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U.S. Citizenship
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FILE: [REDACTED]
SRC 04 042 51424

Office: TEXAS SERVICE CENTER Date: DEC 05 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a corporation offering engineering and software services. It seeks to employ the beneficiary permanently in the United States as a business development manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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. The director denied the petition accordingly.

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.

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 granting 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.

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. §

204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on May 30, 2002.¹ The proffered wage as stated on the Form ETA 750 is \$70,765.00 per year.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; three business invoices; a profit and loss statement as of November 15, 2003; a company brochure as well as other documentation concerning the qualifications of the beneficiary.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on December 8, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of a published annual report; "the last two" U.S. federal tax returns; a Form W-3 Transmittal of Wage and Tax Statement for all employees, or, the W-2 statements for the beneficiary; and an audited financial report.

In response to the request for evidence, counsel submitted copies of the following documents: U.S. Internal Revenue Service Form tax returns for 2002 and 2002; a support letter from the petitioner; the beneficiary's Wage and Tax statements for 2002, 2003 and 2004 with a pay stub for January 2005; the petitioner's annual report; a letter from the petitioner relating to its cash flow projections.

The director denied the petition on May 16, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director cited the cases precedent of *Matter of M*, 8 I&N Dec. 24 (BIA 1958), and, *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).² The director made a specific finding that the "... personal savings or holdings [of the owners of petitioner] are not considered for the ability to pay the proffered wage."

On appeal, counsel asserts that the evidence enclosed with the appeal proves that the petitioner has the ability to pay the proffered wage. Counsel asserts that since the priority date is April 30, 2001, the petitioner should be responsible for paying a pro-rated portion of the proffered wage corresponding to the remaining days of 2002 from May 30th.

¹ It has been approximately four years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² These cases will be discussed below.

Counsel has submitted the following documents to accompany the appeal statement: letters from the owner of petitioner dated June 8, 2005, June 10, 2005, June 14, 2005; statements of the net worth of the owners' of petitioner as of December 31, 2002 and 2003 along with a graph of the petitioner's net worth for the time period 2000 to 2004; statements of investment accounts of the owners of petitioner for 2002 and 2003; a statement of the net worth of the owners of petitioner as of December 31, 2003; assorted business invoices in 2003; an article; the petitioner's 2003 and 2004 U.S. federal income tax return; and, pay stubs for 2005.

As a preface to the following discussion, Citizenship and Immigration Services (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.

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. Evidence was submitted to show that the petitioner employed the beneficiary since January 2002. The petitioner paid the beneficiary \$51,664.97, \$50,666.70, \$57,000.00 in 2002, 2003 and 2004 respectively. In 2005, the petitioner paid the beneficiary \$30,000.00 as of May 31, 2005.³ There is no evidence submitted that the petitioner paid the beneficiary the proffered wage of \$70,765.00 per year.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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); *Ubada 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. v. Sava*, the court held that the Service 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. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng* at 537.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$70,765.00 per year from the priority date of May 30, 2002:

- In 2002, the Form 1120-A stated a loss⁴ of <\$19,283.00>⁵.

³ Counsel has asserted on appeal that that "... The petitioner has paid the beneficiary more than the proffered wage for all of 2005" There is no evidence submitted in the record of proceeding that the petitioner paid the beneficiary the proffered wage of \$70,765.00 per year from the priority date.

⁴ IRS Form 1120-A, Line 24.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

- In 2003, the Form 1120-A stated a loss of <\$15,018.00>.
- In 2004, the Form 1120-A stated a loss of <\$95,589.00>.

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 net current assets.

- In 2002, the Form 1120-A stated a loss of <\$19,283.00>. The petitioner paid the beneficiary \$51,664.97 in 2002. The proffered wage is \$70,765.00 per year. The sum of the taxable income loss and the wages paid is less than the proffered wage.
- In 2003, the Form 1120-A stated a loss of <\$15,018.00>. The petitioner paid the beneficiary \$50,666.70 in 2003. The proffered wage is \$70,765.00 per year. The sum of the taxable income loss and the wages paid is less than the proffered wage.
- In 2004, the Form 1120-A stated a loss of <\$95,589.00>. The petitioner paid the beneficiary \$57,000.00 in 2004. The proffered wage is \$70,765.00 per year. The sum of the taxable income loss and the wages paid is more than the proffered wage.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has net income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage or the difference between wages actually paid and the proffered wage, at any time between the years 2002 through 2004 for which the petitioner's tax returns are offered for evidence. Also, in the subject case the petitioner has not paid the beneficiary the proffered wage in tax years 2002, 2003, 2004 and 2005 from an examination of the evidence submitted found in the record of proceeding.

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.⁶ The petitioner's year-end current assets and current liabilities are shown on Part III of the return. A corporation's year-end current assets are shown on lines 1 through 6. The petitioner's year-end current liabilities are shown on lines 13 and 14. 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.

Examining the Form 1120-A U.S. Income Tax Returns submitted by the petitioner, Part III found in each of those returns indicates the following:

- In 2002, petitioner's Form 1120-A return stated current assets of \$4,365.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$4,365.00 in net current assets. The petitioner's net current assets are less than the difference between wages paid and the proffered wage.

⁶ 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.

- In 2003, petitioner's Form 1120-A return stated current assets of \$1,896.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$1,896.00 in net current assets. The petitioner's net current assets are less than the difference between wages paid and the proffered wage.
- In 2004, petitioner's Form 1120-A return stated current assets of \$33,713.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$33,713.00 in net current assets. The sum of the net current assets and the wages paid, \$57,000.00 is greater than the proffered wage of \$70,765.00 per year.

Therefore, for the period 2002 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets. However, the petitioner evidenced its ability to pay the proffered wage from an examination of its net current assets in 2004.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date.

Counsel asserts that since the priority date is May 30, 2002, the petitioner should be responsible for paying a pro-rated portion of the proffered wage corresponding to the remaining days of 2002 from May 30th.⁷ If this were the rule, then the petitioner's yearly net income would also have to be prorated which would eliminate the presumed benefits of pro-ration. Since CIS is attempting to analyze the petitioner's ability to pay over a given period of time, it would not be logical to measure income earned over a different and longer period of time against the wages earned for the shorter period of time.

Counsel has submitted an unqualified⁸ financial statement for the business to show the ability to pay the proffered wage. Counsel cites no legal precedent for the admissibility of the financial statement, and, according to regulation,⁹ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel has also submitted cash flow projections as evidence of the ability to pay the proffered wage. In a generally accepted accounting principles (GAAP) based cash flow statement, the sources of cash are disclosed. The general categories are cash received from operations, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the

⁷ Since the petitioner suffered a loss of <\$19,283.00>, it is unclear why counsel is making this assertion. There was no net income available in 2002 to pay the proffered wage.

⁸ The statements presented were not audited. A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in CIS deliberations in these matters.

⁹ 8 C.F.R. § 204.5(g)(2).

balance sheet and income statement, present an analysis of the financial health of a business. With only an internally generated report as its basis, the statement can have little probative value in the determination of the ability to pay the proffered wage.

We reject counsel's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.

Further, counsel is contending one way to determine the petitioner's proper valuation is to take a multiple of its total 2003 sales values based upon software invoices submitted, goodwill and development costs. It is unclear why counsel is contending the company's valuation based upon a sales ratio, or an appraised valuation of the business as a good concern in 2003, evidence of the ability to pay the proffered wage.

What counsel is actually demonstrating is an indicator of market value to determine what the business may sell for based upon "a rule of thumb" estimation for similar situated businesses. Totaling the sales invoices for 2003, counsel is using a multiple of three to determine what is a fair market valuation. Counsel cites no case precedent that would allow this method, and, a multiple of future sales or the sum of that computation plus goodwill plus expended software development costs does not equate to current net assets and it is not evidence of the ability to pay the proffered wage from the priority date. Proof of ability to pay begins on the priority date, that is May 30, 2002, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel's contentions cannot be concluded to outweigh the evidence presented in the evidence as submitted by the petitioner. In the totality of all the evidence submitted in this case, there is no evidence to demonstrate that the petitioner's business was in an uncharacteristically unprofitable period. On the contrary, for the years 2002, 2003 and 2004, the petitioner suffered losses of <\$19,283.00>, <\$15,018.00>, and, <\$95,589.00>. In two out of three years, the petitioner did not have sufficient net current assets sufficient to pay the proffered wage. At no time did the petitioner pay the beneficiary the full proffered wage by the evidence submitted.

Matter of Sonogawa, 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 *Sonogawa* 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.

There was no evidence submitted that there were unusual or novel expenses, losses or costs that would have depressed the income of the petitioner.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns for 2002 and 2003 as submitted by petitioner that shows that the petitioner has not demonstrated its continuing ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.