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U.S. Citizenship  
and Immigration  
Services

B6



FILE: EAC 06 095 51873 Office: NEBRASKA SERVICE CENTER Date: OCT 29 2008

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

The petitioner is a grocery store. It seeks to employ the beneficiary permanently in the United States as an assistant manager. 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 failed to establish its continuing financial ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner, through counsel, maintains that the petitioner has had the continuing financial ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See*, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 750 was accepted for processing on April 23, 2001. The proffered wage as stated on Part A of the ETA 750 is \$20.00 per hour, based on a 35 hour work-week which amounts to \$36,400 per year. On Part

B of the ETA 750, signed by the beneficiary on April 20, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on February 13, 2006, the petitioner states that it was established on May 15, 1998, employs two workers, and claims a gross annual income of \$142,030 and a net annual income of \$30,442.

As evidence of its continuing financial ability to pay the proposed wage offer of \$36,400 per annum and in response to the director's request for evidence, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2001, 2002, 2003, and 2004. The petitioner failed to provide a federal tax return or audited financial statement for 2005 as requested by the director. The returns that were submitted indicate that the petitioner files its tax returns using a standard calendar year. The returns also contain the following information:

	2001	2002	2003	2004
Net Income <sup>1</sup>	\$ 30,412	\$ 26,589	\$30,450	\$36,589
Current Assets	\$ 5,506	\$ 8,667	\$19,635	\$23,234
Current Liabilities	\$ 495	\$ 460	\$ 465	\$ 859
Net Current Assets <sup>2</sup>	\$ 5,011	\$ 8,207	\$19,170	\$22,375

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets.<sup>3</sup> Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporation's year-end current assets and current liabilities are shown on Schedule L of its corporate federal income tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If the 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.

<sup>1</sup>Where an S Corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. Here, net income is found on line 21 of page one of the petitioner's 2003 tax return. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. As in this case, if the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004), and line 23 (2001-2002) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf>

<sup>2</sup>The director calculated different amounts for the 2003 and 2004 net current assets by omitting the cash current assets of \$12,310 in 2003 and omitting \$859 in current liabilities in the 2004 calculation.

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The petitioner also provided a letter, dated July 26, 2006, signed by the petitioner's president, [REDACTED] [REDACTED] states that payment of the proffered salary will be provided from her personal sources to cover any deficit.

Following a review of the evidence submitted, the director denied the petition on November 9, 2006. The director declined to accept [REDACTED] assurance of payment of the proffered wage as probative of the corporate petitioner's ability to pay the proffered wage as of the priority date. The director also reviewed the 2001-2004 tax returns and determined that they did not represent the petitioner's continuing ability to cover the proposed salary.

On appeal, the petitioner, through counsel provides copies of the previously submitted documents. Counsel contends that the 2004 tax return shows the petitioner's ability to pay the proffered wage and cites a 2004 AAO decision and [REDACTED] offer to pay additional funds as evidence of the totality of the circumstances that should justify approval of the petition. Counsel also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), and the petitioner's expectation of increased revenue generated by the beneficiary's employment which is expected to increase efficiency by implementing new strategies.

Counsel's contentions are not persuasive. Regarding counsel's reference to a 2004 AAO decision, it is noted that there is no indication by counsel that it was designated as a precedent decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Additionally, it must be noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its *continuing* financial ability to pay the certified salary as of the priority date. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). If the preference petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

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 the proffered salary for that period. Here, the record does not indicate that the petitioner employed the beneficiary during the relevant period.

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 (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income or net current assets to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054 (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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). It is noted that 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.

As noted by the director, the offer of \_\_\_\_\_ to cover payment of the proffered wage may not be considered in this case. The corporate petitioner must establish its own ability to pay a certified wage. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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." It is also unclear what the source of these funds were as the petitioner reported no officer compensation or salaries or wages paid in 2001, 2002, 2003, or 2004. Moreover, CIS (legacy INS) has long held that it 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 Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations will not be considered in determining the petitioning corporation's ability to pay the proffered wage.

Similarly, we do not find that an approval based on *Matter of Sonogawa*, 12 I&N Dec. 612, is appropriate in this case. In *Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related 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 *Sonogawa* 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 Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, counsel asserts that the petitioner may expect increasing profit based on its judgment that the beneficiary's hiring will result in increased efficiency and the implementation of

**new strategies.** In this instance, although counsel provides a hypothesis of how the beneficiary's employment might possibly affect the petitioner's business, no specific documentation has been provided to explain how the beneficiary's employment as an assistant manager of a two-employee business will significantly increase profits for the petitioner. This theory cannot be concluded to outweigh the evidence presented in the corporate tax returns. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Although one of the petitioner's tax returns reflects sufficient net income to cover the proffered wage, the other returns do not represent sufficient funds in either the declared net income or net current assets and not represent a framework of profitable years analogous to the *Sonegawa* petitioner. No evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonegawa* have been provided. The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

In this matter, in 2001, neither the petitioner's net income of \$30,412, nor its net current assets of \$5,011 demonstrates its ability to pay the proffered wage of \$36,400.

In 2002, neither the petitioner's net income of \$26,589, nor its net current assets of \$8,207 establishes its ability to pay the proffered wage in this year.

Similarly, in 2003, the \$30,450 reported as net income, as well as the \$36,589 declared as net current assets were each inadequate to cover the certified salary and demonstrate the petitioner's ability to pay during this year.

In 2004, the petitioner's net income of \$36,589 was sufficient to cover the proffered wage and establish its ability to pay in this year. However, in 2005, the petitioner failed to provide sufficient probative evidence of its ability to pay the proffered wage. It also failed to respond to the director's request to provide a federal tax returns or audited financial statement for 2005. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a *continuing* financial ability to pay the proffered wage. Based on a review of the underlying record and the arguments submitted on appeal, it may not be concluded that the petitioner established a continuing ability to pay the proffered wage.

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

**ORDER:** The appeal is dismissed.