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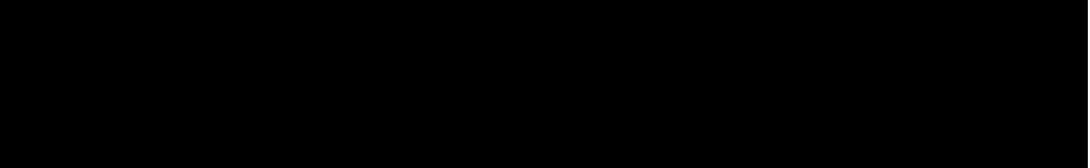
MAR 08 2008

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
WAC-03-012-55450

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
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 sustained. The petition will be approved.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental technician. 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 December 27, 2000. The proffered wage as stated on the Form ETA 750 is \$19.63 per hour, which amounts to \$40,830.40 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 July 1, 1996, to have a gross annual income of \$695,314, and to currently employ 14 workers. In support of the petition, the petitioner submitted its Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2000 and 2001. The tax returns reflect the following information for the following years:

| | <u>2000</u> | <u>2001</u> |
|-------------------------|-------------|-------------|
| Net income ¹ | \$42,234 | \$42,041 |
| Current Assets | \$12,287 | \$40,460 |
| Current Liabilities | \$2,287 | \$3,837 |
| Net current assets | \$10,000 | \$36,623 |

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

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 January 7, 2003, 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 noted that multiple petitions were submitted for different individuals and requested that the petitioner identify "which petition(s) are supported by the petitioner's ability to pay." The director also requested the petitioner's quarterly wage reports and complete tax returns.

In response, the petitioner resubmitted its Forms 1120 Corporate tax returns for the years 2000 and 2001 and submitted its 2002 corporate tax return as well. The 2002 tax return reflects that the petitioner's net income for that year was \$43,062 and its net current assets were \$22,223.

In addition, counsel submitted copies of the petitioner's quarterly wage reports for the four quarters in 2002. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

Counsel asserted that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) applied to the petitioner's case as the petitioner anticipated tremendous growth and profit once the two beneficiaries it sponsored were hired. In support of that assertion, the petitioner provided an affidavit explaining its downturn in business due to lack of labor and testimonials from its clients. Additionally counsel asserted that the director should apply unpublished AAO decisions that counsel asserted stood for the proposition that depreciation expenses and net current assets could be added back to taxable income. Alternatively, counsel asserted that the petitioner is structured as an S corporation, which is "essentially treated as a sole proprietorship for tax purposes," and thus, its sole shareholder's personal assets should be considered as additional evidence of the petitioner's continuing ability to pay the proffered wage. The petitioner submitted the shareholder's individual income tax return and W-2 wage statements.

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 23, 2003, denied the petition. The director considered the petitioner's net income and net current assets and determined that the petitioner did not demonstrate its continuing ability to pay the proffered wage beginning on the priority date since it was sponsoring two beneficiaries whose combined wages are greater than either the petitioner's net income or its net current assets.

On appeal, counsel asserts that the petitioner requests Citizenship and Immigration Services (CIS) to approve one of the pending petitions specifically the instant one. Counsel's brief indicates that the petitioner also requested the same for its other pending petition. The petitioner resubmits previously submitted evidence.

At the outset, the AAO will address arguments counsel made in response to the director's request for evidence.

Counsel's reliance on the assets of the petitioner's sole shareholder is not persuasive. A corporation, even an S 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).

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. 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 the 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 the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2000, 2001, or 2002 were uncharacteristically unprofitable years for the petitioner.

Counsel also argued that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 2000, 2001, or 2002.

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 assertion². 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

² Counsel does not provide a published citation relating to the use of depreciation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions 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).

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 2000, 2001, and 2002 were \$42,234, \$42,041, and \$43,062, respectively. These amounts are all greater than the proffered wage of \$40,830.40. Thus, the petitioner could demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its net income if it only sponsored one immigrant.

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 years in question, 2000, 2001, and 2002, however, were only \$10,000, \$36,623, and \$22,223, respectively, which are all lower than the proffered wage of \$40,830.40. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its net current assets in any respective year regardless of the number of petitions pending.

On appeal, the petitioner requests CIS to choose one petition to approve. Typically, CIS requires the petitioner to make its selection and would require a withdrawal of the petition the petitioner does not intend to sponsor any longer. However, the AAO accessed an internal CIS database that indicates that the AAO dismissed the appeal of the other pending petition. The petitioner only filed two petitions. The petitioner did not appeal or make a motion to reopen or reconsider the AAO's final determination on its other petition⁴. The AAO determines that the petitioner has only one petition pending and an obligation to pay one proffered wage. Thus, the AAO determines that the petitioner can demonstrate that it has the continuing ability to pay the proffered wage beginning on the priority date for its one pending petition, which is the instant petition, out of its net income.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000, 2001, or 2002. In each relevant year, the petitioner shows sufficient net income to demonstrate its continuing ability to pay the proffered

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.

⁴ WAC-03-038-53478 for Min-Sou Ahn.

wage. The petitioner submitted evidence sufficient to demonstrate that it has the ability to pay the proffered wage during 2000, 2001, and 2002. Therefore, the petitioner has established that it has 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.