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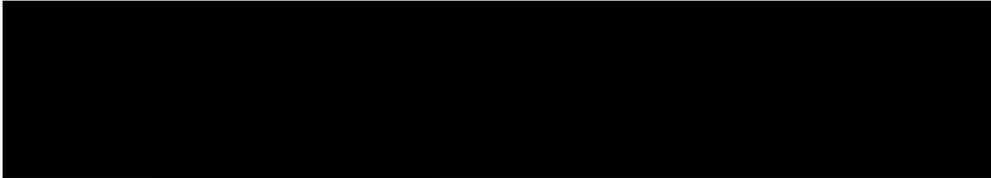
U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: MAR 3 2005

WAC 05 010 51323

IN RE:

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, Chief
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 dismissed.

The petitioner is a Korean specialty restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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 DOL's employment system. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 22, 2002. The proffered wage as stated on the Form ETA 750 is \$10.09 per hour, which amounts to \$20,987.20 annually. The ETA 750B, signed by the beneficiary on January 7, 2002, does not indicate that she has worked for the petitioner.

On Part 5 of the visa petition, filed on October 12, 2004, it is claimed that the petitioner was established in 1999,¹ has gross annual income of \$446,642, and currently employs fourteen workers. As evidence of its continuing financial ability to pay the certified wage of \$20,987.20 per year, the petitioner provided copies of the petitioner's 2002 and 2003 Form 1120, U.S. Corporation Income Tax Return. These returns reflect that the petitioner files its tax returns using a standard calendar year. The tax returns contain the following information relevant to the corporate petitioner's income, assets and liabilities:

	2002	2003
Gross Receipts or Sales	\$609,481	\$681,580
Total Income	\$356,042	\$446,642

¹ As subsequently noted by counsel and as shown on the tax returns, the petitioner was established in 1997.

Compensation of Officers	none listed	none listed
Salaries and Wages	\$165,808	\$164,828
Taxable income before		
Net operating loss (NOL)	\$ 7,774	\$ 24,667
Current Assets (Sched. L)	\$ 15,174	\$ 48,008
Current Liabilities (Sched. L)	\$ 21,431	\$ 22,310
Net Current Assets	-\$ 6,257	\$ 25,698

Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also provided copies of its state quarterly wage report for the third quarter ending September 30, 2003 through the second quarter of 2004, ending June 30, 2004. They reflect that the petitioner maintained a payroll of 13 to 14 workers. The beneficiary's name was not among those listed.

Upon review of the petitioner's net income and net current asset figures reflected on the petitioner's federal tax returns, the director determined that although the petitioner had sufficient funds to cover the proffered wage in 2003, in 2002, neither its net income nor net current assets failed to represent a sufficient resource to pay the proffered wage of \$20,987.20. The director also noted that none of the current employees listed on the state quarterly wage reports earns a salary equal to or greater than the proffered wage (\$5,246.80) of the proposed full-time job offer (as a cook) to the beneficiary. He denied the petition on March 13, 2005.

On appeal, in addition to documents previously supplied to the record, counsel supplies a copy of an internal data processing printout indicating that [REDACTED] is the corporation's sole shareholder. Counsel also submits copies of Mr. Han's individual bank statements from City National Bank covering January through August 2002, October 2002, and January 2003.

Counsel asserts that at the time the petitioner filed its alien labor certification application, the business was young but growing. Counsel relies on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a petitioner's total circumstances should be considered in that a petition may be approved based on a petitioner's reasonable expectations of increasing profit. Counsel also explains that the restaurant was still trying to consolidate its position in 2002 and improve its business and that it would not be unusual to report a modest net income of \$7,774. He notes that the 2002 return shows that the petitioner spent over \$10,000 for repairs/improvement, and over \$253,000 on inventory.

² 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.

Counsel further states that the petitioner had depreciable assets of over \$158,000 and that it took a depreciation deduction of over \$9,000. Counsel suggests that if depreciation and the capital repairs were added back to the petitioner's net income, it would cover the proffered wage.

Counsel adds that the petitioner's 2003 figures show that it is a growing business and that it is able to pay its workers without difficulties. He notes that the sole shareholder had the ability to withdraw additional funds to pay the proffered wage, as shown by ██████████ bank statements. Finally, counsel asserts that had the director allowed the petitioner to submit additional evidence, it would have been able to prove that the totality of circumstances established its ability to pay the proffered salary.

In this matter, we do not find that the director should have necessarily requested additional evidence because counsel provided ample documentation, pursuant to 8 C.F.R. § 204.5(g)(2) and 8 C.F.R. 102.2(b)(8), sufficient to render a decision on the petition and accompanying documentation, where there was no evidence of ineligibility.

It is further noted that CIS jurisdiction includes a determination of whether the petitioner is making a realistic job offer and an evaluation of the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As noted by the director, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record contains no indication that the petitioner has employed the beneficiary.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985).

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 that 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. (Original emphasis.) *Chi-Feng* at 536.

As noted above, counsel's suggestion that the petitioner's depreciation should be added back to its net income is unpersuasive. Similarly, we see no rationale supporting the proposal that the petitioner's \$10,004, reflected as repairs and maintenance on line 14 of the 2002 Form 1120, should be added back to the petitioner's net income. Repairs and maintenance are an expected cost of operating a business. Nor do we find persuasive the assertion that Mr. Han's individual cash assets should be automatically included in the analysis applied to the corporate petitioner. Unlike a sole proprietorship, which is an entity that is indistinguishable from the assets and liabilities of its individual owner, it is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

See also, *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). The *Sitar* court considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court stated, "nothing in the

governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

Counsel asserts that the petitioner’s ability to pay the certified wage may be based on the expectations of increasing business. Counsel is correct that *Matter of Sonegawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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. In this case, the petitioner, a five-year operation at the time of filing the petition, has presented two tax returns showing an increase in net income in 2003, but only a modest profit in 2002. It cannot be concluded that this represents a framework of success such as that discussed in *Sonegawa*, or that the petitioner has demonstrated that such unusual circumstances exist in this case, which are analogous to the facts set forth in that case.

The clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is January 22, 2002. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner’s ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

In this case, as noted above, the petitioner established its ability to pay the proffered wage in 2003. As referenced by the director, however, neither the petitioner’s net income of \$7,774, nor its net current assets of -\$6,257 could meet the proffered wage of \$20,987.20 in 2002, the year of filing. The evidence failed to establish the petitioner’s continuing ability to pay the proposed wage offer during the relevant period.

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning priority date of the petition as required by 8 C.F.R. § 204.5(g)(2).

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.