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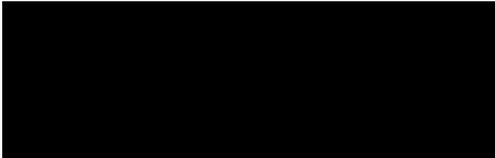
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC-03-075-50684 Office: VERMONT SERVICE CENTER Date: **AUG 22 2005**

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

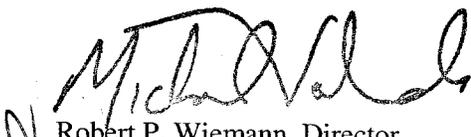
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 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 sustained. The petition will be approved.

The petitioner is a landscaping and bricklaying company. It seeks to employ the beneficiary permanently in the United States as a landscape mason. 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$27.20 per hour, which amounts to \$56,576.00 annually. On the Form ETA 750B, signed by the beneficiary on April 11, 2001, the beneficiary claimed to have worked for the petitioner beginning in April 1997 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on January 6, 2003. On the petition, the petitioner claimed to have been established in March 1980, to currently have eight employees, to have a gross annual income of \$925,745.00, and to have a net annual income of \$351,363.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated October 29, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by CIS on January 12, 2004.

In a decision dated March 24, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits no brief and submits additional evidence. Counsel states on appeal that the decision of the director fails to take into account that the salaries of employees, including compensation of officers, have been deducted from the petitioner's gross income in calculating the petitioner's net income. Counsel also states that the petitioner is a company which has gross income of nearly one million dollars per year.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, the only document newly submitted on appeal is a letter dated April 13, 2004 from a certified public accountant. In his RFE, the director had made no specific request for any type of letter from an accountant. Therefore no grounds would exist to preclude from consideration on appeal the letter from a certified public accountant. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage 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 instant case, on the Form ETA 750B, signed by the beneficiary on April 11, 2001, the beneficiary claimed to have worked for the petitioner beginning in April 1997 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax statements of the beneficiary for 2001 and 2002. The record before the director closed on January 12, 2004 with the receipt by CIS of the petitioner's submissions in response to the RFE. As of that date, the beneficiary's Form W-2 for 2003 was not yet due.

The beneficiary's Form W-2's state compensation received from the petitioner as shown in the table below.

| Year | Beneficiary's actual compensation | Proffered wage | Wage increase needed to pay the proffered wage. |
|------|-----------------------------------|----------------|---|
| 2001 | \$23,890.75 | \$56,576.00 | \$32,685.25 |
| 2002 | \$27,571.26 | \$56,576.00 | \$29,004.74 |

The above figures fail to establish the petitioner's ability to pay the proffered wage either in 2001 or in 2002.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1998, 2000, 2001 and 2002. The returns for 1998 and 2000 are partial copies, lacking certain supporting schedules.

The petitioner's tax year runs from July 1 until June 30 of the following year. For example, the petitioner's tax return for 1998 covers the period beginning July 1, 1998 and ending June 30, 1999. The priority date in the instant petition is April 27, 2001, a date which is within the period covered by the petitioner's tax return for 2000, of July 1, 2000 to June 30, 2001.

The record before the director closed on January 12, 2004 with the receipt by CIS of the petitioner's submissions in response to the RFE. As of that date, the petitioner's federal income tax return for 2003, covering July 1, 2003 to June 30, 2004, was not yet due.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns in the record state amounts for taxable income on line 28 as shown in the table below.

| Tax year | Net income | Wage increase needed to pay the proffered wage | Surplus or deficit |
|----------|-------------|--|--------------------------------|
| 1998 | \$7,005.00 | N/A | N/A (priority date is 4/27/01) |
| 1999 | - | N/A | N/A (priority date is 4/27/01) |
| 2000 | -\$6,986.00 | \$32,685.25* | -\$39,671.25 |
| 2001 | \$6,218.00 | \$29,004.74** | -\$22,786.25 |
| 2002 | \$798.00 | - | - |

* Crediting the petitioner with the compensation paid to the beneficiary in calendar year 2001.

** Crediting the petitioner with the compensation paid to the beneficiary in calendar year 2002.

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage in any of the relevant years. It may be noted that the beneficiary's Form W-2's are on a calendar year basis, and the petitioner's tax returns are on a tax year basis running from July 1 each year to June 30 of the following year. But even if calculations were made to apportion the petitioner's net income or net losses to calendar years corresponding to the beneficiary's Form W-2's, the foregoing information would still fail to establish the petitioner's ability to pay the proffered wage, since the petitioner's net income in each year was significantly less than the amounts needed to raise the beneficiary's actual compensation to the proffered wage in calendar years 2001 and 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

| Tax year | Net Current Assets | | Wage increase needed to pay the proffered wage |
|----------|--------------------|---------------|--|
| | Beginning of year | End of year | |
| 1998 | no Schedule L | no Schedule L | N/A (priority date is 4/27/01) |
| 1999 | - | - | N/A (priority date is 4/27/01) |
| 2000 | no Schedule L | no Schedule L | \$32,685.25* |
| 2001 | -\$21,228.00 | \$11,541.00 | \$29,004.74** |
| 2002 | \$11,541.00 | \$12,454.00 | - |

* Crediting the petitioner with the compensation paid to the beneficiary in calendar year 2001.

** Crediting the petitioner with the compensation paid to the beneficiary in calendar year 2002.

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage in any of the relevant years.

In his notice of appeal, counsel asserts that the director failed to consider salary payments by the petitioner in his analysis of the petitioner's ability pay the proffered wage. Counsel submits as evidence on appeal a letter dated April 13, 2004 which summarizes the petitioner's methods for calculating compensation of officers.

CIS may not “pierce the corporate veil” and look to the assets of the corporation’s owner to satisfy the corporation’s ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958); *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

Nonetheless, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner’s ability to pay the proffered wage. The sole shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation’s taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. The Form 1120, Schedule E provides for itemizing the amount of compensation for each officer, along with each officer’s social security number, percent of time devoted to the business, percent of corporation stock owned, and amount of compensation.

In the instant petition, the petitioner’s Form 1120 U.S. Corporation Income Tax Returns show that two officers of the corporation, Stephen Miller and Doreen Miller, received compensation each year from the petitioner. The Form 1120 for 1998 shows that those two persons own 100% of the shares of the petitioner. The other tax returns in the record do not state the share ownership percentages of the officers.

| Tax year | Compensation of officers | Line 28 taxable income | Total available income | Wage increase needed | Surplus or deficit |
|----------|--------------------------|------------------------|------------------------|----------------------|--------------------|
| 1998 | \$145,570.00 | \$7,005.00 | \$152,575.00 | N/A | N/A |
| 1999 | - | - | - | N/A | N/A |
| 2000 | \$108,680.00 | -\$6,986.00 | \$101,694.00 | \$32,685.25* | \$69,008.75 |
| 2001 | \$108,680.00 | \$6,218.00 | \$114,898.00 | \$29,004.74** | \$85,893.26 |
| 2002 | \$148,680.00 | \$798.00 | \$149,478.00 | - | - |

* Crediting the petitioner with the compensation paid to the beneficiary in calendar year 2001.

** Crediting the petitioner with the compensation paid to the beneficiary in calendar year 2002.

The foregoing figures show that if the amounts needed to raise the beneficiary’s actual salary to the proffered wage had been paid in the petitioner’s tax years 2000 and 2001, substantial amounts still would have remained for officer compensation.

The record contains a letter from a certified public accountant dated April 13, 2004. In the letter, the accountant states that the compensation of the petitioner’s officers consists of a base of \$75,000.00 plus bonuses based on corporate profits. The accountant evidently is referring to total compensation for both officers. The figures in the table above show that after paying the amounts needed to raise the beneficiary’s salary to the proffered wage, the amounts remaining for officers’ compensations would have been \$69,008.75 for the petitioner’s tax year of 2000, which ended on June 30, 2001, and \$85,893.26 for the petitioner’s tax year of 2001, which ended on June 30, 2002.

Since no Form W-3 of the beneficiary was available for 2003 when the record closed, the amount of the beneficiary's actual compensation in 2003 cannot be determined from the record. But the total of officer compensation and taxable income in the petitioner's tax year of 2002, which ended on June 30, 2003, was \$149,478.00, a figure approximately \$35,000.00 higher than the petitioner's total available income in the previous tax year.

Because of the differences between the dates of the petitioner's tax years and the calendar years of the beneficiary's Form W-2's, it is not possible to calculate precisely the amounts which would have remained in each calendar year after paying the beneficiary the full proffered wage. But it appears that at least \$75,000.00 would have remained in each of the relevant years.

The petitioner's tax returns in the record show stable gross receipts or sales. The petitioner's figures for gross receipts or sales on line 1c of the tax returns in the record are as follows: \$739,024.00 in tax year 1998; \$887,353.00 in tax year 2000; \$925,745.00 in tax year 2001; and \$846,349.00 in tax year 2002.

Another factor relevant to the petitioner's ability to pay the proffered wage is the fact that the petitioner has been in business since 1980. Therefore as of the April 27, 2001 priority date, the petitioner had been in business for more than 20 years. That period is longer than that of the petitioner in *Matter of Sonogawa*, 12 I&N Dec. 612, who had been in business for eleven years.

Considering the totality of the circumstances as shown by the evidence in the record, the evidence is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly analyzed the petitioner's tax returns and correctly concluded that the petitioner's net income and its net current assets failed to establish the petitioner's ability to pay the proffered wage during the relevant period. The director did not conduct any further analysis based on the principles in *Matter of Sonogawa*. As shown above, under those principles, the petitioner's evidence is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient to overcome the decision of the director.

In summary, when considering the totality of the circumstances affecting the petitioner's financial situation, including the amount paid as compensation of officers to the petitioner's sole shareholders, the evidence is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.