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FILE: EAC-02-019-53325 Office: VERMONT SERVICE CENTER Date: JAN 25 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 preference visa petition was denied by the Director, Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner provides maintenance services. It seeks to employ the beneficiary permanently in the United States as a laundry supervisor. 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. The AAO affirmed the director's decision.

On motion, counsel submits additional evidence. Counsel submits proof of wages paid to the beneficiary for 1997, 1998, 1999, 2000, 2001, and 2002, as well as the petitioner's owner's individual income tax returns, and asserts that this new evidence proves the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The motion to reopen thus qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

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 July 28, 1997. The proffered wage as stated on the Form ETA 750 is \$28.82 per hour, which amounts to \$59,945.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. She claimed to be an independent contractor performing various jobs from December 1992 to the time of filing the ETA 750.

In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date. 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 February 22, 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 beginning on the priority date. The director specifically requested the petitioner's tax returns from 1997 and any evidence of wages paid to the

beneficiary in 1997, as well as information about the petitioner that was omitted on the petition. In response, the petitioner submitted unaudited financial statements for 2001 and its corporate tax returns for 1998 and 2000.

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 23, 2002, denied the petition. The director noted the petitioner's failure to submit requested documentation; net income less than the proffered wage in 1998 and 2000; and no evidence of paying salaries to any employees which was inconsistent with the petitioner's claim to employ 56 personnel.

On appeal, through substituted counsel, the petitioner submitted its Forms 1120S, U.S. Income Tax Returns for an S Corporation for the years 1997 through 2001. The tax returns reflect the following information for the following years:

	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income ¹	\$26,194	\$12,048	\$21,560	\$49,705	\$10,693
Current Assets	\$22,930	\$11,116	\$9,741	\$10,962	\$20,552
Current Liabilities	\$2,599	\$4,340	\$3,837	\$5,620	\$5,467
Net current assets	\$20,331	\$6,776	\$5,904	\$5,342	\$15,085

The AAO determined that the petitioner's net income each year was lower than the proffered wage and thus did not prove the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On motion, counsel asserts that the combination of wages already paid to the beneficiary and the personal assets of the petitioner's owner establish the petitioner's continuing ability to pay the proffered wage. Counsel submits a copy of a W-2, Wage and Tax Statement issued by the petitioner to the beneficiary in 1997 demonstrating that the petitioner employed and paid the beneficiary \$14,577.75. A copy of Form 1099, Miscellaneous Income, issued by the petitioner to the beneficiary, also illustrated that the petitioner paid the beneficiary another \$15,780 in 1997. Thus, the petitioner demonstrates that it paid the beneficiary a total of \$30,357.75 in 1997. Additional copies of the same forms are submitted for additional years showing that the petitioner paid the beneficiary a total of \$25,589.50 in 1998; \$17,273.50 in 1999; \$12,024 in 2000; and \$13,422 in 2001. Counsel also submits copies of the petitioner's owner's individual income tax returns for 1997, 1998, 1999, 2000, and 2001.

At the outset, the director requested evidence of the actual employment of and wages paid to the beneficiary in 1997, yet the petitioner failed to submit evidence at that time. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO does not usually accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* However, since the director inexplicably did not seek similar evidence of wages paid to the beneficiary in 1998, 1999, 2000, and 2001, the AAO will exercise favorable discretion and accept the evidence of wages paid to the beneficiary in 1997.

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

Additionally, the response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel's reliance on the assets of the petitioner's owner is also 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). 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). Thus, the AAO will not consider the petitioner's owner's individual income tax returns for 1997, 1998, 1999, 2000, and 2001.

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. In the instant case, the petitioner established that it employed and paid the beneficiary total wages of \$30,357.75 in 1997, \$25,589.50 in 1998, \$17,273.50 in 1999, \$12,024 in 2000, and \$13,422 in 2001. Thus, the petitioner must show that it can pay the difference between wages actually paid and the proffered wage, which, for each year is \$29,587.85 in 1997, \$34,356.10 in 1998, \$42,672.10 in 1999, \$47,921.60 in 2000, and \$46,523.60 in 2001.

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.

The petitioner's net income of \$26,194, \$12,048, \$21,560, \$49,705, and \$10,693 in 1997, 1998, 1999, 2000, and 2001, respectively, are all lower than the remaining wage, the difference between the wages actually paid to the beneficiary and the proffered wage, in each respective year of \$29,587.85 in 1997, \$34,356.10 in 1998, \$42,672.10 in 1999, and \$46,523.60 in 2001, but greater than the remaining wage in 2000 of \$47,921.60. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income in any year except for 2000.

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. The petitioner's net current assets during the years in question, 1997, 1998, 1999, and 2001, however, were only \$20,331, \$6,776, \$5,904, and \$15,085, respectively, which are all lower than the remaining wage, the difference between the wages actually paid to the beneficiary and the proffered wage, in each respective year of \$29,587.85 in 1997, \$34,356.10 in 1998, \$42,672.10 in 1999, and \$46,523.60 in 2001. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net current assets in 1997, 1998, 1999 or 2001.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 1997. In 1997, the petitioner shows a net income of only \$26,194 and net current assets of only \$20,331 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. 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 1997.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 1998. In 1998, the petitioner shows a net income of only \$12,048 and net current assets of only \$6,776 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. 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 1998.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 1999. In 1999, the petitioner shows a net income of only \$21,560 and net current assets of only \$5,904 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. The petitioner has not demonstrated that any other funds were available to pay the proffered

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

wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 1999.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2000. In 2000, the petitioner shows a net income of \$49,705 and has therefore demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income. The petitioner has, therefore, shown the ability to pay the proffered wage during 2000.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001. In 2001, the petitioner shows a net income of only \$10,693 and net current assets of only \$15,085 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. 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.

Despite demonstrating its ability to pay the proffered wage in 2000, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997 or subsequently during 1998, 1999, or 2001. 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 motion to reopen is granted and the decision of the AAO dated April 15, 2003 is affirmed. The petition is denied.