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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 19 2005  
EAC 02 234 51829

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 preference visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning and alteration firm. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial 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 additional evidence and contends that the petitioner has demonstrated its continuing financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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 filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$11.67, or \$24,273.60 per year. On Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary does not claim to have worked for the petitioner.

Part 5 of the petition, filed July 1, 2002, indicates that the petitioner claims to have been established in 1991 and have a gross annual income of \$350,000.

In support of its ability to pay the proffered salary, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2000. It indicates that the petitioner files its taxes using a standard calendar year. It shows that the petitioner reported ordinary income of \$4,158.<sup>1</sup> Schedule L of the tax return reveals that the petitioner had \$15,091 in current assets and \$3,999 in current liabilities, resulting in \$11,092 in net current assets. Net current assets are the difference between the petitioner's current assets and

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<sup>1</sup> For the purpose of this review, ordinary income will be treated as net income.

current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end 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.

On September 16, 2003, the director requested additional evidence from the petitioner pertinent to its continuing ability to pay the proffered wage of \$24,273.60 beginning at the priority date of April 27, 2001. The director requested that the petitioner provide a copy of its 2001 federal income tax return with all schedules and attachments. As an alternative, the director advised that the petitioner may submit annual reports for 2001 accompanied by audited or reviewed financial statements. The petitioner further requested copies of the beneficiary's Wage and Tax Statements (W-2s) for 2000, 2001, and 2002, if the petitioner employed her during this period.

The petitioner, through counsel, failed to provide a copy of its 2001 tax return. Instead, a copy of its 2002 corporate tax return was supplied. It shows that the petitioner reported ordinary income of -\$3,873. Schedule L of the tax return reflects that the petitioner had \$7,656 in current assets and \$3,545 in current liabilities, yielding \$4,111 in net current assets.

With the response, the petitioner also provided a copy of its sole shareholder's individual tax return for 2002. Counsel states in her transmittal letter, dated December 10, 2003, that the sole shareholder's gross individual income of \$196,226 includes his officer compensation of \$50,000, as reported on the petitioner's corporate tax return. Counsel states that this compensation may be available to pay the beneficiary's proffered wage of \$24,273.60. She notes that the federal poverty guidelines for 2003 indicates an income of \$15,150 for a family of two, and suggests that the sole shareholder's level of income demonstrates his ability to pay the proffered salary while sustaining himself and his family.

The director denied the petition on May 17, 2004, noting that the petitioner's level of net income and net current assets, as well as the omission of direct financial documentation covering the visa priority failed to demonstrate the petitioner's ability to pay the proposed wage offer.

On appeal, counsel resubmits a copy of the sole shareholder's 2002 individual federal tax return, and renews her contention that the sole shareholder's officer compensation of \$50,000 will be available to pay the proffered wage. It is noted at the outset that counsel's assertions relevant to the sole shareholder's ability to sustain himself and his family does not constitute evidence. In this case, the sole shareholder has not indicated his willingness or ability to forego such compensation. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As noted by the director, the petitioner failed to provide sufficient documentary evidence indicating that it had the ability to pay the proffered wage in 2001. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In this case, CIS will not consider the officer compensation of \$50,000 presented as a deduction from gross income on the petitioner's 2002 corporate tax return simply because it belongs to the sole shareholder. Such compensation is paid to individuals who materially participate in a business. Many of the duties performed by an officer(s) are not the same as those to be performed by a beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. In this case, it is also noted that the amount designated as officer compensation would have to sustain a comparatively significant reduction (approximately 50%) in order to meet the proffered wage. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, 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.

In determining a petitioner's ability to pay the proffered wage, CIS will initially review whether a petitioner may have employed and paid wages to a beneficiary. If a petitioner establishes by credible 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. If either the petitioner's net income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may be demonstrated for a given period. In the instant case, there is no evidence in the record of proceedings suggesting that the petitioner has employed the beneficiary.

CIS will also examine the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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 the Service should have considered income before expenses were paid, rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

It is concluded that in this matter, similar reasoning should apply. Judicial precedent does not support revising the net income figure on the 2002 tax return by adding back officer compensation. In this case, the two tax returns provided to the record failed to demonstrate the petitioner's ability to pay the proposed wage offer of \$24,273.60. In 2002, the neither the petitioner's net income of -\$3,873 nor its net current assets of \$4,111 were sufficient to pay the certified salary of \$24,273.60. Similarly, in 2000, although prior to the visa priority date, both the petitioner's net income of \$4,158 and net current assets of \$11,092, were each insufficient to cover the proposed wage.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate a *continuing* ability to pay the proposed wage offer beginning at the priority date established when the labor certification was first accepted for processing by the DOL.

Following a review of the federal tax returns and other documentation furnished, the petitioner has failed to establish that it has had the continuing financial ability to pay the proffered wage beginning at the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.