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U.S. Citizenship
and Immigration
Services

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File: [REDACTED]
EAC-04-068-51442

Office: VERMONT SERVICE CENTER

Date: DEC 21 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)

IN 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 Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning business. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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 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 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 May 19, 2000. The proffered wage as stated on the Form ETA 750 is \$25,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$177,515, and to currently employ five workers. In support of the petition, the petitioner submitted its corporate tax returns for 2001 and 2002.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 22, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director noted that the petitioner's net income and net current assets in 2001 and 2002 were insufficient to establish its continuing ability to pay the proffered wage beginning on the priority date and she requested evidence pertaining to 2000 as well as any evidence of wages already paid to the beneficiary in 2000, 2001, or 2002 and information about the position.

In response, counsel states that the director should add together the petitioner's net income, net current assets and depreciable assets. Additionally, counsel asserts that the petitioning entity is owned solely by a married couple

who have owned the business since 1993 without any outstanding liabilities and since early 2000 have owned 9 units of real estate property. Counsel also explains that one of the petitioner's owners performed alterations duties on a part-time basis in 1998 and 2002 for which he earned \$5,000 in each year.

The petitioner submitted its Form 1120 corporate tax return for 2000 and resubmitted its 2001 and 2002 tax returns; a copy of a deed conveying real estate property to the petitioner's owners; copies of the individual income tax returns of the petitioner's owners with Schedule Cs pertaining to the petitioning business for 2001 and 2002; copies of W-2 forms issued to the petitioner's owners; and a letter from one of the petitioner's owner, Mr. [REDACTED] (Mr. [REDACTED] who explains that he performed the duties of alterations tailor for less than 10 hours per week during 1998 and 2002 because he could not find a tailor and that his business suffers from not having a full-time tailor.

The petitioner's tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>	<u>2002</u>
Net income ¹	\$1,911	\$2,174	\$12,805
Current Assets	\$9,945	\$8,457	\$1,258
Current Liabilities	\$0	\$47,571	\$0
Net current assets	\$9,945	-\$39,114	\$1,258

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 May 24, 2004, denied the petition.

On appeal, counsel asserts that the petitioner's gross and net incomes have been steadily growing and salaries increasing. Counsel also asserts that the petitioner is committed to the operation of the business and creation of jobs regardless of net profits, which is evidenced by the petitioner's owner's acquisition of the building the business is located in and the owner's offer of assistance with living expenses to the beneficiary. Thus, counsel asserts, "[b]y this degree of commitment, history of employment practices (increasing payroll), and the petitioner's guarantee, the petitioner is assuring its ability to pay the offered wage to the beneficiary." Additionally, counsel states that the petitioner conducted research with other dry cleaning businesses and a certified public accountant to conclude that hiring an alteration tailor would increase the petitioner's net income and that increase alone with cover the expenses of the proffered wage.

On appeal, the petitioner resubmits previously submitted evidence, copies of advertisements for tailor positions and a list of dry cleaning businesses in Bayonne, New Jersey, and a compiled, but not audited "Projected Income Statement of Paks Cleaners, Inc. for 5 Years," dated July 15, 2004. The compiled projected income statement states that the petitioner's business "has been stable and steady, but the sales volume has not grown remarkably ever since [2000]." Additionally, the compiled projected income statement states that the petitioner realized he was losing business because he did not offer alteration services and provides estimated expected sales increases.

On appeal, the petitioner submitted projected income statements. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. A compilation is the management's representation of its financial position and is the lowest level of financial statements relative to other forms of financial statements. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Also, as properly noted by the director, counsel's reliance on the assets of the petitioner's owners is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Citizenship and Immigration Services (CIS) will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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 the full proffered wage in 2000, 2001, or 2002.

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, CIS will next examine the net income figure 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. 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 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 the Service should have considered income before expenses were paid rather than net income.

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.² 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.

Net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is, for example; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000, 2001, or 2002. In each year, the petitioner's net income and net current assets are less than the proffered wage and it has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in 2000, 2001, or 2002.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel suggests that the petitioner's earnings would increase with the addition of an alterations tailor at the petitioner's business. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Additionally, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel also advised that the beneficiary would replace Mr. [REDACTED] for his part-time work in 2002 as an alterations tailor. The record names the workers, states his wages, and verifies his full-time employment. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. However, Mr. [REDACTED] statement is sufficient evidence that his part-time work involved the same duties as those set forth in the Form ETA 750 and that part of his compensation went towards performing those duties. The amount of compensation he received, however, which

² 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.

counsel stated was \$5,000, does not provide sufficient additional resources to overcome the insufficient net income or net current assets in 2002³ and does not dispense with the deficiencies of 2000 or 2001.

Finally, counsel advises that the petitioner's owner has real estate holdings. Any income derived from those real estate holdings would be attributed to the petitioner's owners and not the petitioner. However, as noted above, 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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." Additionally, real estate is not the type of asset typically liquidated or otherwise encumbered in order to pay employee wages. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2000, 2001, or 2002.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2000, 2001, or 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 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.

³ Adding \$5,000 to the petitioner's net income or net current assets in 2002 does not add up to the proffered wage.