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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 22 2005
LIN-03-273-50458

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 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology consultant and software development firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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 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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of 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 March 11, 2002. The proffered wage as stated on the Form ETA 750 is $91,604 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 2002.

On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of $4 million, and to currently employ 75 workers. In support of the petition, the petitioner submitted the first page of its Form 1065, U.S. Return of Partnership Income, for 2001 and 2002, state tax returns, and the first page of its quarterly federal tax return for the quarter ended March 31, 2003 reflecting wages paid in the amount of $228,046.02.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 20, 2003, the director requested additional evidence pertinent to that ability. The director noted the loss reported on the petitioner's 2002 "corporate" income tax return and sought additional evidence such as audited profit/loss statements, complete bank account records, and/or personnel records. Additionally, the director requested evidence of wages paid to the beneficiary from the petitioner. Finally, the director requested a complete list of other pending petitions including information about

the offered wages for each. The director did not note that the petitioner's partnership tax returns were incomplete and did not request any additional information or evidence pertaining to those returns.

In response, counsel stated that the petitioner has nine other petitions pending with salaries ranging from $57,450 to $93,684. The petitioner resubmitted the first page of its 2002 partnership tax return; its quarterly federal tax returns for the first three quarters of 2003; copies of statements from its business checking account with Standard Federal Bank N.A. from March 2002 through December 2003 reflecting ending balances ranging from a low of $2,067 to a high of $97,141; copies of statements from its Oppenheimer money market funds from January 2002 through September 30, 2003 showing ending balances ranging from a low of approximately $5,000 to a high of approximately $34,000; copies of statements from its stock funds from January to November 2003 showing an account total value ranging from a low of approximately $1,700 to a high of approximately $17,000; and a copy of a W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary reflecting wages paid in the amount of $4,615.35 in 2002.

The petitioner's partial tax returns reflect the following information for the following years:

	2001[1]	2002
Net income[2]	$105,665	-$56,867
Gross receipts	$1,597,680	$834,504
Salaries and wages	$822,394	$505,249
Current Assets	$N/A	$N/A
Current Liabilities	$N/A	$N/A
Net current assets	$N/A	$N/A

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 March 22, 2004, denied the petition. The director cited the petitioner's reported loss on its 2002 tax return; insufficient evidence concerning its assets; insufficient information contained in its quarterly federal tax returns; large number of other pending immigrant petitions; cash balances in various accounts that do not show incremental increases in their monthly closing balances sufficient to show a sustainable ability to pay the proffered wage; and the small amount actually paid to the beneficiary in wages in 2002.

On appeal, counsel asserts that the petitioner's federal tax returns and quarterly federal tax returns show that it pays substantial wages to its employees. Additionally, counsel states that the petitioner's "cash-on-hand" is "overwhelming" evidence that it can pay the proffered wage. Counsel does not specifically address the issue of multiple pending petitions. The petitioner submits updated copies of statements from its business checking account at Standard Federal Bank and its stock funds, and provides a copy of a W-2 form issued by the petitioner to the beneficiary in 2003 reflecting wages paid of $40,000.08. The petitioner also submits copies of previously submitted evidence.

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[1] Evidence preceding the priority date in 2002 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

[2] Ordinary income (loss) from trade or business activities as reported on Line 22.

At the outset, the AAO notes that the petitioner was provided notice that it did not provide complete information and evidence pertaining to its current assets from the director's decision. The petitioner provided incomplete tax returns without schedules and attachments and still did not provide complete returns on appeal. Those schedules and attachments would have provided information concerning its cash assets, which are current assets. Additionally, the AAO notes that the failure to provide anything but the first page to its partnership return precludes the AAO from determining how the petitioning entity is legally structured. It is important to ascertain how the petitioning entity is structured so that a determination could be made about the use of partners' personal assets[3].

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements would reflect additional available funds not reflected on its tax return, which would have been analyzed if the petitioner had submitted its Schedule L that shows its net current assets that will be discussed below.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002. Instead, the petitioner paid partial wages in the amounts of $4,615.35 in 2002 and $40,000.08 in 2003, which is $86,988.65 less than the proffered wage in 2002 and $51,603.92 less than the proffered wage in 2003. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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, CIS will next examine the net income figure reflected on the petitioner's 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). 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

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[3] A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Citizenship and Immigration Services (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). In certain forms of partnerships and under certain circumstances, however, the personal assets of partners may be considered.

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 the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a partnership's end-of-year 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 petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in either 2002 or 2003. In 2002, the petitioner reports a loss and does not provide information about its net current assets, and has not therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage since its business checking funds, stock funds, mutual funds, and other cash assets should be properly reflected on its Schedule L as part of its net current assets. The AAO cannot analyze the availability of the petitioner's cash assets without evidence of its current liabilities. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002. The petitioner did not provide its 2003 partnership tax return but the AAO presumes that it was unavailable since the appeal was filed in April of 2004.

Additionally, if the petitioner has multiple other immigrant petitions pending, it would have to show the ability to pay all of those proffered salaries from their priority dates in addition to the instant petition's proffered wage. Thus, any additional proceedings in this matter must discuss that issue.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 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 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.

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[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.