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U.S. Citizenship
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Services

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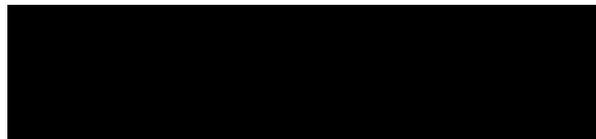
Office: NEBRASKA SERVICE CENTER

Date AUG 12 2005

IN RE:

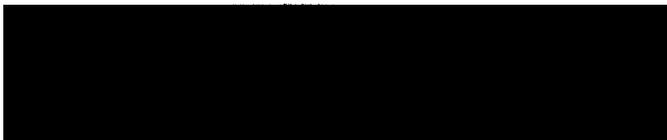
Petitioner:

Beneficiary:



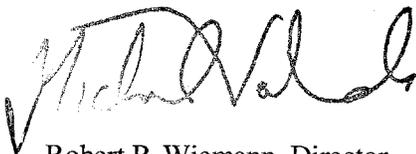
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 martial arts academy. It seeks to employ the beneficiary permanently in the United States as a martial arts consultant/instructor. 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 \$60,923 per year.

On the petition, the petitioner stated that it was established during 1987 and that it employs 11 workers. The petition states that the petitioner's gross annual income is \$450,000 and that its net annual income is \$70,000.¹ On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Northbrook, Illinois.

¹ Evidence subsequently submitted does not support those assertions. The petitioner's 2001 and 2002 tax returns indicate that the petitioner's gross receipts are only slightly in excess of \$300,000 annually, and that its net profit is just over \$4,000 per year.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on August 27, 2003, the Nebraska Service Center issued a Request for Evidence in this matter. The Service Center requested, *inter alia*, evidence pertinent of the petitioner's ability to pay the proffered wage. 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. The Service Center also requested bank statements for the previous year.

In response, counsel submitted (1) the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns, (2) the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, U.S. Income Tax Returns for an S Corporation, (3) the petitioner's owner's 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns, (4) a letter, dated November 15, 2003, from the petitioner's accountant, (5) a letter, dated November 14, 2003 from an attorney other than the petitioner's counsel of record, and (6) the petitioner's bank statements as requested.

The November 15, 2003 accountant's letter states that, in the accountant's opinion, the evidence submitted demonstrates the petitioner's ability to pay the proffered wage.

The November 18, 2003 letter from the petitioner's counsel asserts that the petitioner's tax returns demonstrate its ability to pay the proffered wage. Counsel also urges that that the petitioner's depreciation deduction and other deductions taken, in themselves, were sufficient to show the petitioner's ability to pay the proffered wage.

The November 14, 2003, letter from the second attorney notes that the petitioner is a subchapter S corporation and that, as such, the petitioner's owner's assets are not pledged to pay the debts and obligations of the petitioner.

This office notes that the priority date is April 30, 2001. As such, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Further, as was observed in the November 14, 2003 letter from unrecognized counsel, because the petitioner is a corporation, the petitioner's owner's assets are not pledged to pay its debts and obligations. They are not, therefore, to be considered in assessing the petitioner's ability to pay the proffered wage, and the figures on the petitioner's owner's Form 1040 U.S. Individual Income Tax Return are also not directly relevant.

The 2001 corporate return submitted shows that during that year the petitioner was a subchapter C corporation. During that year the petitioner declared taxable income before net operating loss deduction and special deductions of \$4,116. At the end of that year the petitioner had current assets of \$17,259 and no current liabilities, which yields net current assets of \$17,259.

The 2002 corporate return submitted shows that during that year the petitioner was a subchapter S corporation. During that year the petitioner declared ordinary income of \$4,070. At the end of that year the petitioner had current assets of \$26,924 and no current liabilities, which yields net current assets of \$26,924.

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 February 5, 2004, denied the petition.

On appeal, counsel argues that the director failed to adequately consider the financial records of the petitioner and its stockholders, including payroll records and bank account balances. Counsel further implies that the petitioner was able to reduce its tax liability with certain unspecified deductions that did not involve any corresponding reduction in the funds it had available to pay the proffered wage. Further still, counsel argues that the director failed to consider certain unspecified assets available to the petitioning corporation.

Finally, counsel stated,

The Director failed to cite and thus consider the practical consideration as proffered by the peittioner [sic] that the named beneficiary and others were paid sums as independent contractors by the petitioner for the period of time in question, sums which is [sic] paid to a full time [sic] employee, such as the beneficiary, for the same period were more than ample to pay the proffered wage.²

Counsel's assertion that unidentified assets were available to pay the proffered wage is unpersuasive and cannot demonstrate the petitioner's ability to pay the proffered wage. Counsel stated that the funds were liquid and readily available, but does not otherwise identify the specific funds and does not show that they were sufficient to pay the proffered wage.

Likewise, counsel's assertion that unidentified deductions taken on the petitioner's tax returns could have been reduced is insufficient. If counsel wished to demonstrate that deductions could have been reduced to increase profit sufficiently to pay the proffered wage, counsel was obliged to specify which deductions could have been reduced and demonstrated that the reduction was possible without adversely affecting the petitioner's profit. Counsel was also obliged to show that the reduction would have been sufficient to enable the petitioner to pay the proffered wage.

The conclusory statement of the accountant, in his letter of November 15, 2003, that the evidence demonstrates the petitioner's ability to pay the proffered wage, is unpersuasive. If the petitioner intends to use its tax returns to demonstrate its ability to pay the proffered wage then the accountant should have pointed to the line items which support the contention that the petitioner is able to pay the proffered wage and stated in what way they demonstrate that ability. The determination that the evidence does or does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date is a determination to be made by this office.

Counsel submits a brief and additional evidence to supplement the appeal. The additional evidence submitted includes a letter, dated March 15, 2004, from the petitioner's accountant. In that letter, the accountant lists

² Counsel implies that the petitioner paid the beneficiary and others, in the capacity of contractors rather than employees, but performing the duties of the proffered position, amounts greater than the proffered wage. Subsequently, counsel did submit evidence of funds paid to contractors.

various expenses during 2001 and 2002 which counsel asserts either would have been obviated by hiring the beneficiary or could simply have been eliminated with out affecting revenue.

The accountant states that the petitioner had labor costs of \$63,000 and \$57,000 during 2001 and 2002, respectively. The accountant states that had the beneficiary been legally available,³ the petitioner could have paid those sums to him. In support of the assertion that the petitioner paid those labor costs, counsel submits copies of W-2 Wage and Tax Statements and Form 1099 Miscellaneous Income Statements. The 2001 forms show expenditures of \$63,101.60. The 2002 forms show expenditures of \$56,992.

The accountant claims that the amount of the petitioner's depreciation deductions, its legal fees, its expenditures for supplies, telephones, and travel all represent a funds available to pay additional wages.

The accountant further asserts that the petitioner expended funds for various instructors to conduct seminars in various Tae Kwon Do and self-defense topics. The accountant asserts that, had the beneficiary been available to teach full-time, the petitioner would have employed him to teach its seminars, and the funds thus expended on instruction would also have been available to pay the proffered wage. This office notes that the purpose of the visa classification pursuant to which the instant petition was filed is to provide alien workers to fill positions for which an insufficient number of U.S. workers are available. If the petitioner proposes to replace U.S. workers with the beneficiary, this frustrates the very purpose of the visa category, and casts doubt on the petitioner's representation, made in connection with submission of the Form ETA 750, that it is unable to fill the position with U.S. workers.

In the brief, counsel argues that the discretionary expenses listed by the accountant would have been obviated if the petitioner had been able to hire the beneficiary. Counsel further asserts that the evidence provided demonstrates the petitioner's ability to pay the proffered wage.

Neither counsel nor the accountant explains how hiring the beneficiary might have obviated the petitioner's supply, telephone, and travel expenses. The accountant provided no evidence, however, in support of this assertion.

Further, allowable income tax deductions are described as follows at 26 USC Subtitle A, Chapter 1, Subchapter B, Part VI, Sec. 162. – Trade or business expenses

(a) In general

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business,

In claiming its expenditures for supplies, telephones, and travel, the petitioner represented that those expenses to be reasonably necessary to its business. If the accountant is now asserting that they were superfluous, that

³ The assertion that the petitioner would have hired the beneficiary if he had been available and paid him the amounts shown on the W-2 forms is undermined by the fact that the evidence submitted shows that the petitioner did hire the beneficiary to conduct seminars during 2001, 2002, and 2003 and that he was listed as a teacher and coach on its literature.

assertion is not compelling. If the accountant is asserting that hiring the beneficiary would have obviated those expenses, that assertion, absent any evidence or argument, also fails to convince this office.

No evidence has been submitted to support the accountant's assertion that the petitioner could have paid the beneficiary all of the amounts shown on the 1099 and W-2 forms. Those amounts include, for instance, the compensation paid to the petitioner's owner. The record contains no evidence that the petitioner's owner is able and willing to forego all compensation in order to pay the proffered wage.

Further, the petitioner's 2001 and 2002 tax returns do not confirm the amounts the accountant stated the petitioner paid in labor expenses.

The petitioner's 2001 tax return shows Line 12 Compensation of Officers of \$22,700, Line 13 Salaries and Wages of \$22,996, and Schedule A, Line 3, Cost of Labor of \$0, for a total of \$45,696. That return does not make clear where, if anywhere, the remaining \$17,405.60 of asserted labor costs, as stated by the petitioner's accountant in the March 15, 2004 letter, were recorded on that return.⁴

Similarly, the petitioner's 2002 return shows Line 12 Compensation of Officers of \$24,530, Line 13 Salaries and Wages of \$0, and Schedule A, Line 3 Costs of Labor of \$4,166, for a total of \$28,696. Where, if anywhere, the remaining \$28,296 of asserted labor costs, as stated by the accountant in the March 15, 2004 letter, were recorded on that on that return is unclear.⁵

Further still, as was noted above in the context of payments shown on 1099 forms, if the petitioner intends to eliminate the payments to others in favor of an alien worker, this casts doubt on the legitimacy of the petition in this matter for all those reasons. None of the amounts shown on the W-2 forms submitted in this case will be included in the calculation of the funds the petitioner had available to pay the proffered wage.

The accountant asserts that the petitioner's legal fees should be included in the calculation of funds available to pay wages. The accountant asserts that, in connection with the instant petition, the petitioner paid legal fees of \$9,405 during 2001, \$4,275 during 2002, and \$4,400 during 2003. Other than the accountant's assertion, the record contains no evidence that the petitioner paid those fees for the sole purpose of prosecuting the instant petition. Those amounts are insufficiently evidenced to be included in the determination of the petitioner's ability to pay the proffered wage. Under these circumstances, this office need not decide whether legal fees might, in the abstract, be considered in that calculation, if sufficiently proven.

Counsel's reliance, in his letter of November 18, 2003, on the amount of the petitioner's depreciation deductions is misplaced. Counsel is correct that a depreciation 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

⁴ The 2001 Schedule A lists \$20,252 in expenses at Line 5, Other costs (attach schedule). Because counsel did not provide the schedule itemizing those other costs, however, this office is unable to determine whether any additional labor costs could have been included in that amount.

⁵ The 2002 Schedule A lists \$35,666 in Line 5 Other Costs. Again, counsel failed to provide the required itemization of those expenses. Whether some or all of the petitioner's labor costs might be included in that amount is unknown.

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.

Contrary to counsel's assertion in the November 18, 2003 letter, the size of the petitioner's various other deductions is also generally insufficient to show the ability to pay the proffered wage. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁶ or otherwise increased its net income,⁷ 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 it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. The best approximation of net income on a Form 1120 U.S. Corporation Income Tax Return is the taxable income before net operating loss deduction and special deductions. The best approximation of net income on a Form 1120S, U.S. Income Tax Return for an S Corporation, is the ordinary income.

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.

Counsel's assertion that the petitioner's stockholder's income and assets should have been considered in assessing the petitioner's ability to pay the proffered wage is incorrect. The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). 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 Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner shall not be further considered.

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

⁶ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁷ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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, the petitioner did not establish that it employed and paid the beneficiary.

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 total 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. 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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 \$60,923 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 \$4,116. That total amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$17,259. That amount is insufficient to pay the proffered wage. The petitioner has not provided persuasive evidence that any other funds were available to it during 2001 with which it could have paid 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 \$4,070. That total amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$26,924. That amount is insufficient to pay the proffered wage. The

petitioner has not provided persuasive evidence that any other funds were available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

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.