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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 01 284 56710 Office: CALIFORNIA SERVICE CENTER Date: APR 21 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 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

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a polo and polo horse facility. It seeks to employ the beneficiary permanently in the United States as a polo horse trainer. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies 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.

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.

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.

Eligibility in this matter hinges on the petitioner's 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. Here, the Form ETA 750 was accepted on October 1, 1996. The proffered wage as stated on the Form ETA 750 is $2,535.87 per month, which equals $30,430.44 per year.

With the petition counsel submitted a copy of the petitioner's 1998 Form 1120S U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared a loss of $620,199 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $25,383 and current liabilities of $1,165, which yields net current assets of $24,218.

In a cover letter, dated March 1, 2001, counsel urged that the petitioner's salary and wage expense for that year demonstrated that the petitioner is able to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 9, 2002, requested additional evidence pertinent to that ability.

In accordance with 8 C.F.R. § 204.5(g)(2), the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage

beginning on the priority date. The Service Center also requested copies of the petitioner's California Form DE-6 Employer's Quarterly Wage Reports for the previous four quarters and a description of the job duties of each employee listed on those reports.

In response, counsel submitted copies of the petitioner's 1999, 2000, and 2001 Form 1120S U.S. Income Tax Returns for an S Corporation and its wage reports for all four quarters of 2001. Counsel also submitted a request, dated July 1, 2000, for an extension of time during which to submit the 1996 and 1997 returns, and evidence that they had been requested from IRS.

The 1999 return shows that the petitioner declared a loss of $435,123 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $15,797 and current liabilities of $3,260, which yields net current assets of $12,537.

The 2000 return shows that the petitioner declared a loss of $822,411 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $32,449 and current liabilities of $6,716, which yields net current assets of $25,733.

The 2001 return shows that the petitioner declared a loss of $388,039 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $15,275 and current liabilities of $6,527, which yields net current assets of $8,748.

The quarterly wage reports show that the petitioner paid the beneficiary $4,800, $5,477.55, $9,000, and $3,600 during each of the four quarters of 2001, respectively, which equals total wages of $22,877.55 during 2001.

On July 31, 2002, the California Service Center issued another Request for Evidence in this matter. The request noted that 8 C.F.R. § 103.2(b)(8) does not allow extensions of time to respond. The request also asked the petitioner to provide copies of all Form W-2 Wage and Tax Statements showing payments made to the beneficiary since 1996.

In response, counsel submitted the petitioner's 1996 and 1997 tax returns and 1996, 1997, 1998, 1999, 2000, and 2001 W-2 forms showing wages the petitioner paid to the beneficiary during those years. The W-2 forms show that the petitioner paid the beneficiary $19,125, $17,250, $17,795.46, $18,206.82, $20,720.48, and $22,877.55 during those years, respectively.

The 1996 return shows that the petitioner declared a loss of $1,211,607 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $33,310 and current liabilities of $12,498, which yields net current assets of $20,812.

The 1997 return shows that the petitioner declared a loss of $624,883 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $26,789 and current liabilities of $3,028, which yields net current assets of $23,761.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and denied the on December 10, 2002. The director questioned the petitioner's source of funds to pay the beneficiary's proffered wage given that the petitioner had experienced significant losses during each relevant year.

On appeal, counsel correctly asserts that actual payment of a wage is sufficient evidence of the ability to pay it. Counsel also provides a letter from an accountant. The accountant notes that each year's losses were covered by loans from the petitioner's owner. The accountant states that this shows the ability to pay the proffered wage.

This office recognizes that the petitioner's owner has historically covered its losses. Information in the file implies that the petitioner's owner is able to continue supplying additional money to the petitioner as it suits him.

A corporation, however, is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders 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; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980).

In this case, the petitioner is a subchapter S corporation, and has one owner. As the owner is not obliged to pay the corporation's debts and obligations, the owner's personal income and assets and his ability, if he wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered.

Counsel's original assertion, submitted with the petition, that the size of the petitioner's wage and salary expense shows the ability to pay the proffered wage, is similarly unconvincing.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net income[2], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the INS, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

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[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date is October 1, 1996. The proffered wage is $30,430.44 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1996, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 274 days of that 366-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 92 days. The proffered wage multiplied by 92/366th equals $7,649.18, which is the amount the petitioner must show the ability to pay during 1996.

During all of 1996, the petitioner paid the beneficiary $19,125 in wages. That amount must be prorated, however, to indicate the amount the petitioner paid the beneficiary beginning on the priority date. That total paid times 92/366th equals $4,807.37. That amount, subtracted from the salient portion of the proffered wage that the petitioner is obliged to show the ability to pay during 1996, leaves a difference of $2,841.81.

During 1996, the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay that amount out of its ordinary income during that year. At the end of the year, however, the petitioner had net current assets of $20,812. The petitioner could have paid the remaining portion of the proffered wage out of its net current assets. The petitioner has demonstrated the ability to pay the proffered wage during the salient portion of 1996.

During 1997 and ensuing years, the petitioner is obliged to show the ability to pay the entire proffered wage. During 1997, the petitioner paid the beneficiary $17,250 in wages. That amount, subtracted from the proffered wage leaves a difference of $13,180.44 that the petitioner must show the ability to pay out of its ordinary income or net current assets. During 1997, the petitioner declared a loss, and is therefore unable to show the ability to pay any portion of the proffered wage out of its ordinary income. At the end of that year, however, the petitioner had net current assets of $23,761. The petitioner could have paid the remaining portion of the proffered wage out of its net current assets. The petitioner has demonstrated the ability to pay the proffered wage during 1997.

During 1998, the petitioner paid the beneficiary $17,795.46 in wages. That amount, subtracted from the proffered wage leaves a difference of $12,634.98 that the petitioner must show the ability to pay out of its ordinary income or net current assets. During 1998, the petitioner declared a loss, and is therefore unable to show the ability to pay any portion of the proffered wage out of its ordinary income during that year. At the end of that year, however, the petitioner had net current assets of $24,218. The petitioner could have paid the remaining portion of the proffered wage out of its net current assets. The petitioner has demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner paid the beneficiary $18,206.82 in wages. That amount subtracted from the proffered wage leaves a difference of $12,223.62, which the petitioner must show the ability to pay out of its ordinary income or net current assets. During 1999, the petitioner declared a loss, and is therefore unable to show the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year, however, the petitioner had net current assets of $12,537. The petitioner could have paid the remaining portion of the proffered wage out of its net current assets. The petitioner has demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner paid the beneficiary $20,720.48 in wages. That amount, subtracted from the proffered wage leaves a difference of $9,709.96 that the petitioner must show the ability to pay out of its ordinary income or net current assets. During 2000, the petitioner declared a loss, and is therefore unable to show the ability to pay any portion of the proffered wage out of its ordinary income during that year. At the end of that year, however, the petitioner had net current assets of $25,733. The petitioner could have paid the remaining portion of the proffered wage out of its net current assets. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner paid the beneficiary $22,877.55 in wages. That amount, subtracted from the proffered wage leaves a difference of $7,552.98 that the petitioner must show the ability to pay out of its ordinary income or net current assets. During 2001, the petitioner declared a loss, and is therefore unable to show the ability to pay any portion of the proffered wage out of its ordinary income during that year. At the end of that year, however, the petitioner had net current assets of $8,748. The petitioner could have paid the remaining portion of the proffered wage out of its net current assets. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner has demonstrated the ability to pay the proffered wage during 1996, 1997, 1998, 1999, 2000, and 2001. 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.