

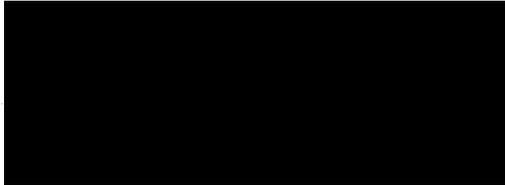
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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Services



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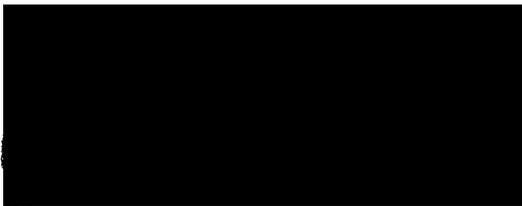
FILE: EAC 03 159 52111 Office: VERMONT SERVICE CENTER

Date: DEC 19 2005

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

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

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 dismissed.

The petitioner is a mechanical repair business. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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, 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on June 9, 1998. The proffered salary as stated on the labor certification is \$22.68 an hour (35 hour week) or \$41,277.60 per year.

With the petition, the petitioner, through counsel, submitted a copy of its 1998 Form 1120, U.S. Corporation Income Tax Return, for fiscal year February 1, 1998 through January 31, 1999. The tax return reflected a taxable income before net operating loss deduction and special deductions of \$13,193 and net current assets of \$7,466. The director determined the documentation to be insufficient to establish the ability to pay the proffered wage, and on March 9, 2004, the director requested additional evidence of that ability. The petitioner was informed that the additional evidence may include, but was not limited to, accredited profit/loss statements, bank account records, or personnel records. The director specifically requested a copy of the beneficiary's 1998 Form W-2, Wage and Tax Statements.

In response, counsel provided a copy of the petitioner's bank statement for the period March 1, 2004 through March 31, 2004, and a copy of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax

Return, for the fiscal year February 1, 2002 through March 31, 2003. Counsel explained that the petitioner is waiting for the beneficiary to change status in the U.S. before placing him on the payroll. The 2002 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$2,924 and net current assets of \$32,759. The bank statement reflected a beginning balance of \$738.91 and an ending balance of \$562.94.

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. On June 21, 2004, the director denied the petition.

On appeal, counsel provides previous documentation and states that depreciation, officer compensation, and total assets should be considered when determining the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 1998 through 2002.

As an alternative 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, 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 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 CIS 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.¹ A corporation'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 corporation'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's net current assets during 1998 and 2002 were \$7,466, and \$32,759, respectively. The petitioner could not have paid the proffered wage in 1998 and 2002 from its net current assets.²

In a prior letter, counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. However, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment will significantly increase profits for the company. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel suggests that depreciation should be added back to the petitioner's taxable income when determining the ability to pay the proffered wage. However, a depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be 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 cost of equipment and buildings and the value lost as they 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.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule,

¹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

² The petitioner failed to provide tax returns for the years 1999 through 2001. Therefore, CIS is unable to determine the petitioner's taxable income before net operating loss deduction and special deductions or its net current assets for those years.

he does not offer any alternative allocation of those costs. Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner.

Counsel also contends that officers' compensation should be included when determining the petitioner's ability to pay the proffered wage. However, CIS (legacy INS) has long held that it 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. It is an elementary rule that 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), and *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. In addition, even if CIS were to include the officers' compensation in the instant case, the result would still not cover the wage of the beneficiary (1998: \$13,193 taxable income + \$20,800 officers' compensation = \$33,993 or \$7,284.60 less than the proffered wage of \$41,277.60; 2002: -\$2,924 taxable income + \$13,000 officers' compensation = \$10,076 or \$31,201.60 less than the proffered wage of \$41,277.60).

Counsel further suggests that the petitioner's total assets be considered when determining the petitioner's ability to pay the proffered wage. However, the petitioner's total assets 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.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has only provided tax returns for two years, 1998 and 2002, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

The petitioner's 1998 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$13,193 and net current assets of \$7,466. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 1998.

The petitioner's 2002 federal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$2,924 and net current assets of \$32,759. The petitioner could not have paid the proffered wage from either its taxable income or net current assets in 2002.

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.