



U.S. Citizenship  
and Immigration  
Services

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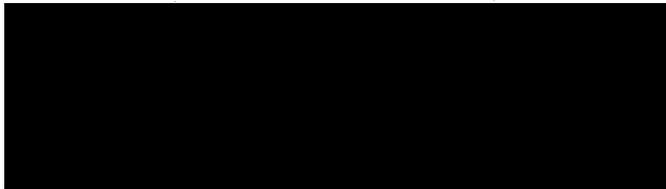


FILE: EAC 03 025 53173 Office: VERMONT SERVICE CENTER Date: SEP 09 2004

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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.

for Robert P. Wiemann, Director  
Administrative Appeals Office

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prevent clearly unwarranted  
invasion of personal privacy

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on April 27, 2001. The proffered salary as stated on the labor certification is \$16.82 per hour or \$34,985.60 per year.

With the petition, counsel submitted a copy of the front page of Haverford at Woodmore, LLC's 2001 Form 1065, U.S. Return of Partnership Income. The Employee Identification Number (EIN) listed on the tax return was 52-1873396. It is noted that the EIN on the Form I-140, Immigrant Petition for Alien Worker, is 52-1955266. The return reflected an ordinary income of \$749,734. The director considered this documentation insufficient, and, on November 20, 2003, she requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage to be in the form of copies of annual reports, complete federal tax returns, or audited financial statements from 2001 to the present.

In response, counsel submitted copies of the petitioner's 2001 and 2002 Forms 1120, U.S. Corporation Income Tax Return with EIN 52-1955266 and a copy of a tax analysis by Mr. [REDACTED] JD, CPA that concludes that Haverford Homes had the ability to pay the beneficiary the proffered wage as of the

priority date. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$16,654 and net current assets of -\$36,352. The 2002 tax return reflected a taxable income before net operating loss deduction and special deductions of \$30,921 and net current assets of -\$73,874. Mr. [REDACTED] states:

Based upon my analysis of [the petitioner's] financial condition, as supplemented by the information contained in this letter and the personal assets of Mr. [REDACTED] Balian, the following financial resources were available to enable the Company to pay [the beneficiary's] an annual salary of \$34,985 as of April 27, 2001.

04/27/01

Company's Net Income	\$(16,654)
Average Cash Balance	27,353
Depreciation	5,262
Mr. [REDACTED] Liquid Assets	71,792
Total	\$87,753

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, on May 17, 2004, denied the petition.

On appeal, counsel provides another letter from [REDACTED] a copy of Haverford Homes and Affiliates Combined Financial Statements for the years ended December 31, 2001 and 2002, a letter from [REDACTED] Chief Financial Officer, Haverford Homes, and a letter from [REDACTED] CPA, Beers and Cutler, PLLC, certified public accountant for Haverford Homes. Counsel states:

A review of the enclosed financial documentation reveals that Haverford Homes and Affiliates earned revenue in excess of \$47 million in year 2001 and in excess of \$58 million in year 2002. The gross profit for these years is, respectively, over \$8 million in 2001 and over \$11 million in 2002. **The net income for these years is, respectively, over \$5 million in 2001, and over \$7 million in 2002.** See Haverford Homes and Affiliates Combined Financial Statements for years ended December 31, 2002 and 2001: Combined Statements of Operations. In addition, Haverford Homes and Affiliates had over \$36 million and over \$28 million in available lines of credit/construction loans in 2002 and 2001, respectively, of which over \$14 million and over \$16 million were outstanding at years end. See Combined Financial Statements at Note 3, page 7.

... Specifically, [REDACTED] has determined that Haverford Construction Corporation is part of an affiliated group of entities that form Haverford Homes. The other entities are created and live only for the lifetime of the construction project for which they are created. The employees for these other entities are employed by Haverford Construction Corporation, as Haverford Construction Corporation's primary purpose "is to serve as the employer for all the employees used throughout the Affiliated Group. The costs of those

employees are then passed through [sic] or 'billed' to the other entities via . . . an 'Overhead Fee.' The Overhead Fee that HCC receives from the other entities in the Affiliated Group provide HCC's sole source of gross income. Therefore the appropriate way to view HCC is not as a separate business, but as one link in the chain of related businesses that form Haverford Homes." See Chisholm letter, page 2.

██████████ relying on ██████████ Chief Financial Officer of Haverford Homes, opined "that HCC has so little taxable income or loss in any given year . . . because ██████████ and the other managers of Haverford Homes plan to recognize only a nominal amount of taxable income in an effort to minimize HCC's income tax liability and avoid the double taxation inherent in a C-Corporation that has high amounts of taxable income." See Note 2 - Summary of Significant Accounting Policies "No provision has been made for federal and state income taxes in the accompanying combined financial statements since the net income or loss of the affiliated limited liability companies and S-Corporation is not taxable at the entity level, but rather is included in the income tax returns of the members. **Balian Investment Partners, Inc. and Haverford Construction Corporation are subject to corporate income tax.**"

\* \* \*

In light of the non precedent case, Mr. ██████████ assets should be considered to establish the petitioner's ability to pay. **Even without consideration of Mr. ██████████ assets**, however, the additional documentation enclosed with this motion and appeal, establishes that the Petitioner has the ability to pay the proffered wage to Mr. ██████████ Haverford Construction Corporation is part of an extremely healthy group of affiliated companies who have structured the affiliated entities to allow for Haverford Construction Corporation to be in charge of the employees and other managerial matters that benefit the group of affiliated entities. . . .

(Emphasis in original.) In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that it employed the beneficiary from 2001 to the present.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. 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. 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 CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent 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.

If the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

The 2001 and 2002 tax returns reflect taxable incomes of -\$16,654 and \$30,921, respectively. Those tax returns also reflect net current assets of -\$36,352 and -\$73,874, respectively. The petitioner could not pay the proffered wage from either the taxable incomes or the net current assets in either year.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel's request that we consider the combined statements of the affiliates is not persuasive or sufficiently supported. First, those statements are "reviewed," not audited. 8 C.F.R. § 204.5(g) provides that when a petitioner relies on financial statements, those statements must be audited. The partial tax return for Haverford at Woodmore, LLC is also insufficient, as it is simply one affiliate and cannot demonstrate the financial situation of all of the affiliates combined. Further, 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 Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). While the petitioner's organization is understandable, the record lacks evidence that any of the affiliated companies has a contractual obligation to pay the employment costs of the petitioner. Specifically, the record lacks copies of any employment contracts between the petitioner and any affiliate, including Haverford at Woodmore, LLC. CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003).

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.