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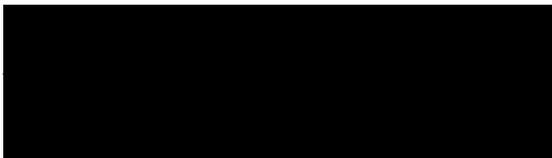
Office: VERMONT SERVICE CENTER

Date: **JUN 17 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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a convenience store and delicatessen. It seeks to employ the beneficiary permanently in the United States as a manager. 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 granting 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$19.72 per hour, which equals \$41,017.60 per year.

On the petition, the petitioner stated that it was established on December 7, 1990 and that it employs four workers. The petition states that the petitioner's gross annual income is \$523,586 and that its net annual income is \$2,551. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since September 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Danbury, Connecticut.

In support of the petition, the petitioner submitted a copy of its 2000 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports taxes based on a fiscal year running from December 1 of the nominal year to November 30 of the following year. That return, therefore, covers the period from the priority date until November 30, 2001, and is relevant to the instant case. That return shows that, during that fiscal year, the petitioner declared taxable income before net operating loss deduction and special

deductions of \$2,551. At the end of that fiscal year, the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on November 16, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested a copy of the 2001 W-2 form showing wages the petitioner paid to the beneficiary during that year.

In response, the petitioner submitted (1) its compiled financial statements for its 1999 and 2000 fiscal years,¹ (2) a photocopy of a pay stub, (3) a letter, dated January 21, 2003, from the petitioner's accountant, and (4) a letter, dated January 29, 2003, from the petitioner's owner. The petitioner's owner's letter states that the petitioner's fiscal year 2000 compensation to officers, salaries and wages, depreciation, taxes and license fees, management fees, and profit, added together, equal \$91,250, and implied that this fund could be used to pay additional wages to the beneficiary.

The petitioner did not provide the requested W-2 form.

The accountant's letter states that the petitioner, by choice, withdraws profits as a management fee such that it only breaks even. The accountant further states that the petitioner has sufficient cash flow to pay the proffered wage. In support of those assertions, the accountant cites the petitioner's unaudited financial statements.

The photocopied pay stub submitted shows that during the pay period ending December 21, 2002 the petitioner was paying the beneficiary at the rate of \$16 per hour. That stub also shows that, to that date in 2002, the petitioner had paid the beneficiary a total of \$21,760.

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 July 8, 2003, denied the petition.

On appeal, counsel states that the year-to-date total of \$21,760, paid to the beneficiary by December 21, 2002, was actually paid to him between May 2002 and that date. Counsel states that prior to that time, because was working illegally, the petitioner paid the beneficiary off the books.

In support of those assertions, counsel submitted additional weekly pay stubs. Those pay stubs cover the weekly pay periods ending between May 15, 2002 and July 19, 2003. Those stubs also show that throughout those months the petitioner paid the beneficiary \$16 per hour for 40 hours of work per week. Finally, those pay stubs, together with those previously submitted, show that the petitioner paid the beneficiary \$21,760 during 2002, for working during the pay periods ending May 15, 2002 through December 28, 2002, and paid him \$19,200 during 2003 through the pay period ending July 19, 2003. Those figures are all consistent with

¹ The financial statements refer to the 1999 fiscal year as the year ended November 30, 2000 and to the 2000 fiscal year as the year ended November 30, 2001.

the petitioner paying the beneficiary \$16 per hour for 40 hours of work per week. Counsel asserts that those pay stubs show that the petitioner is already paying the beneficiary an amount in excess of the proffered wage.

The pay stubs make clear that the petitioner has been paying the beneficiary \$16 per hour since the pay period ending May 15, 2002. They do not indicate that the petitioner employed and paid the beneficiary prior to that time. Further, the proffered wage in this matter is \$19.72 per hour. Those pay stubs do not indicate that the petitioner has ever paid the beneficiary that amount or, as counsel alleges, in excess of that amount. The wages indicated by those pay stubs will be considered in the determination of the petitioner's ability to pay the proffered wage. They do not, in themselves, however, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, or that it was able to pay the proffered wage at any time.

Further, counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered. Counsel notes that the petitioner's gross sales were higher during its 2001 fiscal year than during its 2000 fiscal year and states that this difference is "due for the most part to the efforts of [the beneficiary] as the manager of [the petitioner]."

A difference between two years is not clear and convincing evidence of a trend. Further, although counsel asserts that this variation from one year to the next is due to the beneficiary's efforts, he provides no evidence in support of that assertion. The assertion that the improvement from fiscal year 2000 to fiscal year 2001 was due to employing the beneficiary is especially unconvincing in this case, as the petitioner employed the beneficiary during both of those fiscal years.² Further, that comparison is based on figures from the petitioner's unaudited financial statements, which, as is explained below, are not convincing evidence.

Further still, counsel notes that the unaudited financial statement shows a manager's salary of \$36,400 and a management fee of \$6,500. Counsel implies that those two amounts, together, were available to pay the beneficiary's wages, or possibly were used to pay the beneficiary's wages but, in any event, show the ability to pay the proffered wage. The existence of those funds is also information drawn from the petitioner's unaudited financial statements. As is explained below, figures from the petitioner's unaudited reports are not sufficiently reliable to be incorporated into the determination of the petitioner's ability to pay the proffered wage.

Counsel also cites the petitioner's accountant's January 21, 2003 letter as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel provides a letter, dated August 5, 2003, from the petitioner's owner. In that letter the petitioner's owner asserts that his store is able to pay the proffered wage, and would not otherwise have hired the beneficiary. The petitioner's owner states that the store has been paying the proffered wage to the

² The beneficiary claimed to have worked for the petitioner since September 2000. The petitioner's 2000 fiscal year began on December 1, 2000.

beneficiary, but incorrectly states that the proffered wage in this matter is \$35,000.³ The petitioner's owner also states that, if necessary, he is willing to pay the petitioner's expenses, as would other members of his family.⁴

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). 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). 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. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner and his relatives shall not be further considered.

Finally, counsel provides 30 form affidavits, each stating that the beneficiary has managed the petitioning store for three years, notwithstanding that some of the affiants state that they have lived in the neighborhood less than that amount of time. All of those affidavits are dated July 28, 2003. Two of them are, in addition, hand dated August 6, 2003.

Further, although those affidavits are signed, the names of the affiants are not all legible, and the affidavits do not include the addresses of the affiants. Thus, those affiants would be difficult to locate for corroboration of the information in the affidavit. Further still, those affidavits do not state the relationship of the affiants to the petitioner's owner or the beneficiary.⁵ As such, whether the affiants are biased is open to question.⁶

Finally, those affidavits do not state the source of the affiants' knowledge of the beneficiary's employment at the petitioning store. Those affidavits might be taken to imply personal knowledge of the beneficiary's employment as the petitioner's manager during the past three years. All of those affidavits state that the service at the petitioning store has improved during the past three years during which it has employed the beneficiary. Some of the affiants, however, admit to having lived in the neighborhood for less than three years. Two of the affiants state that they have lived in the neighborhood for only one year. Four admit that they have lived in the neighborhood for only two years. An additional two affiants left blank the space where they were to have inserted the number of years they lived in the neighborhood of the petitioning store. Under

³ The misstatements of counsel and the petitioner's owner appear to indicate that they do not realize that the proffered wage in this matter is \$41,017.60.

⁴ The petitioner's owner also states that his family owns the condominium complex that surrounds the store, without explaining how that is possible, given that condominium units, by their very nature, are individually owned.

⁵ Actually, seven of those affidavits state that the affiants are "living in a condominium complex owned by The Haddad Family." Although those affidavits state that the affiants are the tenants of the petitioner's owner's family, they do not negate any additional relationship by blood or marriage. Further, that they, like the petitioner's owner's August 5, 2003 letter, state, apparently incorrectly, that the petitioner's owner's family owns the surrounding condominium complex, appears to indicate common authorship of the affidavits and the letter.

⁶ Two of the affiants have the same family name as the petitioner's owner. One has a family name very similar to the beneficiary.

these circumstances, the basis of the affiants in stating that the petitioning store has employed the beneficiary during the last three years and that its service has improved during the last three years is unclear.

The accountant's conclusion that the petitioner can pay the proffered wage is not, in itself, convincing evidence. The accountant did not point to any evidence that led him to that conclusion other than to cite the petitioner's unaudited financial statements.

The unaudited financial statements are not convincing evidence. 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. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that 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.

Counsel's reliance on *Masonry Masters, Inc. v. Thornburgh, Id.*, is misplaced. A portion of that decision urges that the ability of the beneficiary in that case to generate income for the petitioner should be considered.⁷ That portion is clearly dictum, however, as the decision was based on other grounds. Further, it appears in the context of a criticism of the failure of the Immigration and Naturalization Service to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage.

Further, in citing *Masonry Masters*, counsel implies that, had the petitioner been able to employ the beneficiary during its 2000, 2001, and 2002 fiscal years the petitioner would have enjoyed greater profits. In fact, the petitioner employed the beneficiary during all three of those years. In light of that fact, counsel's argument falls flat.

Further still, while that decision urges the Service to consider the income that the beneficiary would generate, it does not urge the Service to assume that the beneficiary would generate income and to guess at the amount. The petitioner has submitted no evidence that the petitioner would generate additional income, and absent such evidence the Service will make no such assumption.

In a submission to supplement the appeal, counsel provided a copy of a 2003 Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary \$33,920 during that calendar year. Counsel also provided copies of additional pay stubs, showing that the petitioner continued to pay the beneficiary \$640 per week for the weeks ended August 2, 2003 through January 10, 2004. This office notes that the petitioner has continued to pay the beneficiary an amount less than the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

⁷ The AAO may consider the reasoning of this decision, however, the AAO is not bound to follow decisions of a United States district court even in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Even if the opinion in that case supported some proposition urged by counsel, counsel would be obliged to argue that the reasoning of the decision is sound and convincing, rather than merely citing the case for the proposition.

In the instant case, the evidence demonstrates that the petitioner employed and paid the beneficiary \$640 per week for the weekly pay periods ending May 15, 2002 to January 10, 2004.⁸ No clear and convincing evidence was submitted pertinent to wages paid before or after those pay periods.

If attributed to the petitioner's fiscal years, the check stubs show that the petitioner paid the beneficiary \$19,200 for working during its 2001 fiscal year,⁹ \$33,280 for working during its 2002 fiscal year,¹⁰ and \$3,840 during its 2003 fiscal year.¹¹ Those amounts are less than the annual amount of the proffered wage.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 total 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

⁸ Although counsel neglected to provide the pay stub for the week ending July 26, 2003, this office presumes that the petitioner paid the beneficiary \$640 for 40 hours of work during that week, just as it did for the numerous other weeks of work.

⁹ \$640 per week for 30 weeks.

¹⁰ \$640 per week for 52 weeks.

¹¹ \$640 per week for 6 weeks.

The proffered wage is \$41,017.60 per year. The priority date is April 26, 2001.

The priority date falls within the petitioner's 2000 fiscal year. The petitioner has submitted no clear and convincing evidence that it paid the beneficiary any wages during that fiscal year, and is obliged to demonstrate the ability to pay the entire proffered wage during that fiscal year. During that fiscal year the petitioner reported taxable income before net operating loss deduction and special deductions of \$2,551. That amount is insufficient to pay the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner cannot, therefore, demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that fiscal year. The petitioner submitted no reliable evidence of any other funds available to pay the proffered wage during that fiscal year. The petitioner has not demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

During its 2001 fiscal year, the petitioner demonstrated that it paid the beneficiary \$19,200. The petitioner is obliged to demonstrate the ability to pay the remaining \$21,817.60 of the proffered wage during that fiscal year with copies of annual reports, federal tax returns, or audited financial statements. The petitioner, however, submitted none of those types of evidence pertinent to its 2001 fiscal year, nor any other reliable evidence of that ability. The petitioner has not demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

The petitioner submitted no evidence pertinent to its 2002 fiscal year. The appeal in this matter, however, was filed on August 8, 2003. The petitioner's 2002 fiscal year ended on November 30, 2003. The petitioner's 2002 fiscal year tax return, therefore, was unavailable when the appeal in this matter was filed. The petitioner is excused from providing evidence pertinent to its finances during its 2002 fiscal year and subsequent fiscal years.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during its 2000 and 2001 fiscal years. 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.