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20 Mass. Ave., N.W., Rm. A3042
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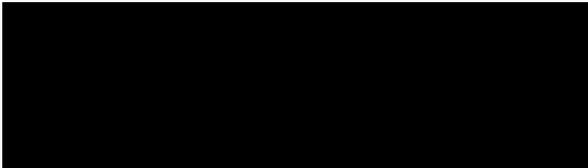
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FILE: WAC-02-024-50273 Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2005

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a garment manufacturer and wholesaler. It seeks to employ the beneficiary permanently in the United States as an assistant designer. 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.

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 January 12, 1998. The proffered wage as stated on the Form ETA 750 is \$9.67 per hour, which amounts to \$20,113.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on April 16, 1984, to have a gross annual income of \$2,642,575, and to currently employ ten workers. In support of the petition, the petitioner submitted its Forms 1120, U.S. Corporation Income Tax Returns for 2000 and 1999; its quarterly wage reports for the last quarter in 2000 and the first two quarters in 2001, and unaudited financial statements dated June 30, 2001.

The tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2000</u>
Net income ¹	\$31,082	-\$18,346
Current Assets	\$586,984	\$820,258
Current Liabilities	\$739,514	\$938,978
Net current liabilities	-\$152,530	-\$118,720

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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 February 10, 2002, 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 the petitioner's 1998 tax return, additional quarterly wage reports, and information about the petitioner's employees.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the year 1998 which reflected that the petitioner's net income was \$39,613 and its net current assets were -\$180,017. In addition, counsel submitted copies of the petitioner's quarterly wage reports for all four quarters in 2001 along with a list of employees and their respective duties. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 14, 2002, the director again requested additional evidence pertinent to that ability. The director noted that petitioner's loss represented on its 2000 tax return and requested information pertaining to any other funds available to the petitioner for use in demonstrating its continuing ability to pay the proffered wage.

In response, the petitioner re-submitted its 2000 tax return; unaudited financial statements² for the period ending March 31, 2001; and a letter from [REDACTED] a certified public accountant, stating that if depreciation were added back to the petitioner's net income in 2000, it would no longer show a loss and explained that the petitioner's two shareholders received large compensation packages to offset double taxation.

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 June 20, 2002, denied the petition.

On appeal, counsel asserts that wages paid to the petitioner's shareholders and corporate officers as well as their personal assets are funds available to the petitioner to pay the proffered wage. Counsel also asserts that two part-time employees will be replaced by the beneficiary and thus wages already spent to those employees since 1998 are available to pay the proffered wage. Counsel does not specifically state the names and occupations of the two employees who will be replaced. Counsel states that evidence of such employees performing the same duties as the proffered position was submitted into the record of proceeding previously. The petitioner re-submits much evidence already submitted, and submits for the first time additional quarterly wage and withholding and tax returns, W-3 forms, additional unaudited financial statements, and documents relating to the petitioner's shareholder's personal financial assets. The petitioner submitted its 2001 corporate tax return that reflects net income of \$31,809 and net current assets of \$535,614.

At the outset, the unaudited financial statements that counsel submitted in response to the director's request for evidence and on appeal 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 statements are the unsupported

² The financial statements were compiled, which is not audited.

representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, none of the unaudited financial statements will be considered.

Counsel's reliance on the assets of [REDACTED] two shareholders and corporate officers of the petitioning entity, is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Thus, the AAO will not consider the personal assets of these individuals or the wages they received over the years in compensation for their respective employment capacities with the petitioning entity as funds available for the petitioner to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998, 1999, 2000, or 2001.

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. 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.

The petitioner's net incomes in 1998, 1999, 2000, and 2001 were \$39,613, \$31,082, -\$18,346, and \$31,809, respectively. The net incomes for 1998, 1999, and 2001 all cover the proffered wage of \$20,113.60. Thus, the petitioner has demonstrated an ability to pay the proffered wage out of its net income in 1998, 1999, and 2001. The petitioner has not demonstrated an ability to pay the proffered wage out of its net income in 2000, however.

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. 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.³ 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's net current assets during the year in question, 2000, however, were negative. As such, the petitioner cannot demonstrate an ability to pay the proffered wage out of its net current assets in 2000.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998. In 1998, however, the petitioner shows a net income of \$39,613 and has, therefore, demonstrated the ability to pay the proffered wage out of its net income. The petitioner has, therefore, shown the ability to pay the proffered wage during the salient portion of 1998.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999. In 1999, however, the petitioner shows a net income of \$31,082 and has, therefore, demonstrated the ability to pay the proffered wage out of its net income. The petitioner has, therefore, shown the ability to pay the proffered wage during the salient portion of 1999.

The petitioner has not demonstrated that it paid any wages to the beneficiary 2000. In 2000, the petitioner shows a loss and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2000.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage during 2000. Counsel asserts that two part-time employees will be replaced and have similar employment positions to the proffered position. The proffered position is described as follows on Form ETA 750A:

Will lay out, mark, and cut pattern and garment for women. Will use design sketch, master pattern, and scissors. Will trace outline of specified paperboard pattern onto fabric, and cut pattern using scissors. Will position and pin pattern sections onto dressmaker model for making of style lines by designer. Will position and pin garments and patterns for designer's approval and to ensure that patterns conform in proportion, harmony, and balance to the design sketch concept. Remove market sections from model and trace style lines on pattern using tracing wheel and carbon paper.

The Department of Labor (DOL) categorized the proffered position as a sample stitcher.

The AAO examined the description of employee positions submitted in response to the director's request for evidence. None of the employees are assistant designers. One employee is a designer; and one is a cutter and another is a sample maker. Additionally, two employees' names were highlighted on a quarterly wage and

³ 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.

withholding report for the quarter ended March 31, 2002. Those employees were [REDACTED]. These employees' names are not mentioned by counsel nor the petitioner in any other document and the employees' names are not highlighted on any other evidence submitted into the record of proceeding in any point during these proceedings. The AAO considered these as two possible employees that may be replaced by the petitioner, however, [REDACTED] is a designer and [REDACTED] is a sample maker. The job descriptions of both employees are different than the proffered position but [REDACTED] is similar. [REDACTED] employment description involves marking, cutting and constructing sample garments following pattern, sketches, and sewing specifications, using sewing machines, needle and thread. [REDACTED], however, involves design of fabrics using computer assisted programs and developing lines of color and materials for new designs. The proffered position does not include the use of a computer assisted program or development of color lines and new materials. Thus, [REDACTED] position could not be considered similar to the proffered position.

The AAO analyzed these two employees without ample evidence and testament from the petitioner. The petitioner did not make any statement concerning the termination of two employees and replacement of the two terminated employees with the beneficiary. Only counsel made this assertion on appeal. Counsel advised that the beneficiary would replace two workers. 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). The petitioner has not documented the position, duty, and termination of named workers who performed the duties of the proffered position. If employees performed other kinds of work, then the beneficiary could not have replaced him or her. 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). Thus, counsel's replacement theory, uncorroborated with supporting evidence, is without merit.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, however, the petitioner shows a net income of \$31,809 and has, therefore, demonstrated the ability to pay the proffered wage out of its net income. The petitioner has, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on 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.

ORDER: The appeal is dismissed.