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FILE: [Redacted]
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Office: VERMONT SERVICE CENTER

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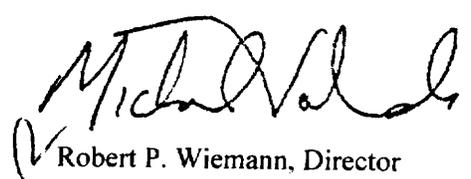
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[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

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a custom ironworks. It seeks to employ the beneficiary permanently in the United States as a layout fitter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied 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 and denied the petition accordingly.

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 granting 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.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.50 per hour, which equals \$36,400 per year.

On the petition, the petitioner stated that it was established on May 3, 1994 and that it employs 18 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since July 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Bridgeport, Connecticut.

In support of the petition, counsel submitted a copy of the petitioner's 2001 compiled financial statements.¹

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on January 3, 2003, requested,

¹ The reason the petitioner may not rely on compiled financial statements to demonstrate its ability to pay the proffered wage is discussed in detail below.

inter alia, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports taxes based on the calendar year. The petitioner reported taxable income before net operating loss deduction and special deductions of \$5,381 during 2001. At the end of that year the petitioner's current liabilities exceeded its current assets.

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 April 18, 2003, denied the petition.

On appeal, counsel states that the evidence submitted establishes the petitioner's continuing ability to pay the proffered wage beginning on the priority date, stressing the amount of the petitioner's gross income and its cost of labor, or wage expense. Counsel also states that the petitioner's profits during the salient years exceeded the amount of its taxable income before net operating loss deduction and special deductions, but that the additional profits were "distributed as salary to various key employees in order to avoid double taxation." Counsel further states, "it is the normal policy of most closely held corporations to distribute their earnings and profits prior to the end of the tax year."

In support of his assertion that the petitioner distributed its profits to its employees, counsel provides a letter from an accountant. That letter makes the same assertion. Neither counsel nor the accountant state the amount of the petitioner's additional profits, state where that amount may be found on the petitioner's tax return, or provide any additional evidence of the existence of those alleged additional profits.

Counsel provided a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that during that year the petitioner declared taxable income before net operating loss deduction and special deductions of \$11,365. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also provided a 2002 W-3 transmittal showing that the petitioner paid wages of 580,291.32 during that year. Counsel also provided 2002 W-2 Wage and Tax Statements identifying the 27 employees to whom those wages were paid. The wages paid to those employees ranged from 2,866 to \$53,778.50 during that year. The beneficiary was not shown on those W-2 forms as having worked for the petitioner during 2002.²

Counsel's assertion that the petitioner's depreciation deduction should be included in the calculation of the petitioner's ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation

² The beneficiary is identified on the Form I-140 petition and the Form ETA 750 as [REDACTED]. That name does not appear on any of the W-2 forms. One of the W-2 forms shows wages paid to [REDACTED], but has a social security number different from that shown for the beneficiary on the Form I-140. A Form G-28 Notice of Entry of Appearance in the file identifies the beneficiary as [REDACTED] and a Form I-485 Application to Adjust Status in the file identifies him as [REDACTED]. Those documents are insufficient, however, to show that the beneficiary, [REDACTED], is the same person as [REDACTED]. In any future proceedings, the petitioner should reconcile any such name discrepancy.

deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *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.

Counsel's reliance on the petitioner's compiled financial statements is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel has stated that the petitioner had additional profit, beyond that stated on its tax returns, but chose to distribute that amount to "key employees." Counsel states that this is a standard practice among closely held corporations.

Although some corporations do distribute their profits to their officers to avoid corporate taxation on those profits, this office is unaware of corporations that avoid profits by donating their profits to employees. During 2001, however, the petitioner paid compensation to officers of only \$3,400, and during 2002 it paid no compensation to its officers. The petitioner's compensation to officers, even if it were shown to be discretionary, would not greatly alter the calculation of the funds available to pay the proffered wage during the salient years.

Further, the amounts the W-2 forms in this case show that the petitioner paid to its employees are consistent with wages for hours worked. Counsel submitted a letter from an accountant in support of his contention that the petitioner gave away its profits to avoid taxation. Counsel has submitted no evidence to demonstrate the amount of those payments that ostensibly represented gifts from the company rather than wages. No portion of the wages shown on the petitioner's W-2 forms will be counted as funds available to pay the proffered wage.

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, although the petitioner and the beneficiary both allege that the petitioner employed, and presumably paid, the beneficiary, the petitioner provided no evidence in support of that contention.

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, 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 the 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, those expected to be 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.

The proffered wage is \$36,400 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,381. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$11,365. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

Counsel argues, however, that any company with wage expense of over \$500,000 necessarily has the ability to pay an additional \$36,400 in wages. Counsel's reasoning is unconvincing. The regulation at 8 C.F.R. § 204.5(g)(2) makes an exception to the necessity of a petitioner demonstrating, with copies of annual reports, federal tax returns, or audited financial statements, its ability to pay the proffered wage, if the petitioner is able to demonstrate that it employs 100 or more workers. No such exception is included in that regulation for companies with an annual payroll expense in excess of \$500,000 and none will be construed. That the petitioner was able to pay its expenses during the salient years does not demonstrate the ability to pay any additional wages.

The petitioner failed to submit evidence sufficient 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 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 appeal is dismissed.