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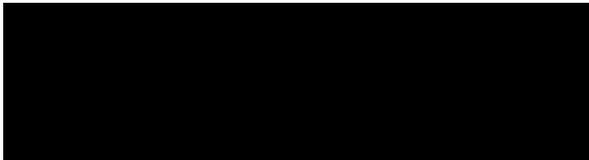
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FILE: EAC 03 108 51000 Office: VERMONT SERVICE CENTER Date: DEC 16 2005

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:



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 Acting 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 landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscape designer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$13.58 per hour, which equals \$28,246.40 per year.

On the petition, the petitioner stated that it was established during March of 1998 and that it employs three workers. The petition states that the petitioner's gross annual income is \$361,417. The petitioner did not state its net annual income in the space provided on the application for that purpose. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 1996. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Riverside, Connecticut.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a corporation, that it incorporated on April 1, 1988, and that it reports taxes pursuant to the calendar year and cash basis accounting. That return also shows that the petitioner declared ordinary income of \$1,079 during that year. The corresponding

Schedule L shows that at the end of that year the petitioner declared current liabilities in excess of its current assets.

In addition, counsel provided (1) copies of monthly statements pertinent to the petitioner's bank account, (2) a spreadsheet purporting to show that the petitioner paid \$140,935 in salaries from July 1, 2001 to June 30, 2002, (3) a letter, dated February 7, 2003, from the petitioner's accountant, and (4) the petitioner's Connecticut quarterly tax returns for all four quarters of 2000. Those quarterly returns show that the petitioner paid total wages of \$4,825, \$22,025, \$21,825, and \$72,250 during those quarters, respectively. This office notes, however, that the priority date of the petition is April 26, 2001. 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.

The accountant's February 7, 2003 letter cites the petitioner's net profits, total wage expenses, and the petitioner's financial statements as indices of the petitioner's ability to pay the proffered wage. No financial statements were submitted with the petition.

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 31, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 2001, it provide a copy of the Form W-2 Wage and Tax Statements showing the wages it paid to him during that year.

In response, counsel submitted (1) additional bank statements, (2) the petitioner's owner's 2001 Connecticut CT-1040 personal income tax return, (3) the petitioner's owner's 2002 Form 1040 U.S. Individual Income Tax Return, (4) the petitioner's 2002 and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, (5) a letter, dated March 18, 2004, from the petitioner's accountant, (6) the petitioner's 2002 and 2003 W-2 forms and W-3 transmittals, (7) the petitioner's Form 941 and Form 941TeleFile Quarterly Federal Tax Returns, and (8) a letter, dated March 17, 2004, from the petitioner's owner.

The petitioner's 2002 tax return shows that it declared ordinary income of \$17,349. The corresponding Schedule L shows that the petitioner's current liabilities as stated on that form exceeded its current assets.

The petitioner's 2003 return shows that it declared ordinary income of \$6,828. The corresponding Schedule L shows that the petitioner's current liabilities as stated on that form exceeded its current assets.

The 2002 W-2 forms and W-3 transmittals show that the petitioner employed four workers during that year, including the petitioner's owner, to whom it paid \$72,000 during that year. They further show that the petitioner paid a total of \$41,600 to the other three workers. Those forms do not indicate that the petitioner employed the beneficiary during 2002. Further, the wages shown on the W-2 forms submitted as having been paid to the petitioner's owner and his three employees is equal to the total wages shown on the W-3 transmittal, which indicates that no W-2 forms were omitted.

The 2003 W-2 forms and W-3 transmittals show that the petitioner employed four workers during that year, including the petitioner's owner, to whom it paid \$65,000 during that year. They further show that the

petitioner' paid a total of \$45,440 to the other three workers. Those forms do not indicate that the petitioner employed the beneficiary during 2003. Further, the wages shown on the W-2 forms submitted as having been paid to the petitioner's owner and his three employees is equal to the total wages shown on the W-3 transmittal, which indicates that no W-2 forms were omitted.

Most of the Form 941 and Form 941 TeleFile quarterly returns do not indicate the quarter to which they apply. The return for the first quarter of 2002, however, indicates that the petitioner paid no wages to any of its employees during February 2002. The return for the first quarter of 2003 indicates that the petitioner paid no wages to any employees during January 2003.

The petitioner's owner's March 17, 2004 letter states,

I cannot locate [the beneficiary's] W-2 form for the year of 2001. My best estimate is that he averaged approximately six hundred dollars per week, which would amount to a yearly gross of thirty one thousand, two hundred dollars.

The accountant's letter states that the petitioner's bank statements and its tax returns show the ability to pay the proffered wage. The accountant also observed that a corporation's owner may pay himself a bonus at the end of the year, thus reducing the corporation's income for tax purposes, although the reduced taxable income reported is not a fair index of the corporation's actual profits. The accountant further stated that the petitioner would charge \$32 per hour for the beneficiary's services, which would more than cover the proffered wage. The accountant provided no basis for his assertion that the petitioner would charge \$32 per hour for the beneficiary's services, and no evidence that the beneficiary would be fully employed if the petitioner charged that amount.

Finally, the accountant stated that, in the case of a sole proprietorship, the personal income and assets of the owner might be considered in the determination of the company's ability to pay the proffered wage. This office notes that, notwithstanding that it has one owner, the petitioner is not a sole proprietorship, but a corporation. The distinction is explained further below.

The Acting 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 May 25, 2004, denied the petition.

On appeal, counsel submits (1) the transcript of a teleconference between the management of the Vermont Service Center and representatives of an immigration lawyer's association, (2) a copy of a May 4, 2004 memorandum from CIS Associate Director for Operations, (3) a letter, dated June 18, 2004, from the petitioner's bank, (4) unaudited statements of the petitioner's owner's net worth, (5) a letter, dated June 21, 2004, from the petitioner's accountant, and (6) the petitioner's trial balance for the first quarter of 2004 and for March of 2004.

The teleconference transcript states, *inter alia*, that in the case of a sole proprietorship the income and assets of the owner may be considered in determining the petitioner's ability to pay the proffered wage. This office

again notes that the petitioner is not a sole proprietorship. This salient difference will be further addressed below.

The May 4, 2004 memorandum describes various situations in which Service Centers should not issue Requests for Evidence. The salience of that document to the instant case is unclear. Counsel did not submit any argument clarifying the proposition in support of which he submitted that memorandum.

The letter from the petitioner's bank states that the bank takes the personal assets of a corporation's owner into account when considering making a loan to the corporation.

The accountant, in his June 21, 2004 letter, notes the petitioner's owner's statements of his net worth and states that the petitioner's owner's personal assets should be considered in the determination of the petitioner's ability to pay the proffered wage because "these assets are inextricably entwined with the business."

In a brief, counsel reiterates the argument that in the case of a sole proprietorship the personal assets of the owner should be considered in assessing the entity's ability to pay the proffered wage. Counsel cites the bank letter as evidence that consideration of personal assets in making corporate loans is standard practice in the commercial lending industry.

Counsel asserts that,

Where the petitioner asserts that the hiring of the beneficiary will cause the petitioner's income to increase and that beneficiary will be paid from that increase, it can be documented that [the] petitioner has [the] ability to pay.

Counsel asserts that "Documentation submitted showed **payroll** for 7/2001 – 6/2002 of \$140,935; W-2's for 2002 in the amount of \$214,400, and W-2's for 2003 in the amount of \$115,273.60." [Emphasis in the original.] The only documentation pertinent to the salaries paid during the months from July 2001 to June 2002 was a spreadsheet that was apparently prepared by the petitioner or its agent. The record contains no indication that the figures on that spreadsheet, apparently prepared for use in this proceeding, are reliable.<sup>1</sup>

The three types of evidence of the petitioner's ability to pay the proffered wage sanctioned by cit are copies of annual reports, federal tax returns, and audited financial statements. Unaudited financial documents are the representations of management. Unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Finally, counsel notes that the petitioner is not required to employ the beneficiary prior to approval of the visa petition. Counsel is correct. The purpose of the request for the W-2 forms showing payments to the beneficiary was to ascertain whether the petitioner had paid the proffered wage during each of the salient

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<sup>1</sup> Counsel's addition of the figures on the W-2 forms was faulty. Those errors, however, are not salient to this office's analysis pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

years, or had paid some portion of that proffered wage. The Service Center did not imply that the petitioner's failure to employ the beneficiary during the pendency of the petition renders the petition unapprovable.

Counsel's reliance on the unaudited financial records 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. This office notes that a trial balance is produced for a company's internal use and, by its very nature, is not an audited financial statement.

Counsel's reliance on the bank statements submitted is similarly misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.<sup>2</sup> Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

As was noted above, counsel and the accountant imply that the petitioner is a sole proprietorship, or equivalent to a sole proprietorship, and that the petitioner's owner's personal assets should therefore be considered in the determination of the petitioner's ability to pay the proffered wage. A salient distinction exists between the petitioner and a sole proprietorship, however, that precludes consideration of the petitioner's owner's personal assets.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or shareholders. *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 are not available, as a matter of right, to the corporation to pay its debts and obligations.<sup>3</sup> The petitioner's owner's personal assets cannot, therefore, 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.

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<sup>2</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

<sup>3</sup> The assets of the petitioner's owner are not, therefore, "inextricably entwined" with those of the corporation. The petitioner's owner may elect to pay the debts and obligations of the corporations with his own funds, or he may elect to not to do so.

The distinction between corporations and sole proprietorships is not modified by the asserted practice of commercial lending institutions of considering the personal assets of the sole owner of a subchapter S corporation in considering lending to that corporation. The bank is permitted to consider those assets on the theory that the petitioner's owner may elect to pay the debts and obligations of the corporation out of his own funds. The owner is not, however, obliged to do so, for which reason this office will not consider the petitioner's owner's income and assets.

Finally, counsel argues that the petitioner's owner, being the sole shareholder, had the authority to adjust the amount of compensation he received from the petitioner as necessary to pay the proffered wage. In order to prevail on that point, however, the petitioner must demonstrate that the ability of the petitioner's owner to adjust his compensation to pay the proffered wage is realistic. That is, it must demonstrate not only that its owner had the legal authority to forego compensation, but that he could feasibly have chosen to forego that compensation.<sup>4</sup> The petitioner must demonstrate that its owner could have paid the proffered wage out of his compensation while retaining the ability to meet his own debts and obligations.

The proffered wage in this case is \$28,246.40 per year. That amount represents a sizeable proportion of the petitioner's owner's compensation during each of the salient years. The record does not contain any information pertinent to the petitioner's owner's budget. Whether the petitioner's owner could have met his expenses after paying the proffered wage out of his compensation during any of the three years is unclear. The petitioner has not shown its ability to pay any portion of the proffered wage out of the compensation paid to its owner.

Counsel urges that hiring the beneficiary would increase the petitioner's profits. The only evidence in support of that assertion, however, is the statement of the accountant that the petitioner proposes to charge \$32 per hour for the beneficiary's services. The record contains no evidence that the market will bear the proposed per hour charge for the beneficiary's services. Further, even if the charge is reasonable, the record does not indicate that the petitioner would be able to fully employ the beneficiary at that rate. The record does not, therefore, support the assertion that hiring the beneficiary would increase the petitioner's profits.

If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary might generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no reliable evidence that the net income generated by the beneficiary would entirely offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption. This office is unconvinced by counsel's argument that the mere assertion that hiring the beneficiary would result in an increase in the petitioner's profit is sufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel's argument that the petitioner's total wage expense shows its ability to pay the proffered wage is similarly unconvincing. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded

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<sup>4</sup> The petitioner might also be required to demonstrate that its owner was willing, in addition to able, to forego compensation to the extent necessary to pay the proffered wage.

the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>5</sup> or otherwise increased its net income,<sup>6</sup> 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. 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, the petitioner's wage reports indicate that it paid no wages at all during at least two months of the pendency of this petition. Whether those hiatus is unclear. Clearly, however, landscaping is a seasonal business, and whether the petitioner could have continued to pay the proffered wage to the beneficiary during the periods when it was paying no wages to its other workers is similarly unclear.

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, the only evidence that the petitioner paid any wages to the beneficiary during 2001 is the petitioner's owner's statement. That statement, unsupported by any corroborating evidence, is insufficiently reliable to demonstrate the petitioner's ability to pay the proffered wage. Further, the 2002 and 2003 W-2 forms and W-3 transmittals, taken together, indicate that the petitioner did not employ the beneficiary during either of those years. The petitioner did not establish that it employed and paid the beneficiary during any one of the three salient years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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.<sup>7</sup> 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).

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<sup>5</sup> 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. This office notes, however, that the underlying purpose of the instant visa category is to provide alien workers for positions for which U.S. workers are unavailable. If the petitioner wished to support the contention that it has the ability to pay the proffered wage because the beneficiary would replace an existing worker, then the petitioner might also be required to demonstrate that it is not seeking to replace a U.S. worker with a foreign worker out of preference.

<sup>6</sup> 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.

<sup>7</sup> 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 \$28,246.40. The priority date is April 26, 2001.

During 2001 the petitioner declared ordinary income of \$1,079. That amount is insufficient to pay the proffered wage. At the end of that year, according to the petitioner's Schedule L, the petitioner had negative net current assets. The petitioner cannot show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds 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 ordinary income of \$17,349. That amount is insufficient to pay the proffered wage. At the end of that year, according to the petitioner's Schedule L, the petitioner had negative net current assets. The petitioner cannot show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds 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.

During 2003 the petitioner declared ordinary income of \$6,828. That amount is insufficient to pay the proffered wage. At the end of that year, according to the petitioner's Schedule L, the petitioner had negative net current assets. The petitioner cannot show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. 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.