

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



B6

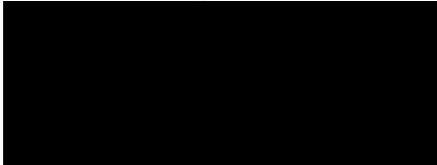
FILE: [REDACTED] Office: VERMONT SERVICE CENTER
EAC 02 162 54878

Date: FEB 03 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

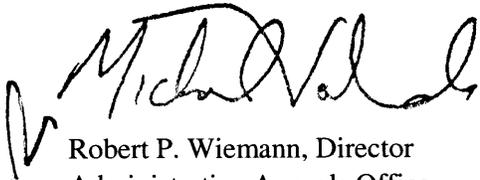
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a consulting, marketing, and distribution company for medical and orthopedic products. It seeks to employ the beneficiary permanently in the United States as director of an international marketing department. 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 states that all the discrepancies identified by the director in his decision have been clarified in reference to additional submitted 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 February 1, 2001. The proffered wage as stated on the Form ETA 750 is an annual salary of \$107,536. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1999.

On the petition, the petitioner claimed to have been established in 1990, and to have a net annual income of \$2,569,409. The petitioner did not indicate the number of its employees on the petition. In support of the petition, the petitioner submitted a letter of support that stated the beneficiary began working with the petitioner in January 1999 and outlined his job duties. The petitioner also submitted IRS Form 1120S, the

petitioner's corporate income tax return for 2000, with accompanying Schedule L and Form 4797, Sales of Business Property; and an IRS W-2 form for the beneficiary for the year 2001. The former document includes a statement of the petitioner's income for the year ending in December 2000.

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 August 27, 2002, 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 as of April 15, 2002, the date of filing the instant petition, and continuing to the present.¹ The director requested that the petitioner submit its 2001 federal income tax returns with all schedules and attachments, as well as copies of the beneficiary's 2000 and 2001 Form W-2 wages and tax statements. The director requested further information on the petitioner's business, including the number of employees, the nature of business, gross annual income, and net annual income. The director also questioned whether the position was new, and if not, requested that the petitioner document who held the position previously.

With regard to the beneficiary's qualifications, the director requested evidence, to establish that the beneficiary possessed the required master's degree and two years of related experience, and again identified the date for establishing eligibility as April 15, 2002. The director also requested that the petitioner submit letters from current or former employers to document the beneficiary's qualifying experience or training. The director stated that such letters should include the name, address, and the title of the writer and a specific description of the duties performed by the beneficiary or of the training received. The director also noted that Citizenship and Immigration Services (CIS) records indicated that the beneficiary was in H-4 status, and, thus, was not eligible to work. The director requested evidence that the beneficiary had been granted work authorization to work for the petitioner.

In response, counsel submitted IRS Form 1120S, the petitioner's corporate tax returns for the year 2001. In addition, counsel submitted copies of the petitioner's checking account statements for the period from January 2001 through January 2002. The monthly statements from January to June 2001 were from Summit Bank, New Brunswick, New Jersey, while the remaining monthly statements submitted are identified as a "small business statement" for the petitioner from Fleet Bank, address unknown. The petitioner also submitted an IRS Form W-2 for the beneficiary for the year 2000. With regard to the beneficiary's qualifications and ability to work in the United States, the petitioner submitted Form I797B that stated the beneficiary had been granted H-1B status on March 31, 1995 for Hemisphere Development. This H-1B approval was valid from April 1, 1995 to March 31, 1998. The petitioner also submitted a Form I797A that approved the beneficiary's change of status to H-4, spouse of a H-1B beneficiary. This approval was valid from September 21, 2001 to May 24, 2004. Finally the petitioner submitted a letter from Diane Gavin, general manager, Hemisphere

¹ In the request for further evidence, the director erroneously identified April 15, 2002, the date of filing the petition, as the date for establishing the petitioner's ability to pay the proffered wage. However, as previously stated in this decision, the regulations identify 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, as the pivotal date for establishing visa eligibility. The priority date for the instant petition is February 1, 2001, which the director noted in his denial of the petition.

Development Corporation, Somerset, New Jersey. The letter stated that the beneficiary worked for the company from April 1995 to March 1998, and outlined the beneficiary's work responsibilities.

In his denial of the petition, the director stated that the petitioner's 2000 tax return showed current assets of \$2,197,945 in excess of current liabilities. Although the director stated that this evidence appeared to be sufficient to establish the petitioner's ability to pay the proffered wage in 2000, he also stated that CIS required evidence of the petitioner's ability to pay from the priority date, namely, February 1, 2001, and continuing to the present.

The director also determined that the petitioner's 2000 and 2001 corporate tax returns showed material inconsistencies. He stated that a review of the petitioner's 2000 and 2001 tax returns and Schedule Ls showed that roughly \$3,250,000 in current assets and \$4,020,000 in current liabilities disappeared from the tax reports between the end of 2000 and the start of 2001. The director also noted that the sums of \$2,700,000 and \$300,000 were claimed in both the petitioner's 2000 and 2001 federal income tax returns on Form 4797. The director stated that these identical amounts claimed in two separate years added to the confusing nature of the evidentiary documentation. On February 21, 2003, the director denied the petition.

On appeal, counsel addresses the issues raised by the director. With regard to the discrepancy between the ending balance in Schedule L for the year 2000 and the beginning balance of Schedule L for the year 2001, counsel states that this inconsistency was due to the sale and transfer of inventory between the petitioner and De Puy, a subsidiary of Johnson and Johnson Company prior to the end of the year 2000. Counsel affirms that the tax return for the petitioner for the year 2000 should have shown this transfer, and that the inventory and related liability was transferred back to the purchasing company. Counsel states that the effect of the transfer does in fact appear as a beginning balance for the year 2001. Counsel further states that this error is in the process of being rectified with the IRS. Counsel submits the following documents to support these assertions:

A document entitled "Reconciliation" on the petitioner's letterhead that examines the future reconciliation of the end of the year 2000 and the beginning of the year 2001 assets and inventory figures. The breakdown of the reconciliation of the petitioner's tax reports shows that the net inventory of the petitioner was worth \$3,329,787 at the end of the year 2000, and was transferred to agents and distributors who replaced Oxford Medical, Inc. (The petitioner's former corporate name) in Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania.

A document signed by [REDACTED] The Tradewinds Group, Inc., and Joe Day, Johnson & Johnson Professional, Inc., that certifies that the petitioner transferred all components and instrument inventory to Johnson & Johnson Professional, Inc, by the end of the year 2000.

A notarized statement from [REDACTED] the petitioner's president, that states that the change in assets and liabilities is due to the final transfer and settlement of all instruments used in the orthopedics procedures to the agents and distributors covering the petitioner's previous territory. The document also states that the sums of \$2,700,000 and \$3,000,000 on Forms 4797 represent the final two payments per the attached contract schedule #4, and refers to the two year

no compete clause also referenced in the purchase agreement described below.² The petitioner's president also states that she is willing to continue to fund the business, because of the expressed interest in the United States for new trauma and mini-fixator orthopedic products the petitioner is planning on introducing.

A document entitled "Asset Purchase Agreement" that outlines an agreement among DePuy Orthopaedics, Inc., an acquisition of Johnson and Johnson; Oxford Medical, as the petitioner was formerly known; and [REDACTED] and [REDACTED] both of whom are identified as principals of the petitioner. The document describes the process for the transfer and assignment of all assets of the petitioner's medical equipment distribution inventory to Depuy Orthopaedics, Inc., from the petitioner, who previously been an exclusive manufacturer's representative for Johnson and Johnson Professional. The agreement also outlines a payment of ten million dollars in total to the petitioner over a three-year period of time for the termination of its manufacturer's representative status, and the sale and transfer of the petitioner's intangible assets to DePuy.

A copy of Forms 1120S, Shareholder's Share of Income, Credits, Deductions, for the years 2000 and 2001 for both of the petitioner's shareholders. According to counsel, these forms show the sums of \$1,350,000 for each partner for the years 2000 and 2001.

Counsel also states that the bank statements included in support of the petition establish that the petitioner had enough money at the end of each and every month to pay the difference between what was actually paid to the beneficiary, and the monthly prevailing wage of \$5,962.00.³ Although counsel acknowledges that the bank statements do not show incremental increases, she asserts that the balances do show that, on a monthly basis, the petitioner had the ability to pay the proffered wage.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Fourth, the petitioner provided no explanation for why it submitted bank statements from two different banks throughout the year 2001. The record is devoid of any information as to whether a bank merger took place, whether both accounts were in use during the entire year, or any distinction between the sums deposited or withdrawn from either account. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies

² The correct sums on Form 4797 for both 2000 and 2001 are \$2,700,000 and \$300,000.

³ This figure is the proffered annual wage of \$107,000, minus the \$36,000 actual annual wage paid to the beneficiary by the petitioner, divided by 12 months.

in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.”

In addition, with regard to the petitioner’s ability to pay the proffered wage as of the priority date, February 1, 2001, the petitioner’s ending balance in the Summit Bank statement for January 31, 2001 was \$33,823, which is considerably less than the proffered annual wage of \$107,536. Therefore, the petitioner’s bank statement does not establish that as of the priority date, the petitioner had sufficient bank funds to pay the proffered wage.

In his decision, the director noted the recurring sums of money identified on Form 4797 of the petitioner’s income tax returns which added to the confusing nature of the evidentiary documentation. On appeal, counsel submits 1120S Schedule K for each shareholder to explain the same figures appearing twice in the petitioner’s annual tax forms. Based on this evidentiary documentation, the explanation provided by counsel as to these documents and recurring is plausible. However, it should be noted that any reliance on the assets of the two shareholders to support the petitioner’s ability to pay the proffered wage 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). Even though the petitioner’s president in her letter stated that she was willing to continue to fund the petitioner’s business activities, and ostensibly, wages, CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 at 3 (D. Mass. Sept. 18, 2003).

In determining the petitioner’s ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. Although the petitioner submitted W-2 salary statements for the beneficiary for the years 2000 and 2001, since the priority date for the petition is February 1, 2001, the beneficiary’s salary and the petitioner’s financial resources in the year 2000 are not dispositive in the present proceedings. Therefore, only the IRS W-2 form from 2001 is considered in this proceeding. Based on this document, the petitioner paid the beneficiary an annual salary of \$36,000, which is \$71,535 less than the proffered annual wage.⁴ In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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*

⁴ The director in his request for further evidence raised the issue of whether the beneficiary possessed a work permit and was allowed to work. The petitioner presented no documentation of an extension of the beneficiary’s H-1B status, or change of employers to support the possession of a work permit by the beneficiary, based on a continued H-1B status beyond March 31, 1998. As a H-4 visa holder, the beneficiary is not allowed to work.

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. As noted previously, the wage and tax documentation submitted by the petitioner for the year 2000 is not relevant to these proceedings. Therefore, only the petitioner's 2001 federal income tax returns are considered with regard to its net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001 shows the following amount of ordinary income: -\$120,944. This figure fails to establish the ability of the petitioner to pay the proffered wage.

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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 the year 2001, however, were \$58,530. If the annual salary of \$36,000 paid to the beneficiary were added to this figure, \$13,005 would still be lacking from the petitioner's net current assets to pay the proffered wage of \$107,536.

With regard to counsel's statements as to the conflicting figures on the petitioner's 2000 end of the year balance figures on Schedule L and 2001 beginning of the year balance figures, while the petitioner's response can be seen as plausible, this inconsistency occurred in the end of 2000 and prior to the priority date of February 1, 2001, and thus, the resolution of these conflicting figures is not necessarily dispositive in the instant petition. Nevertheless, it does suggest a closer look at the 2001 figures. *Matter of Ho*, 19 I&N Dec.

⁵ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a negative net income, and net current assets of only \$58,530 in the year 2001, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. As noted previously, the assets of the shareholders are not viewed as corporate assets. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. 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.