JUN 12 2007

IN RE: Petitioner:
Beneficiary:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition and a subsequent motion to reopen were denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) 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 food service manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 director erred in failing to determine the petitioner's 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) 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 DOL's employment system. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is 2,790 per month, which amounts to \$33,480 per year. The ETA 750B, signed by the alien beneficiary on February 12, 2002, indicates that he has worked for the petitioner since January 1999. An accompanying letter, dated June 22, 2005, from the employer confirms that the petitioner still employs the beneficiary.

The visa petition was filed on July 5, 2005. As evidence of its continuing financial ability to pay the certified wage of \$33,480 per year, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2001, 2002, and 2003. They indicate that the petitioner files its taxes using a standard calendar year. The tax returns contain the following information:

| | 2001 | 2002 | 2003 |
|--|----------|----------|-----------|
| Net taxable income before the net operating loss(NOL) | \$6,497 | -\$9,478 | \$ 1,533 |
| Current Assets (Sched. L) | \$24,113 | -\$6,855 | -\$14,025 |

| | | | |
|--------------------------------|-----------|----------|-----------|
| Current Liabilities (Sched. L) | \$ -0- | \$ 635 | \$ -0- |
| Net Current Assets | \$ 24,113 | -\$7,490 | -\$14,025 |

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets.¹ Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year 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.

The director issued a notice of intent to deny on July 26, 2005, noting that the petitioner had not established its ability to pay the proffered wage and notifying that the petitioner could respond within thirty (30) days with additional evidence and/or argument. The director also noted that as the petitioner employed the beneficiary, it could provide copies of Wage and Tax Statements (W-2s) showing compensation paid to the beneficiary reflecting wages equal to or exceeding the proffered wage.

In response, the petitioner provided unaudited financial statements for 2001, 2002, and 2003.

The director denied the petition on August 30, 2005. She determined that the petitioner had failed to establish its continuing ability to pay the proffered wage beginning at the priority date because either its net income or net current assets were insufficient to demonstrate that it had sufficient funds to pay the certified salary in any of the three relevant years.

The petitioner submitted an untimely appeal alleging that the regulations do not require that the petitioner employ the beneficiary or that he must be paid the proffered wage prior to filing the Immigrant Petition for Alien Worker (I-140). Referring to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), counsel also asserted that the petitioner has generated sufficient revenue to pay the proffered wage.

The director treated the untimely appeal as a motion to reopen under 8 C.F.R. § 103.3(a) and on December 2, 2005, determined that the motion failed to overcome the grounds for denial. The director noted that providing evidence of wages paid that equal or exceed the proffered wage is only one of three methods of determining the petitioner's ability to pay the proffered wage as suggested by a CIS headquarters memorandum.²

¹ 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.

² *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004).

On appeal, counsel provides copies of tax returns previously supplied to the underlying record and additionally submits copies of unaudited financial statements for 2004 and for January through November 2005. Counsel maintains that as the sole shareholder of a small corporation, [REDACTED]'s income tax return is of significance in providing evidence of the petitioner's ability to pay the proffered wage.

The AAO does not concur and notes that [REDACTED] income tax return has not been provided. Moreover, 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).

The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, 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."

Counsel cites *Matter of Sonegawa* for the proposition that the petitioner is experiencing consistent growth and should be able to establish its ability to pay the proffered wage because its expectations of increasing profits support its future prospects for success. Counsel asserts that the petitioner's total gross income increased from approximately \$537,000 in 2001 to \$856,000 in 2002, to \$1,044,000 in 2003. In *Matter of Sonegawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. 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. Here, while it is recognized that the petitioner has been in business since 1995, the three tax returns submitted to the record do not form a framework of profitable years analogous to the situation in *Sonegawa*. Although the petitioner reported increases in gross income, it also had a corresponding increase in expenses and consistently reported modest or negative net income and net current assets. There is no evidence of the petitioner's business reputation in the record of proceedings. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Counsel's assertions as to the petitioner's business reputation 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). 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*.

Regarding the documentation provided to the record, it is noted that unaudited financial statements are not probative evidence of a petitioner's ability to pay the certified wage. 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. As none of the financial statements are audited as required by the 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during 2004 or 2005.. Although the regulation allows additional evidence such as bank account records, profit/loss statements, or personnel records may be submitted by the petitioner or requested by the director in appropriate cases, it neither suggests nor implies that CIS is obliged to accept unaudited financial statements in lieu of other prescribed evidence.

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 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 the petitioner may have paid the alien less than the proffered wage, those amounts will also be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. In this matter, the record indicates that the petitioner has employed the beneficiary. Although the director's discussion of this employment did not clearly confirm that credible evidence of amounts paid to the beneficiary that were less than the proffered wage would also be considered, there was sufficient notice to the petitioner that CIS would review documentation of compensation paid to a beneficiary for services performed.

If the petitioner does not establish that it may have 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 (or net current assets) as 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)). 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.

As set forth above, in 2001, neither the petitioner's net income of \$6,497 nor its net current assets of \$24,113 was sufficient to cover the proffered wage of \$33,480. The petitioner has not demonstrated its ability to pay the proposed wage offer in this year.

In 2002, neither the petitioner's -\$9,478 in reported net income nor its -\$7,490 in net current assets could have covered the certified wage. The petitioner has not established its financial ability to pay the proffered wage for this year.

Finally, in 2003, neither the petitioner's reported \$1,533 in net income nor its -\$14,025 in net current assets could provide sufficient funds to pay the beneficiary's proposed wage offer of \$33,480. The petitioner did not establish its ability to pay the proffered salary in 2003.

Based on a review of the evidence contained in the record and the argument and evidence submitted on appeal, the AAO concludes that the petitioner has failed to demonstrate its continuing financial ability to pay the proffered salary beginning as of the priority date.

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

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.