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FILE: EAC 02 116 50196 Office: VERMONT SERVICE CENTER Date: JAN 25 2005

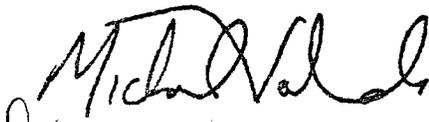
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a carpentry contracting firm. 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 asserts that the petitioner has established its financial ability to pay the proposed wage offer.

Counsel indicates on that notice of appeal that he needs an additional thirty days to submit a brief and/or additional evidence to the AAO. As of this date, more than eighteen months later, nothing further has been received to the record. Therefore, the AAO will base its review on the record as it currently stands.

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 April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$13.21 per hour, which amounts to \$27,476.80 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since January 2001.

On Part 5 the petition, the petitioner claims to have been established in 1986, to have a gross annual income of approximately \$1.5 million, and to currently employ fourteen workers. In support of its continuing ability to pay the petitioner provided a copy of its 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. It shows that the petitioner files its taxes using a standard calendar year. The petitioner declared net income of \$11,289 in 2000. Schedule L of the tax return shows that the petitioner had \$49,534 in current assets and \$40,279 in current liabilities, resulting in \$9,255 in net current assets. Besides net income, CIS will examine a petitioner's net

current assets as a measure of a petitioner's ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on line(s) 1 through 6 of Schedule L of the federal tax return. The current liabilities are shown on line(s) 16 through 18 of Schedule L. 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.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on May 20, 2002, the director requested additional evidence pertinent to that ability. The director also specifically requested that the petitioner provide a copy of its 2001 federal tax return and a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001 if it employed the beneficiary during that period.

In response, although the petitioner failed to provide a W-2 issued to the beneficiary, the petitioner submitted a copy of its 2001 corporate tax return. It shows that the petitioner reported net income of -\$117,903 in 2001. Schedule L reflects that the petitioner had \$65,553 in current assets and \$27,312 in current liabilities, resulting in \$38,241 in net current assets.

In addition, counsel submitted a copy of a May and June 2001 investment report showing the securities holdings owned by the petitioner's principal shareholders.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage, and, on March 13, 2003, denied the petition.

On appeal, counsel asserts that the principal shareholders' individual investment assets should be considered in support of the petitioner's ability to pay the proffered wage. Counsel's assertion is not persuasive. The petitioner is a corporation. 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). 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, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have 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 failed to submit any evidence showing that it has paid wages to the beneficiary.

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

¹ 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.

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.

As mentioned above, CIS will also consider a petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage. In this case, although the petitioner's 2001 net income was insufficient to cover the proffered wage, the petitioner's net current assets of \$38,241 were enough to pay the proposed wage offer of \$27,476.80. The director erred in failing to review the level of the petitioner's net current assets. As the evidence was sufficient to show that the petitioner had the continuing ability to pay the proffered wage, the petition may be approved.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.