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**U.S. Citizenship
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FILE: [REDACTED]
EAC 03 021 50701

Office: VERMONT SERVICE CENTER

Date: AUG 23 2005

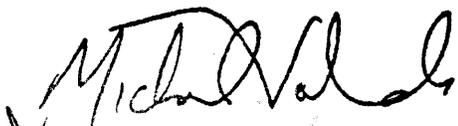
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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: SELF-REPRESENTED

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 (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a software development and project management firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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, the petitioner submits a brief.

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.

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 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 January 19, 1999. The proffered wage as stated on the Form ETA 750 is \$81,203.20 per year.

On the petition, the petitioner stated that it was established during 1995 and that it employs 50 workers. The petition states that the petitioner's gross annual income is \$7.9 million. The petitioner did not state its net annual income in the space provided for that purpose. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 1998.

In support of the petition, the petitioner submitted a letter, dated September 9, 2002, from the petitioner's finance manager, stating that the petitioner employs approximately 50 employees, has annual revenues of

approximately \$7.5 million, and has the ability to pay the beneficiary the proffered wage. The petitioner submitted no other evidence of its ability to pay the proffered wage with the petition.

The regulation at 8 C.F.R. § 204.5(g)(2), as set out above, contains a provision that if a petitioner employs 100 or more workers, CIS may accept a statement from a financial officer of the company that it has the ability to pay the proffered wage in lieu of the copies of annual reports, federal tax returns, or audited financial statements that would otherwise be required to show that ability. The regulations make no such exception for companies that employ less than 100 workers.

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 December 17, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center 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, the petitioner submitted (1) 2001 and 2002 Form W-2 Wage and Tax Statements, (2) the petitioner's 1999 and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation, and (3) the petitioner's audited financial statements for 2000 and 2001.

The 2001 and 2002 W-2 forms show that the petitioner paid the beneficiary \$59,733.65 and \$58,220.88 during those years, respectively.

The petitioner's tax returns show that the petitioner is a subchapter S corporation and reports taxes pursuant to the calendar year.

During 1999 the petitioner had gross receipts of \$7,491,310 but declared a loss of \$2,878,439 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$48,862 and no current liabilities, which yields net current assets of \$48,862.

During 2001 the petitioner had gross receipts of \$10,041,677 but declared a loss of \$3,459,397 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$181,957 and current liabilities of \$24,618, which yields net current assets of \$157,339.

The petitioner's 2000 audited financials show that the petitioner had revenues of \$8,072,220 but a loss from operations of \$2,093,016 during that year. The balance sheet shows that at the end of that year the petitioner had current assets of \$5,068,345 and current liabilities of \$1,845,370, which yields net current assets of \$3,222,975.

The petitioner's 2001 audited financials show that the petitioner had revenue of \$9,723,202 but a loss from operations of \$3,062,220 during that year. The balance sheet shows that at the end of that year the petitioner had current assets of \$5,770,035 and current liabilities of \$3,131,929, which yields net current assets of \$2,538,106.¹

¹ Although the petitioner's 2001 current assets, current liabilities, and, therefore, its net current assets as shown on its tax

In a letter dated February 28, 2003 the petitioner's legal coordinator stated that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date in accordance with the requirements of 8 C.F.R. § 204.5(g)(2).

The director found 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 June 30, 2003, denied the petition.

On appeal, the petitioner's legal coordinator argues that the petitioner's gross receipts show its continuing ability to pay the proffered wage beginning on the priority date. The legal coordinator also notes that the petitioner's owner has other assets at his disposal, and can subsidize the petitioner's debts and obligations as necessary.

The petitioner's reliance on its gross receipts as an index of its ability to pay additional wages is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income,³ 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. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp1080, 1084 (S.D.N.Y. 1985), 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 reliance on the assets of its owner is similarly misplaced. 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

return differ markedly from the values shown on its audited financial statements for the same year, that difference may merely represent differences between tax accounting and auditing pursuant to generally accepted accounting principles.

² 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.

³ 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 established that it employed and paid the beneficiary \$59,733.65 during 2001 and \$58,220.88 during 2002. The petitioner must demonstrate the ability to pay the balance of the proffered wage during those years.

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*, *supra*, *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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 \$81,203.20 per year. The priority date is January 19, 1999.

During 1999 the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had net current assets of \$48,862. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 1999 with which it could have paid the proffered wage. The petitioner is unable to demonstrate the ability to pay the proffered wage during 1999 out of its net income or net current assets.

The petitioner's audited financial statements show that during 2000 it had a loss from operations of \$2,093,016. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year, however, the petitioner had net current assets of \$3,222,975. The petitioner's net current assets show its ability to pay the proffered wage during 2000.

The petitioner has demonstrated that it paid the beneficiary \$59,733.65 during 2001. The petitioner must show the ability to pay the \$21,469.35 balance of the proffered wage during that year. The petitioner's 2001 tax return shows that during that year the petitioner declared a loss of \$3,459,397 as its ordinary income. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of profits during

that year. That return shows that at the end of the year the petitioner had net current assets of \$157,339. The net current assets shown on the petitioner's tax return show its ability to pay the balance of the proffered wage during 2001.⁴

The petitioner has demonstrated that it paid the beneficiary \$58,220.88 during 2002. The petitioner would ordinarily be obliged to show the ability to pay the \$22,982.12 balance of the proffered wage during that year. The Request for Evidence in this case, however, was issued on December 17, 2002. The petitioner's response was dated February 28, 2003. On that date the petitioner's 2002 tax return, audited financial statements, and annual reports were unlikely to be available. The petitioner is excused from providing evidence pertinent to 2002.

The petitioner's 2000 audited financial statements and its 2001 tax returns and audited financial statements show the petitioner's ability to pay the proffered wage during those years.

As was noted above, however, 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer stating that the U.S. employer is able to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. See *Employment-Based Immigrants*, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). Although the director retains the discretion to reject the assurances of a financial officer in some cases, this alternative recognizes that large employers may have large net tax losses but remain fiscally sound and retain the ability to pay additional wages.

In this case, although the petitioner's federal tax return showed a net loss and insufficient net current assets to pay the proffered wage during 1999, the balance of the evidence indicates that the petitioner has been in business for ten years, grossed over \$7 million during each of the salient years, and paid over \$1 million in salaries and wages during each of the salient years.

A petitioner is not necessarily precluded from showing its continuing ability to pay the proffered wage beginning on the priority date by a single year during which its net income was less than the annual amount of the proffered wage. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Here the totality of circumstances reflecting the magnitude of the petitioner's operations and the favorable regulatory language relating to large employers at 8 C.F.R. § 204.5(g)(2) weigh in the petitioner's favor.

The totality of the circumstances in the instant case clearly and convincingly indicate that the petitioner has been able since the priority date to pay the proffered wage and will continue to have that ability for the foreseeable future. The petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

⁴ The petitioner could also have demonstrated its ability to pay the proffered wage during 2001 with the \$2,538,106 in year-end net current assets shown on its audited financial statements for that year.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.