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U.S. Citizenship
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Services

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[Redacted]

FILE: [Redacted]
LIN 03 174 51157

Office: NEBRASKA 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)(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 Director, Nebraska 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 real estate development company. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 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 \$17.55 per hour, which equals \$36,504 per year.

On the petition, the petitioner stated that it was established during 1992 and that it employs between two and 15 workers. The petition states that the petitioner's gross annual income is \$3,615,306 and that its net annual income is \$101,745.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from April 1995 to April 2001, but did not claim to have worked for the petitioner since the priority date. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Edwards, Colorado.

In support of the petition, counsel submitted 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 March 16, 1992, and that it reports taxes pursuant to the calendar year. That return also shows that the petitioner

reported a loss of \$146,804 during that year as its ordinary income.¹ The return shows that the petitioner's reported Schedule M-1, Line 8, income of \$101,745. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In addition, counsel provided the tax returns of two other companies.

Counsel also provided a letter, dated December 3, 2002, from the petitioner's accountant. That letter contends that the petitioner's "Overall net income," to be found at Line 23 of Schedule K of the petitioner's tax return, is a better index of its ability to pay additional wages than its Line 21 Ordinary income from page one of the Form 1120S return. The accountant further notes that the petitioner's owner also owns the two related companies for whom tax returns were provided, and states that the evidence submitted shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on August 28, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested a copy of the petitioner's 2002 tax return and, if it employed the beneficiary during either 2001 or 2002, copies of the Form W-2 Wage and Tax Statements showing wages it paid to the beneficiary during those years.²

In response, counsel submitted a letter, dated October 29, 2003. In that letter, counsel stated that the petitioner has not employed the beneficiary since the priority date. Counsel also stated that the other two entities for which tax returns were submitted are the petitioner's wholly-owned subsidiaries and that their income and assets should be considered in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel also submitted a letter, dated October 23, 2003, from the petitioner's accountant. The accountant argued that the petitioner's Schedule M-1, Line one, Net income (loss) per books is a more appropriate index of its ability to pay additional wages than its ordinary income. The accountant acknowledged that that figure showed a loss during 2002, but stated that this was due to an economic downturn due to the events of September 11, 2001.

The figure shown as Schedule M-1, Line 1, Net income per books, \$101,035, is almost identical to the amount shown on Schedule K, Line 23, Income, \$101,745. The difference is a Travel and Entertainment deduction at Line 3a of Schedule M-1. Like the numbers in question, counsel's assertion that the petitioner's Net income per books should be considered is nearly indistinguishable from his argument that the petitioner's Schedule K income should be considered. Because of the similarity, the argument pertinent to Schedule M-1 income will not be addressed separately from the argument pertinent to the petitioner's Schedule K income.

The accountant further argued that the petitioner's total equity, its outstanding capital stock added to its retained earnings, is another indication of its ability to pay the proffered wage. Further still, the accountant

¹ That amount is shown at Line 21 of the petitioner's Form 1120S, U.S. Income Tax Returns for an S Corporation.

² The Service Center also requested to know which entity is petitioning for the beneficiary. In response to that request, counsel stated that the petitioner in this matter is Canwest Ventures, Incorporated.

stated that the other two companies for which tax returns were submitted and the petitioner's owner all owe substantial amounts to the petitioner, and that those amounts are due upon demand. The accountant argues that those amounts should also be considered in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. As evidence of amounts owed by the petitioner's owner, counsel provided copies of promissory notes.³

Finally, the accountant gave what he alleged are the values and outstanding loan balances of three properties he states the petitioner owns. The accountant further states that two of the properties are rental properties, and also generate cash flow.⁴ The accountant stated, further still, that the petitioner has other assets in the amount of \$41,784.⁵

Counsel submitted the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared a loss of \$20,695 as its ordinary income during that year. Schedule M-1, Line 8 shows that the petitioner declared a loss of \$24,801 as its total income during that year.⁶ The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. Counsel also submitted 2002 tax returns for the two other entities and the petitioner's owner's Form 1040 U.S. Individual Income Tax Return.

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 20, 2004, denied the petition.

On appeal, counsel argues that the Service Center was incorrect in finding that the petitioner does not have the continuing ability to pay the proffered wage beginning on the priority date.⁷ Counsel argues that the

³ Counsel also submitted promissory notes issued by one of the related entities to another of the related entities. What bearing this document might have on the petitioner's continuing ability to pay the proffered wage beginning on the priority date is unknown to this office, and counsel does not elaborate.

⁴ This office notes that the petitioner declared a loss of \$13,359 from its rental real estate activities during 2001 at Line 2 of the Schedule K attached to its tax return. In any event, even if the petitioner had profited from its rental activity as the accountant implied, that profit would have been included on the income shown on the petitioner's tax return, and no adjustment to the numbers on the tax return would have been necessary to account for that rental income.

⁵ Again, as the petitioner is seeking to demonstrate its ability to pay the proffered wage with tax returns, its assets will be considered, as appropriate, if they are included on those returns. No adjustment is necessary for the assets cited by the accountant.

⁶ Schedule M-1, Line 8 income includes various types of income not included in the petitioner's ordinary income, including section 1231 gains, those derived from sale of property used in trade or business, and a few other dispositions not relevant here. Various types of income are segregated on the tax return of an S corporation because they retain their character as ordinary income or section 1231 gains when passed through to the beneficiary. The more complete figure shown on Schedule M-1 is therefore a better index of a petitioner's ability to pay the proffered wage during a given year.

⁷ Counsel mischaracterizes the Service Center's finding. The petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The Service Center did not find that the petitioner did not have the ability to pay that wage. Rather, the Service Center found that the petitioner had failed to demonstrate that ability as it is required to do by the regulations.

relationship of the petitioner to the related entities, explained in the accountant's letter of December 3, 2002, coupled with those other entities tax returns, demonstrates the petitioner's ability to pay the proffered wage.

Counsel cites *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980) for the proposition that the petitioner and the related entities are affiliated corporations within the meaning of that decision. Counsel does not state how that asserted fact should guide the decision in this matter. Further, the other entities in question are clearly not affiliated corporations, as they are not corporations.

Counsel again notes that the petitioner's owner also owns 99% of two of the related entities for whom tax returns were submitted. From this fact, counsel concludes, "Therefore, it is logical to include the finances of Mr. Wood, [and the other two entities] when considering the [petitioner's] ability to pay the proffered wage."

Counsel cites *Elatos Restaurant Corporation v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986) for the proposition that where a petitioner's tax returns are unclear in their support for the petitioner's ability to pay the proffered wage, the petitioner must submit additional evidence clarifying that ability. Counsel states, "By submitting all of the affiliated company tax returns Petitioner is trying to clarify the financial position of the Glenn [sic] Wood companies as a whole."

Counsel again asserts that the petitioner's loss during 2002 was due to the events of September 11, 2001. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that the petitioner's losses do not, under these circumstances, preclude approval of the petition.

Counsel provides copies of the petitioner's unaudited balance sheet as of September 30, 2003 as additional evidence of the petitioner's ability to pay the proffered wage. Counsel argues that the petitioner's retained earnings, its equity position, and the promissory notes executed by the petitioner's owner and the related companies are indices of its continuing ability to pay the proffered wage beginning on the priority date.

Pertinent to the promissory notes, counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) for the proposition that "if a petitioner is financially linked to another entity and it has obtained pledges of support [CIS] must consider those resources."

Finally, counsel asserts that CIS failed to consider the fact that the petitioner itself owns a portion of the related entities, and asserts that the ownership interest must be included in the analysis of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The financial position of the Glen Wood companies taken as a whole and the financial position of Glen Wood, the petitioner's owner, are irrelevant. 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).

That the petitioner is attempting to clarify its financial position pursuant to *Elatos Restaurant Corporation v. Sava, supra*, does not render the finances of the petitioner's owner or other companies he owns relevant. The evidence pertinent to the finances of the related companies is inapposite to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel counters that position by asserting that *Full Gospel Portland Church v. Thornburgh, supra*, stands for the proposition that CIS must consider the resources of another entity to whom a petitioner is financially linked. *Full Gospel*, however, stands for the proposition that pledges to a church must be considered in the determination of its ability to pay the proffered wage. Counsel offers no argument pertinent to extending that proposition to any entity to which a petitioner is linked. Further, even if *Full Gospel* were directly on point, the decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court, even in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

In his letter of October 23, 2003, the petitioner's accountant provided figures that he claims are the costs or values of properties owned by the petitioner and the amounts of their indebtedness. No other evidence was offered to show that the petitioner actually owns those properties, to show the amounts for which they were purchased, their current market values, or the amounts by which they are encumbered. The accountant's statement is insufficient to demonstrate the petitioner's equity in those properties.

Further, equity in real estate is not the sort of liquid investment that may be readily used to pay wages. Even had the accountant sufficiently demonstrated the petitioner's equity in those properties that would be insufficient.

Counsel's reliance on 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.

Counsel's reliance on the amount of the petitioner's retained earnings is similarly misplaced. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income or to net current assets is therefore duplicative, at least in part.

Further, even if considered separately from net income and net current assets, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer to pay to its employees in cash while continuing in business. They are not, therefore, an index of a company's ability to pay additional wages.

Similarly, the petitioner's outstanding capital stock, although a component of equity, does not necessarily represent funds available for disposition, and counsel has submitted no evidence that it does. The amount of the petitioner's outstanding capital stock will not be considered in the calculation of funds available to pay the proffered wage.

The petitioner's promissory notes and its part-ownership of the related companies may be considered together. All of the petitioner's assets and liabilities, including its promissory notes and equity in other companies, are included on its income tax return. This office will not consider the petitioner's assets without also considering its liabilities. Further, assets shown on the petitioner's tax return as non-current will not be considered as current assets. The consideration of the petitioner's assets is addressed further below.

The assertion that the petitioner's owner's debt to the petitioner may be used to pay wages is unpersuasive. Typically, debt of owners to their own companies is occasioned by the purchase of stock, is secured only by that stock, and is never expected to be repaid. Counsel has submitted no evidence that the debt relied upon in this instance is other than typical. Further, even if the petitioner's owner decided to exercise his power, as the petitioner's majority owner, to require himself to repay that debt, an unlikely scenario, that debt might be extinguishable by returning the stock that likely occasioned it and that likely secures it. The amount of the petitioner's owner's debt to the petitioner could not necessarily be used to pay wages.

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 petitioner did not establish that it employed and paid the beneficiary since the priority date.

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. 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 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, 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, however, 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 \$36,504 per year. The priority date is April 26, 2001.

During 2001 the petitioner declared a loss as its ordinary income. The petitioner is unable, therefore, to demonstrate its ability to pay any portion of the proffered wage out of its ordinary income during that year. At the end of the year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year.

Counsel argues, however, that this office should consider the petitioner's Schedule K, Line 23 Income in determining the petitioner's ability to pay additional wages. On the petitioner's 2001 return, that line item is \$101,745, an amount greater than the proffered wage.

Because the various types of income passed through to the owner or owners of a subchapter S corporation retain their character and are taxed differently when declared by the owner, those different types of income are segregated on the Form 1120S, U.S. Income Tax Return for an S Corporation. Not all of the different types of income are included in the Ordinary income shown at Line 21 of that return.

The Line 23, Schedule K income includes the corporation's ordinary income, in this case a loss. Various other types of income that receive more favorable treatment than ordinary income are also included in Line 23. In the instant case, that line item includes \$259,673 declared as section 1231 gain. Section 1231 gain derives from the sale of business property. This office agrees with counsel that no reason exists to exclude it from the calculation of the funds available to the petitioner during a given year with which it could have paid additional wages. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss as its ordinary income. The petitioner is unable, therefore, to demonstrate its ability to pay any portion of the proffered wage out of its ordinary income during that year. The petitioner's Schedule K, Line 23 Income during that year was a loss of \$24,801. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage during that year out of its Schedule K, Line 23 Income. At the end of the year the petitioner had negative net current assets. The petitioner is unable, therefore, to 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 that year with which it could have paid the proffered wage. The petitioner's 2002 tax return does not demonstrate the petitioner's ability to pay the proffered wage during 2002.

Counsel argues, however, that even if the petitioner's tax returns fail to numerically demonstrate its ability to pay the proffered wage during 2002, its low income or losses were due to the events of September 11, 2001, and may be overlooked. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that, in this situation, its low income or losses may be overlooked.

In *Matter of Sonogawa*, however, the petitioning entity demonstrated that, during the year in which the petition was filed the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business. In *Sonogawa*, the cause of the petitioner's poor performance during a single year was demonstrated, rather than merely alleged. The evidence demonstrated that the poor performance was uncharacteristic and was unlikely to recur.

In the instant case, no evidence appears to demonstrate that the petitioner's poor performance during 2002 was due to the events of September 11, 2001. Counsel has not demonstrated that the business of the petitioner, in particular, suffered somehow as a result of those events, nor that real estate developers and builders in Edwards, Colorado, or Colorado as a whole suffered a decline in business because of those events. Counsel has provided insufficient evidence to demonstrate the cause of the petitioner's loss during 2002, or to show that the losses were uncharacteristic and unlikely to recur. Counsel's citation of *Sonogawa*, therefore, is unconvincing.

The petitioner failed 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 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.