

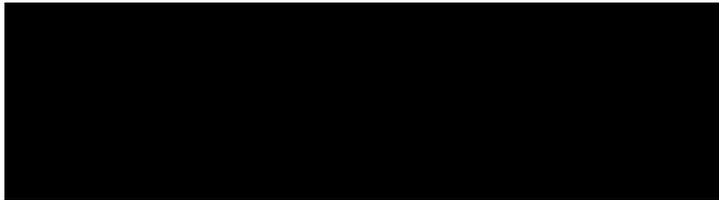
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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
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Services

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Office: VERMONT SERVICE CENTER

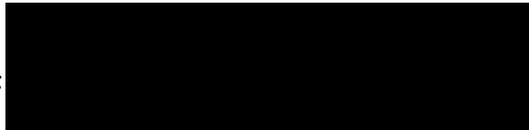
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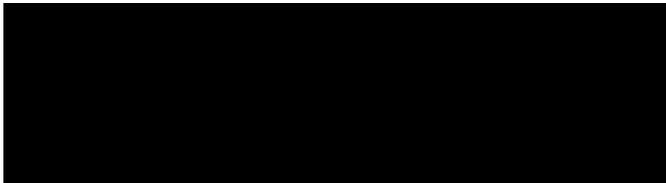
Petitioner:

Beneficiary:



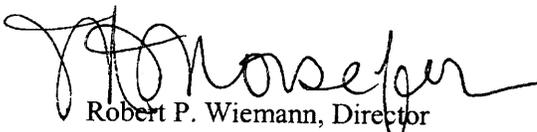
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of CNC machining and precision milling. It seeks to employ the beneficiary permanently in the United States as a machinist and machine operator. 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 5, 2001. The proffered wage as stated on the Form ETA 750 is \$21.92 per hour, which amounts to \$45,593 annually.

In the petition, the petitioner stated that it has 14 employees, was established in 1962, had sales of \$658,200, accounts receivable of \$140,000, and investments of \$100,000. With the petition, the petitioner submitted a letter of support that stated its gross sales for 2000 were approximately \$1,200,000. The petitioner also submitted IRS Form 1120, federal corporate income tax return, for the year 2001. In addition, the petitioner submitted a letter from its officer and owner that stated the year 2001 was not a profitable year for several reasons. Among the reasons listed were the downturn in the semi-conductor industry, and the events of September 11, 2001. The officer pointed out that the petitioner had been in business for over forty years and had been serving many industries, from medical, electronic, semiconductor, to the military industry. The petitioner also submitted a letter from [REDACTED] the petitioner's accountant since 1996. The accountant stated that the business has been fairly profitable until 2001 when it suffered some losses. The accountant stated that the addition of a qualified machinist would enable the petitioner to increase its revenue. According to the accountant, the petitioner

was financially capable of paying the proffered wage to the beneficiary. Finally the petitioner submitted an affidavit from [REDACTED] that stated the beneficiary had worked for [REDACTED] Corporation, Valley Stream, New York, from July 1998 to July 2000 as a machine operator.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 18, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested additional evidence that the petitioner had the ability to pay the proffered wage as of the priority date and continuing to the present. In addition, the director stated that if the petitioner employed the beneficiary in 2001, that the petitioner submit copies of the beneficiary's Form W-2.

In response, counsel submitted a detailed statement from the petitioner describing all the assets owned by the petitioner's owner in excess of three quarters of a million dollars, which included: a certificate of incorporation of [REDACTED] Corporation, which the petitioner's officer states he is a 50 percent owner; an unaudited profit and loss statement for January through November 2003 that examines the petitioner's 2003 income and expenses, as well as compares the petitioner's 2003 financial records with the petitioner's 2002 financial figures; and pay records for the beneficiary from November 6 to December 3, 2003. These records indicate that the beneficiary was paid a weekly salary of \$880 for this period of time.

With regard to the petitioner's owner's description of assets that the company had in 2001, the petitioner lists accounts receivable and cash on hand of over \$156,000, a \$5,000 note due to the petitioner that is owed by another company, \$7,000 in security deposits that will be returned in the future, and \$111,000 in inventory as of the end of 2001.

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 5, 2004, denied the petition. The director stated that while the petitioner's 2001 tax return showed the petitioner had \$268,666 in current assets in that year, the petitioner also had \$237,126 in current liabilities. The director determined that although the current assets exceeded current liabilities by \$31,540, the petitioner's net current assets were still about \$10,000 short of the proffered wage. With regard to the other sources of income pointed out by the petitioner in its response to the director's request for further evidence, the director stated that the other sources could not be used to pay the proffered wage. With regard to the petitioner's building where the petitioner is housed, the director stated that this building was a fixed asset and not readily available to pay the proffered wage. The director also pointed out that a different corporation owned the building, and that its assets may not be combined with another separate corporation. With regard to the petitioner's owner's house, the director stated that this was a personal asset and as such could only be considered if the petitioner was not incorporated. In sum, the director stated that only the income of the petitioning corporation as well as the current assets in the year of filing could be considered when analyzing whether the petitioner in the instant petition had the ability to pay the proffered wage.

On appeal, counsel asserts that the director failed to take into account other factors pointing to the financial viability of the petitioner. In addition, counsel states that since the petitioner believed that the assets reflected in the 2001 tax return were sufficient evidence, he did not mention that he had \$200,000 in a line of credit in 2001 with [REDACTED] Bank, and that \$100,000 of this line of credit was readily available. Counsel then states that

subsequent to the director's denial, the petitioner hired an independent tax and financial expert to analyze their 2001 tax return and available assets during the year 2001, and submits a letter to the record from [REDACTED]

[REDACTED] states in his letter that the petitioner showed a tax loss of \$49,230 in 2001 due to cancelled orders and a general business slowdown in the New York area during the last three and a half months of 2001. The accountant also asserts that he reviewed the bank statements for the petitioner and states that the petitioner maintained positive cash flow throughout the year, and that the petitioner also had a \$200,000 line of credit with [REDACTED] Bank, of which \$100,000 was readily available. The accountant examines the depreciation expenses on the 2001 tax return and states that the actual depreciation expense for the year 2001 was \$44,759 and that the current liabilities of \$187,103 should actually be approximately \$133,023 based on the accountant's analysis of the petitioner's current equipment payments and its payments on its line of credit. Finally Mr. [REDACTED] states that, as of December 31, 2001, the petitioner had a healthy current ratio of 1.5 to 1 with regard to current assets and current liabilities.

Counsel also submits the front page of the petitioner's account statement for his [REDACTED] credit account as of August 5, 2001, as well as the petitioner's monthly bank statements for the petitioner's [REDACTED] Bank business checking account from January 31, 2001 to September 30, 2001. Counsel also states that the petitioner's owner is sole owner of the petitioner, and that the owner took \$54,500 out of the business in 2001. Counsel states that as sole owner of the petitioner, the owner can easily pierce the corporate veil to reach or infuse funds into the business for the petitioner's survival.

Counsel also states that the director should have taken into considerations the events of 9/11, the fact that business revenues and income improved remarkably by the end of 2002, the relatively short period of time in 2001 when the petitioner had a tax loss, the projections of the new employee's contribution to the employer's business upon hire, and the availability of the owner's personal assets to further support the petitioner's ability to pay the proffered wage in 2001. Counsel states that the employer has actually been paying the proffered wage to the beneficiary. Counsel cites to *Sonegawa*, and also states that the blind reliance on financial statements or corporate income tax returns without regard to other circumstances pertaining to the petitioner's financial ability was criticized in *Masonry Masters, Inc. v Thornburgh*, F.2d. (D.C. Cir. May 19, 1989).

On appeal, counsel submits the petitioner's bank statements from January to September 2001. Counsel's reliance on the balance 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 Schedule L of its 2001 tax return. It should also be noted that if the petitioner wanted to further establish counsel's and the petitioner's assertions that its revenues decreased in the latter part of 2001 due to cancelled orders and the aftermath of September 11, 2001, the submission of the petitioner's monthly bank statements from October to December 2001, and into the year 2002 would have possibly provided much more weight to these assertions.

With regard to the documentation on the petitioner's line of credit, 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). In addition, if counsel wished to have the petitioner's line of credit considered as part of its finances, counsel should have submitted this evidence in response to the director's request for further evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the petitioner's line of credit documentation to be considered, it should have submitted the document in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. However, as previously stated, since the petitioner's line of credit documentation is not dispositive in the instant petition, the AAO will examine the petitioner's ability to pay the proffered wage based on the remaining documentation in the record.

With regard to counsel's assertions that the petitioner's owner can easily pierce the corporate veil to take out funds necessary for the petitioner's survival, and that the owner's personal assets can be viewed as further evidence of the petitioner's ability to pay the proffered wage, these assertions are not well founded. Citizenship and Immigration Services (CIS), formerly the Service or INS 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); *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. Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, in response to the director's request for further evidence, and on appeal, counsel submitted an unaudited profit and loss statement that listed the petitioner's expenses and income in 2003 and then compared the petitioner's expenses and revenues in 2003 to the petitioner's expenses and income in 2002. However, the unaudited financial statements 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 representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. It should also be noted that the petitioner's net income for 2002, as indicated in the unaudited document is -\$61,487. This figure would suggest that the year 2002 may also have been an unprofitable one for the petitioner, in terms of net income. However, as stated previously, the unaudited financial statement will not be considered in these proceedings.

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. Although the beneficiary indicated on ETA Form 750 that he had not worked fulltime for the petitioner from March 2001 to the present, the petitioner submitted a printout of an unidentified document that appeared to indicate that the petitioner from early November 2003 to the beginning of December 2003 employed the beneficiary. The petitioner provided no further information as to when it hired the beneficiary or any other wages paid to the beneficiary as of the priority date to the present time. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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 and the independent financial analyst's assertions on motion, CIS does not consider depreciation deductions to be available cash, but rather only examines net income figures in its analysis. 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 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, now CIS, should have considered income before expenses were paid rather than net income.

It is noted that in his request for further evidence dated September 18, 2003, the director requested further evidence with regard to the petitioner's ability to pay the proffered wage from the 2001 priority date and continuing to the present. Although the 2003 notice was sent after April 15, 2003, the date on which the petitioner would have filed its federal income tax or to file for an extension to file its income tax return, the petitioner neither provided its 2002 federal corporate income tax return or an explanation of why it did not submit the return. Therefore, for purposes of these proceedings, only the petitioner's 2001 corporate income tax return is considered. With regard to 2001, the petitioner's net income, as correctly noted by the director and counsel, was -\$49,230. Thus, in 2001, the petitioner had no positive net income available to pay the proffered wage.

Nevertheless, counsel is correct that 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. In addition, 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 tax returns reflect the following information for the year 2001:

2001	
Taxable income ²	\$ -49,230
Current Assets	\$ 268,666
Current Liabilities	\$ 237,126
Net current assets	\$ 31,540

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of -\$49,230 and net current assets of \$31,540. The petitioner still lacked \$14,053 to have sufficient current net assets to pay the proffered wage of \$45,593 in 2001. Therefore the petitioner cannot establish its ability to pay the proffered wage based on its 2001 net current assets.

Both the petitioner and counsel have asserted that the owner's real estate assets and other items such as notes owed to the petitioner could be used as a source of additional funds. As correctly stated by the director, the officer's and sole shareholder's assets cannot be used to supplement the corporation's financial assets. Counsel on appeal states that other items, such as inventory, accounts receivable and cash on hand could be considered in assessing the petitioner's ability to pay the proffered wage. As illustrated above, the AAO does consider items such as inventory, cash on hand, and accounts receivable in its analysis of the petitioner's net current assets. For example, line 1 of Schedule L is cash; while Line 4 of Schedule L is inventory. Both of these items were considered in arriving at the petitioner's net assets in 2001.

On appeal, counsel also states that the compensation given to the petitioner's owner and sole officer and shareholder could easily be used to pay the proffered wage. Since the compensation of the petitioner's sole officer and shareholder can be viewed as a discretionary expense item as opposed to salaries and other business expenses that are not discretionary, there is some merit in counsel's statement. As documented in the petitioner's income tax return for 2001, the sole officer and shareholder was compensated \$54,500. In a letter from the petitioner's owner submitted in response to the director's request for further evidence, the president stated the following: "I have been and still am willing to do whatever is needed to keep the business going. If need be I would be willing to infuse capital to help the company through any rough economic

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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

² Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

times.” However, the record reflects no statement by the owner that he would be willing to forego almost a quarter of his compensation of \$54,500 to cover the \$14,053 of the proffered wage not covered by the petitioner’s 2001 net current assets. Beyond the assertions of counsel on appeal, the record does not establish that the petitioner’s owner is willing to forego a part of his compensation for 2001. 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).

In addition, within the wider context of the totality of the circumstances, the record does not have sufficient evidence to establish that the petitioner is analogous to the petitioner in *Sonegawa*. For example, the record is devoid of evidence that the petitioner’s owner received similar or higher compensation in previous years or the years after 2001 that would support an ongoing ability to use the officer’s compensation to fund the proffered wage. The evidence in the record also did not establish exactly how many of the years in the period of time prior to the priority date of 2001 to the present were profitable for the petitioner; and that the year 2001 was singular in the petitioner’s history with regard to viability or profitability. [REDACTED] the petitioner’s accountant since 1996 stated in his letter that the business had been fairly profitable until 2001, and that in 2001, the business had to bear some losses due to many factors. He also added that the addition of a qualified machinist would enable the petitioner to increase its revenue. This statement by an individual familiar with the petitioner’s finances suggest that additional staff may be as crucial in the future profitability of the petitioner, as its recovery from the aftermath of 9/11. It is also noted that although the financial expert in his letter, submitted on appeal, mentioned cancelled orders being a factor in the petitioner’s financial picture in 2001, the petitioner provided no evidentiary documentation to establish this assertion any further as a pivotal cause of the petitioner’s financial situation in 2001.

Since the record only contains the petitioner’s federal income tax return for 2001, no pattern of years of profitability with one interim unprofitable year can be determined, as in *Sonegawa*. Other factors such as the number of employees, the payment of employee salaries and benefits, and the existence of the petitioner since 1962 do add weight when examining the totality of the circumstances; however, the record is too limited with regard to the petitioner’s financial record to find the petitioner’s circumstances to be analogous to those outlined in *Sonegawa*. In addition, while the petitioner’s existence as a business since 1962, or 43 years, can be viewed as a testimony to its viability, it is also noted that the present owner has only been the president of the company since 1995.

Although counsel raises the issue of officer compensation and its use in paying the proffered wage, counsel does not provide sufficient evidence to show that this factor should be applied in the instant petition in the analysis of the petitioner’s ability to pay the proffered wage as of 2001 and onward. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present. Therefore, the director’s decision shall stand, the motion will be dismissed, and the petition shall be denied.

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 motion is dismissed.