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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 11 2006
EAC 03 261 52138

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.

A handwritten signature in black ink, appearing to read "RWiemann".

Robert P. Wiemann, Chief
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 hair salon. It seeks to employ the beneficiary permanently in the United States as a hair stylist. 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.

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.

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 September 6, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$18.68 per hour, which amounts to \$38,854.40 annually.

On the petition, the petitioner indicated it was established in October 1994, and it had a gross annual income of \$946,616. The petitioner did not indicate its number of employees. With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 2000. This document indicated the petitioner's net income in 2000 was -\$22,405.

¹ The beneficiary in the instant petition is a substituted beneficiary. The petitioner originally submitted the Form ETA 750 for another beneficiary on August 15, 2003.

On February 17, 2005, the director issued a combined Notice of Intent to Deny (NOID) the petition, and a request for further evidence. With reference to notice to deny the petition, the director stated that the petitioner's attorney of record, ██████████ plead guilty in United States District Court for the District of Columbia to a one count of conspiracy, four counts of money laundering, and one hundred and sixty-four counts of labor and immigration fraud. The director stated that based on the widespread scope of the fraud perpetrated by Mr. ██████████ Citizenship and Immigration Services (CIS) was scrutinizing all immigrant worker visa petitions filed with CIS if Mr. ██████████ or his firm appeared as attorney of record. The director then stated that the instant petition would be denied unless the petitioner submitted to CIS a statement, accompanied by documentary evidence, to establish that the petitioner did, in fact, retain Mr. ██████████ or his firm to obtain a bona fide labor certificate relating to a bona fide job offer, and to file a bona fide immigrant work visa petition so that the beneficiary could immigrate based on the bona fide job offer.

In addition, the director also noted that the petitioner's federal income tax return for tax year 2000 indicated a net loss of \$22,405 and current assets of \$4,216 over current liabilities. The director determined that the petitioner's ability to pay the proffered wage was not established in the record. The director stated that the petitioner should submit additional evidence to establish the petitioner's ability to pay the proffered wage as of September 6, 2001, the priority date and continuing to the present. The director specially requested the petitioner's 2001, 2002 and 2003 U.S. federal income tax returns, with all schedules and attachments. The director stated that as an alternative, the petitioner might submit annual reports for the same years, accompanied by audited or reviewed financial statements. Finally the director stated that if the petitioner had employed the beneficiary, to submit the beneficiary's W-2 forms.

In response, the petitioner submitted a letter with documentation to address the director's concerns with regard to the original Form ETA 750 and the I-140 petition filed by Mr. ██████████. The petitioner also submitted its 2001, 2002, and 2003 federal tax returns to establish its ability to pay the proffered wage. These tax forms indicated the petitioner had taxable income before net operating loss deduction and special deductions of -\$11,686 in 2001, -\$22,154 in 2002, and -\$27,065 in 2003.

On April 25, 2005, the director denied the petition. In his decision, the director stated that the petitioner's response to the initial NOID overcame the primary reason of the NOID, namely the filing of the petition and labor certification by Mr. ██████████ and whether the instant petition and job offer were bona fide. With regard to the petitioner's evidence submitted to further establish the petitioner's ability to pay the proffered wage, the director noted the petitioner's net losses in tax year 2001, 2002 and 2003. The director then stated that the petitioner had net current assets of \$8,355 in 2001, negative net current assets of \$38,717 in 2002, and negative net current assets of \$29,627.² The director then determined that the petitioner did not have the ability to pay the proffered wage at the time of filing.

On appeal, new counsel states that CIS had initially approved the instant petition on the basis of the petitioner's 2000 federal income tax return; however, CIS subsequently requested further evidence that former counsel had

² In his decision, the director described the petitioner's net current asset figures as either "net assets over liabilities" or "current liabilities over current assets." The AAO will explain more fully further in these proceedings how the petitioner's net current assets are calculated.

not fraudulently submitted the petition. Counsel notes that the director in his decision acknowledged that the petitioner's response to the NOID overcame the primary reason for the NOID.

With regard to the petitioner's ability to pay the proffered wage, counsel states that the personal assets of any of the co-owners may be taken into account in determining the petitioner's ability to pay the proffered wage. Counsel further stated that when the petitioner's taxable income is negative, CIS utilizes several other criteria for determining the petitioner's ability to pay the proffered wage. Counsel identifies these criteria as including the owner's personal assets, the owner's willingness to commit personal resources to the assets of a petitioner, and the petitioner's volume of sales/receipts, and also the petitioner's contention that the hiring of the beneficiary will turn an unprofitable company into a profitable one. Counsel asserts that the petitioner is a viable business concern with gross receipts of \$900,000 a year. Counsel further asserts that hiring the beneficiary will help the petitioner turn its losses into profits.

Counsel submits a letter signed by both co-owners, [REDACTED] and [REDACTED] that also states Mr. [REDACTED] willingness to use his additional resources to make up any deficiency in the petitioner's taxable income. Mr. [REDACTED] states that he is willing to commit a revolving credit line of \$40,000, and also an insurance policy worth \$54,973.55 in his name.

Counsel submits a copy of Mr. [REDACTED] credit card with Citi AAdvantage World MasterCard and a statement for this credit card dated April 21, 2005. This statement indicated a revolving credit line of \$40,000, a current outstanding balance of \$28,408.18, with an available remaining revolving credit line of \$11,591. Counsel also submits a copy of the quarterly growth report on Mr. [REDACTED] policy with American International Group (AIG) dated March 31, 2005. This account appears to be for an annuity account. The accumulated balance for this account as of March 31, 2005 is \$54,973.55.

On appeal, both the petitioner and counsel state that the instant petition was initially approved based on the petitioner's 2000 federal income tax return. Neither the petitioner nor counsel provide any further substantiation of this assertion. The record does not reflect that the instant petition was ever approved. Furthermore although the director did not address this in his decision, the priority date for the instant petition is September 6, 2001, and therefore, the petitioner's financial records in 2000 would not be dispositive in these proceedings. It is further noted that the petitioner in 2000 also indicated a negative taxable income of \$22,405, which further brings into question any prior approval of the petition.

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. The petitioner did not claim to have employed the beneficiary as of the priority date. Thus, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward. The petitioner also has the obligation to pay the entire proffered wage as of 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. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The petitioner is structured as a corporation. The petitioner's net income is the taxable income shown on line 28, taxable income before NOL deduction and special deductions on its IRS Form 1120. In tax years 2001, 2002, and 2003, as stated previously, the petitioner's net income was -\$11,686 in 2001, -\$22,154 in 2002, and -\$27,065 in 2003. None of these figures is sufficient to pay the proffered wage of \$38,854.40.

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. 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

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.

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 tax returns reflect the following information for the tax years 2001, 2002, and 2003:

	2001	2002	2003
Taxable income ⁴	\$ -11,686	\$ -22,154	\$ -27,065
Current Assets	\$ 8,681	\$ 6,425	\$ 24,787
Current Liabilities	\$ 326	\$ 45,142	\$ 54,414
Net current assets	\$ 8,355	\$ -38,717	\$ -29,627

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 -\$11,686, and net current assets of \$8,355, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of -\$22,154 and net current assets of -\$38,717. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2003, as previously illustrated, the petitioner shows a taxable income of -\$27,065, and net current assets of -\$29,627, and has not, therefore, demonstrated the ability to pay the proffered wage. Thus, the petitioner did not have the ability to pay the proffered wage as of the 2001 priority date year and during tax year 2002 and 2003 based on its net income or net current assets.

On appeal, counsel states that the assets of one of the petitioner's co-owners can be utilized to address the deficiency in the petitioner's financial assets. Contrary to counsel's 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.

Furthermore, even if the owner's assets could be considered, in the instant petition, counsel presents the co-owner's credit card line of credit and annuity insurance balance as evidence of further financial assets to be utilized by the petitioner. However, 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). The co-owner's line of credit also shows remaining funds available as of May 2005, although the petitioner has to establish its ability to pay the proffered wage as of September 2001 and onward. In addition, the co-owner's insurance policy does not appear to be a liquid asset that could be considered readily available to pay the proffered wage, either as of the date of the current balance, or as of the September 2001 priority date.

⁴ As previously stated, 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.

Counsel also asserts that CIS should consider the employment of the beneficiary as a factor in determining the petitioner's ability to pay the proffered wage, as the employment will turn an unprofitable company into a profitable one. Counsel does not submit any further evidence to further substantiate this assertion. In addition, counsel's assertion is not persuasive. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel also notes that the petitioner's volume of sales/receipts of goods might also be a factor to consider in determining the petitioner's ability to pay the proffered wage. 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. Reliance on the petitioner's gross receipts and wage expense is misplaced.

On appeal, counsel infers that other criteria can be used in examining petitioners when taxable income is negative, however, counsel's criteria are not persuasive. The totality of the circumstances for such petitioners is examined in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). This precedent decision 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Neither the petitioner nor counsel has provided substantive information as to the petitioner's circumstances beyond its federal income tax returns. These tax returns reflect that the petitioner had substantial total income in the years 2001 to 2003, with salaries and wages paid ranging from \$459,505 in 2001 to \$529,777 in 2003; but the record does not reflect the number of the petitioner's employees or other business circumstances. Thus, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. The petitioner in the instant petition has had unprofitable years since the priority date and to the present.

The petitioner has not presented sufficient evidence as to any further sources of funds that the petitioner can utilize to pay the proffered wage. Therefore the petitioner has not established its ability to pay the proffered wage as of the 2001 priority date and to the present.

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.