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U.S. Citizenship
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Services

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FILE: [Redacted] Office: VERMONT SERVICE CENTER
EAC 02 271 51026

Date: MAR 30 2007

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 Acting Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the acting director's decision. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The previous decisions of the acting director and AAO will be affirmed. The petition will be denied.

The petitioner is a restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a cook. The acting director determined that the petitioner had not established that it has had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

The record shows that the motion was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the acting director incorrectly applied the pertinent law.

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 or seasonal nature, for which qualified workers are unavailable 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$12 per hour, which equals \$24,960 per year.

The visa petition in this matter was submitted on August 26, 2002. On the petition, the petitioner stated that it was established during 1998 and that it employs three workers. The petition states that the petitioner's gross annual income is \$125,000 and that its net annual income is \$25,000. On the Form ETA 750, Part B, signed by the beneficiary April 10, 2001, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Philadelphia, Pennsylvania.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) 2000, 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) monthly statements pertinent to the petitioner's owner's bank account, (3) a letter dated August 7, 2003 from the petitioner's owner, (4) compiled balance sheets and income statements for the nine months ended September 30, 2003, and (5) a letter dated July 9, 2003 from the petitioner's accountant. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on December 23, 1997,² and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2000 the petitioner had gross receipts of \$128,685 and declared ordinary income of \$22,802. At the end of that year the petitioner's current liabilities exceeded its current assets. This office notes that, because the priority date of the instant petition is April 20, 2001, evidence pertinent to the petitioner's finances during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The peripheral relevance of the 2000 return, however, is discussed below, in response to counsel's argument, made on appeal and on motion, that the petitioner's business is growing.

During 2001 the petitioner had gross receipts of \$120,183 and declared a loss of \$2,788 as its ordinary income. At the end of that year the petitioner's current liabilities exceeded its current assets.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² Although this contradicts the statement that the petitioner was established during 1998 the difference is minimal and immaterial.

During 2002 the petitioner had gross receipts of \$106,147 and declared ordinary income of \$2,743. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner had gross receipts of \$149,433 and declared ordinary income of \$27,310. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner had gross receipts of \$137,677 and declared ordinary income of \$28,303. At the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's owner's August 7, 2003 letter states that the amount in her bank account is available to pay the proffered wage if necessary. The petitioner's accountant's July 9, 2003 letter states that the petitioner is able to pay an additional \$30,000 in salary as necessary to pay the beneficiary's proffered wage.

The acting director denied the petition on October 15, 2003.

On appeal, counsel asserted (1) that the petitioner's depreciation deduction, beginning-of-year and end-of-year cash, capital stock, retained earnings, and the petitioner's owner's personal funds are available to pay the proffered wage, (2) that the accountant's letter demonstrates that the petitioner is able to pay the proffered wage, and (3) that the petitioner's demonstrated growth supports the proposition that it is able to pay the proffered wage. Counsel notes that 8 C.F.R. § 204.5(g)(2) states that additional evidence may be considered in appropriate cases and urges that the petitioner's owner's bank statements should, therefore, be considered. Counsel also urges that, if the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, CIS should have requested additional evidence.

The AAO dismissed the appeal on August 11, 2005. On the motion, counsel reiterated the arguments made previously on appeal.

The petitioner's owner's bank statements are poor evidence of the petitioner's ability to pay the proffered wage for various reasons. Initially, they represent an asset of the petitioner's owner, rather than an asset of the petitioner. The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), 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 with no legal obligation to pay the wage."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts the income and assets, including bank balances, of the owners, stockholders, and others are their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Further, bank statements, even if they showed the petitioner's own funds rather than the petitioner's owner's, would be poor evidence of the petitioner's ability to pay the proffered wage. First, bank statements are not

among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.³ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's owner's bank statements reflect additional available funds not shown on the petitioner's tax returns.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁴ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel appears to argue that the sum of the petitioner's beginning-of-year cash and its end-of-year cash is somehow relevant to the petitioner's ability to pay the proffered wage. This office is unable to see the

³ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁴ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

relevance of that sum and counsel did not explain. The petitioner's end-of-year cash will be considered in the analysis pertinent to net current assets, below. The petitioner's beginning-of-year cash will also be considered, in that it is the end-of-year cash of the previous year.

The proposition for which counsel cited the petitioner's Schedule L, Line 22, Capital Stock is unclear to this office. Counsel did not specify whether he was arguing that the capital stock entry represents a fund available to pay additional wages or an offsetting credit that reduces the funds available to pay additional wages. In any event, it is neither.

Capital stock is not an asset, but a counterbalancing entry that indicates that the source of a given asset, typically cash, was a stock sale. In this case, the petitioner sold stock for \$1,000. The \$1,000 went to cash and the counterbalancing credit entry was Capital Stock of \$1,000. In the determination of the funds available to the petitioner, whether the petitioner still has that cash is relevant, but where it initially came from is not. The petitioner's cash on hand will be considered in the context of calculating its net current assets, which calculation is detailed below. Capital stock has no place in that equation.

Counsel asserts that retained earnings are a fund available to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income is therefore duplicative, at least in part.

Further, even if considered separately from net income, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer to pay to its employees in cash while continuing in business. They are not, therefore, an index of a company's ability to pay additional wages.

The accountant's July 9, 2003 letter states the conclusion that the petitioner is able to pay the proffered wage, but without explaining how any evidence points to that conclusion. Determining, on appeal, the petitioner's continuing ability to pay the proffered wage beginning on the priority date is among the duties of this office. This office will not abrogate that duty or assign it to the petitioner's accountant. While this office would willingly have considered any evidence and counsel's reasoning from that evidence, the conclusion of the accountant, in itself, is of little weight.

Counsel urges that, if the evidence submitted were insufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date then CIS could have requested additional evidence. This office notes that, on May 28, 2003, the service center issued a request for additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner was on notice then that the service center found the evidence then in the record insufficient and was free to submit additional evidence at that point.

The decision of denial constituted additional notice that the service center found the evidence insufficient and the petitioner was free to submit additional evidence on appeal. The dismissal of the appeal constituted yet further notice that CIS found the evidence in the record insufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner was free to submit additional evidence with the instant motion. Counsel's argument that the petitioner was accorded insufficient notice that the evidence was unsatisfactory and insufficient opportunity to supplement the evidence is unconvincing.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are

typically⁵ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$24,960 per year. The priority date is April 20, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$2,743. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$27,310. That amount is sufficient to pay the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared ordinary income of \$28,303. That amount is sufficient to pay the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The visa petition in this matter was submitted on August 26, 2002. On that date the petitioner's 2005 tax returns were unavailable. The request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, was issued on May 28, 2003. On that date the petitioner's 2005 return was still unavailable. The petitioner is excused, therefore, from the obligation of showing its ability to pay the proffered wage during 2005 and subsequent years.⁶

Finally, counsel argued that notwithstanding that its tax returns may have been insufficient to show the petitioner's ability to pay the proffered wage during one or more years its pattern of growth demonstrates that ability.

⁵ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁶ The petitioner's 2003 and 2004 tax returns were also unavailable when the request for evidence was issued and the petitioner was not obliged to provide them. Because counsel chose to submit those returns, however, this office will consider them.

Counsel is correct that, as per *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) a petition may be approved notwithstanding that a petitioner's net profit may have been less than the proffered wage during a given year.

Sonegawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, 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 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 that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the petitioner has had two bad years and two relatively good years. This office does not perceive the pattern of growth that counsel postulates.⁷ No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied and the appeal correctly dismissed on that basis, which has not been overcome on the motion.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is granted. The AAO's decision of August 11, 2005 is affirmed. The petition is denied.

⁷ The petitioner's ordinary income was \$22,802, <\$2,788>, \$2,743, \$27,301, and \$28,303 during 2000, 2001, 2002, 2003, and 2004, respectively. This fluctuation does not support the premise of inexorable growth.

This office, as was noted above, does not view gross receipts, *per se*, as indicative of profitability. Even if it did, however, the petitioner's gross receipts were \$128,685, \$120,183, \$106,147, \$149,433, and \$137,677 during those same years. Again, this fluctuation does not support the premise of continuing growth.