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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 141 50418 Office: CALIFORNIA SERVICE CENTER Date: MAR 2 9 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a board and care facility. It seeks to employ the beneficiary permanently in the United States as a board and care cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that director failed to adequately review the petitioner's financial information.

Section 203(b)(3)(A)(i) of 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 not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

> (2) *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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is $11.55 per hour or $24,024 per year based on a 40-hour week. The visa petition indicates that the petitioner was established in 1997 and employs two people. The record reflects that it is organized as a corporation.

As evidence of its ability to pay, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2000. This tax return indicates that the petitioner declared -$22,723 as ordinary income. Schedule L shows its current assets and current liabilities. Current assets were $1,158 and current liabilities were -$13,552. The difference of -$12,394 is the value of the petitioner's net current assets at the end of the year. CIS will consider net current assets in addition to net income because it reflects the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Here, neither the petitioner's ordinary income of -$22,723 nor its net current assets of -$12,394 was sufficient to cover the beneficiary's proposed salary of $24,024.

On May 9, 2002, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. The director instructed the petitioner to submit annual reports, federal tax returns, or audited financial statements for 1998, 1999 and 2001. The director also instructed the petitioner to submit copies of its state quarterly wage reports for the most recent four quarters filed.

The petitioner, through counsel, provided the requested information. The petitioner's federal tax returns reflected the following information:

Year	Ordinary Income	Current Assets	Current Liabilities	Net Current Assets
1998	$12,790	$20,640	$ -0-	$20,640
1999	-3,061	2,844	-2,212	632
2000	-22,723	1,158	13,552	-12,394
2001	-7,050	1,158	9,340	- 8,182

The state quarterly wage reports submitted with the petitioner's response to the director's request for additional evidence reflect that the petitioner paid $3,675 in wages to the beneficiary for the quarter ending December 31, 2001. The quarterly reports also show that the beneficiary received $1,188 in wages for the quarter ending March 31, 2002 and $1,728 for the quarter ending June 30, 2002. The only other evidence relating to the beneficiary's employment with the petitioner is reflected on Part B of the ETA-750, which was signed by the beneficiary in January 1998. It indicates that the beneficiary worked for the petitioner from October 1997 to December 1997. To the extent that the petitioner actually paid wages to the beneficiary, that amount can be considered when reviewing the petitioner's ability to pay the proffered wage. In this case, the difference in 2001 between the beneficiary's wages of $3,675 and the proposed salary of $24,024 is $20,349. This difference could not be paid out of either the petitioner's ordinary income or its net current assets. Even if the beneficiary's 2001 quarterly wages were representative of a full year's salary, it would represent $9,324 less than the proffered annual salary, which could not be met out of either the petitioner's net current assets or ordinary income. As noted above, both the petitioner's ordinary income and net current assets were insufficient to cover the beneficiary's proffered wage of $24,024 in 1998, 1999, 2000, and 2001.

On appeal, counsel submits a letter co-signed by the petitioner's principal shareholder. It states that the petitioner requires the beneficiary's services because it has purchased three homes in the last five years. Counsel also offers copies of real estate settlement statements and various bank statements held in the individual names of the petitioner's principal shareholder and another administrator. The real estate statements indicate that the purchasers were also the petitioner's individual principal shareholder and another administrator. 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. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983. As discussed above, neither the petitioner's ordinary income nor its net current assets indicate sufficient levels necessary to pay the beneficiary's proffered salary in any of the relevant years.

In this case, it is also noted that the petitioner is organized as a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of M,* 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.,* 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass) 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."

In the context of the financial records contained in the record, counsel argues that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. *Sonegawa* 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 Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa.* Rather, the record shows that the petitioner has had one modestly profitable year and three years of losses.

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its ability to pay the proffered as of the priority date of the petition and continuing until 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.