



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: SEP 30 2006

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

identity information deleted to
protect privacy
PUBLIC COPY

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 employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is in the import/export/company-building/construction business. It seeks to employ the beneficiary as a consultant. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a brief and additional evidence.

In pertinent part, Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on April 18, 2001. The proffered salary as stated on the labor certification is \$70,242 per year.

With the petition, the petitioner, through counsel, submitted copies of the petitioner's 2001 and 2002 Forms 1120S, U.S. Income Tax Returns for an S Corporation, a copy of a 2002 Form 1065, U.S. Return of Partnership Income, for [REDACTED] copies of the owner's 2001 and 2002 Forms 1040, U.S. Individual Income Tax Returns, and copies of two loans belonging to the petitioner's owner. The

2001 Form 1120S reflected an ordinary income of -\$5,364 and net current assets of -\$4,918. The 2002 Form 1120S reflected an ordinary income of -\$18,487 and net current assets of \$1,596. The 2002 Form 1065 reflected an ordinary income of \$48,207 and net current assets of \$2,161. The 2001 Form 1040 reflected an adjusted gross income of \$136,761. The 2002 Form 1040 reflected an adjusted gross income of \$5,033. The director considered this documentation insufficient and on July 28, 2003, he requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. The director specifically requested a copy of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax Statements, a copy of the beneficiary's most recent pay voucher, copies of the petitioner's most recent Forms 941, Employer's Quarterly Federal Tax Returns, and copies of the petitioner's most recent state unemployment compensation report forms.

In response, counsel submitted copies of the petitioner's quarterly state tax filings for the quarters ending June 30, 2003 and September 30, 2003, copies of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax Statements, a copy of a current pay voucher for the beneficiary, and a copy of the beneficiary's earnings statement for the period January 1, 2003 through September 30, 2003. The beneficiary's 2001 and 2002 Forms W-2 reflected wages earned of \$36,300 each, and his current pay voucher reflected wages earned of \$2,500. The petitioner's Forms 1120S reflected wages paid of \$30,000 in 2001 and \$42,760 in 2002. The petitioner's state filings reflected wages earned by the beneficiary totaling \$18,150 for the two quarters ending June 30, 2003 and September 30, 2003. The beneficiary's earning statement reflected wages earned of \$27,225 for the period January 1, 2003 through September 30, 2003.

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 May 10, 2004, denied the petition.

On appeal, counsel submits previously submitted documentation and a letter from [REDACTED] of [REDACTED] Inc., that explains that a mistake was made on the petitioner's 2001 income tax return in regard to the amount of wages shown. Mr. [REDACTED] asserts that the correct amount of salaries paid should have been \$36,300, not \$30,000 as shown on the tax return. However, an amended return was not provided as evidence of this correction. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). JJS Financial Group, Inc. also provides a compilation for the period January 1, 2004 through April 30, 2004. The compilation reflects a net income of \$19,561.13 and net current assets of -\$29,212.47. The regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of the ability to pay shall be in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only in addition, rather than in place of, the types of documentation required by the regulation. In the instance, the petitioner submitted compilations, and those compilations do not reflect that it has the ability to pay the proffered wage as of the filing date of the petition. Counsel further submits copies of the petitioner's bank statements for the period January 1, 2004 through April 30, 2004, a copy of the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, a copy of a 2001 Form 1065 for [REDACTED] copies of the petitioner's owner's 2002 and 2003 Forms 1040, U.S. Individual Income Tax Returns, and a letter from Builder's [REDACTED] in [REDACTED] stating that the petitioner's owner is employed as

a General Manager for that company with a salary of \$72,750. The bank statements reflect balances ranging from a low of \$3,912.13 to a high of \$66,588.50. The 2003 Form 1120S reflects an ordinary income of -\$34,638 and net current assets of \$24,794. The Form 1065 reflects an ordinary income of \$37,231 and net current assets of -\$59,746. The 2002 and 2003 Forms 1040 reflect adjusted gross incomes of \$5,033 and \$283,356, respectively. Counsel states:

Although we note the nature of [REDACTED] as a separate corporate entity, we respectfully submit that it would be impractical and not in keeping with the materials presented and the purpose to be served in operating growing and viable businesses were we not to assume that Mr. [REDACTED] would not, as required, infuse capital funds on behalf of the annual payroll needs of Gulf Marketing, Inc. for the subject years. These funds remained available over the period of time in question per the cash flow generated by Mr. [REDACTED] existing corporations/businesses. In light of these arguments, we respectfully request that the Director's Decision be reversed for cause.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2001 through 2003 at a salary equal to or greater than the proffered wage. In 2001 and 2002, the beneficiary was paid \$36,300 or \$33,942 less than the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.¹ 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 for the years 2001 through 2003 were - \$4,918, \$1,596, and \$24,794, respectively. The petitioner could not have paid the proffered wage from its net current assets in those years.

Counsel offers the petitioner's bank balances in support of the petitioner's ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank account is misplaced. 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. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. In addition, 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 its tax return, such as the cash specified on Schedule L that is considered when determining the petitioner's net current assets.

Counsel asserts that it would be impractical not to consider the owner's ability to infuse funds when needed into the business. Counsel provides copies of tax returns for another entity as well as copies of the owner's individual income tax returns to support his contention. However, contrary to counsel's primary assertion, CIS 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), and *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.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the

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.

circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has not provided enough evidence to establish that the business has met all of its obligations in the past or to establish its reputation or historical growth. In addition, the petitioner has not demonstrated that any unusual circumstances existed in this case to parallel those in *Sonogawa*, nor has it been established that 2001 through 2003 were uncharacteristically unprofitable years for the petitioner.

The 2001 tax return reflects an ordinary income of -\$5,364 and net current assets of -\$4,918. Since both the petitioner's ordinary income and its net current assets are negative, the petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2001, even after considering the wages paid of \$36,300 to the beneficiary ($\$70,242 - \$36,300 = \$33,942$).

The 2002 tax return reflects an ordinary income of -\$18,487 and net current assets of \$1,596. Even after adding the wages paid of \$36,300 to the beneficiary in 2002 to the net current assets ($\$36,300 + \$1,596 = \$37,896$), the petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2002 ($\$70,242 - \$37,896 = \$32,346$).

The 2003 tax return reflects an ordinary income of -\$34,638 and net current assets of \$24,794. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2003.

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.