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**U.S. Citizenship
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Services**

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FILE: SRC 03 124 51825 Office: TEXAS SERVICE CENTER Date: **MAR 04 2005**

IN RE: Petitioner:
Beneficiary:

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

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 employment based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a building systems organization. It seeks to employ the beneficiary as a sales representative, building equipment and supplies. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because she determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a brief and additional evidence.

In pertinent part, Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on July 13, 2001. The proffered salary as stated on the labor certification is \$62,000 per year.

With the petition, counsel submitted a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. The petitioner's 2002 tax return reflected an ordinary income of \$22,979 and net current assets of -\$406,805. The director considered this documentation insufficient and on June 29, 2003, she requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of July 13, 2001 and continuing to the present. The director specifically requested copies of the petitioner's 2001 and 2002 corporate tax returns, and copies of the petitioner's bank statements from July 2001 to the present.

In response, counsel submitted copies of the petitioner's bank statements for the months April 2001 through July 31, 2003, copies of the petitioner's 2001 and 2002 Forms 1120S, U.S. Income Tax Return for an S Corporation, a letter from [REDACTED] investor, and copies of Forms 941, Employer's Quarterly Federal Tax

Return, from June 2001 to the present. The petitioner's bank statements reflected balances ranging from a low of \$1,199.42 to a high of \$7,872.22. The petitioner's 2001 tax return reflected an ordinary income of -\$212,184 and net current assets of -\$397,261. No evidence was provided that shows that the petitioner employed the beneficiary during 2001 and 2002. [REDACTED] letter states:

I, [REDACTED], made an investment into Alpha America with the belief that the company will yield good returns. Because of Isaac Simon's expertise in the industry, I hired him to help protect my investment and to see that it becomes profitable. Therefore, I will personally guarantee his salary until such time that the company's income is sufficient to cover his wages. His experience and support will undoubtedly become an important asset to this business.

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 November 3, 2003, denied the petition.

On appeal, counsel submits a 2003 compiled financial statement for the period ended November 30, 2003. The compiled statement reflects a net income of \$75,115 and current liabilities of \$549,064. Current assets were not shown. Counsel states:

1. The petitioner's profit, notwithstanding a carry over-loss from years prior, exceeded the proffered wage.
2. The petitioner's net current assets were calculated incorrectly and to the detriment of the beneficiary's petition.
3. The document submitted established that the petitioner has the ability to pay the proffered wage.

Enclosed please find the 2003 financial statement for Alpha America, Inc., which reflects that both net current assets and net income exceed the salary offered to the beneficiary.

In 2003, net current assets were \$111,525¹ and the net income was \$75,115.

The documentation submitted is sufficient proof of the company's past and future ability to pay the salary offered.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2001 and 2002 at a salary equal to or greater than the proffered wage.

¹ This figure appears to have been arrived at by considering shareholders' equity.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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(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 2001 and 2002 were -\$397,261 and -\$406,805, respectively. The petitioner could not have paid the proffered wage in 2001 or 2002 from its net current assets.

Counsel previously contended that the petitioner's bank balances establish the petitioner's ability to pay the proffered wage. However, 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

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.

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 is considered when determining the petitioner's net current assets.

Counsel points to a 2003 compiled balance sheet as evidence that the petitioner has established its ability to pay the proffered wage. Again, compiled financial 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. In addition, counsel appears to include shareholder's equity as a current asset in determining the petitioner's ability to pay the proffered wage. However, counsel fails to cite any specific case, memorandum, or other authoritative CIS determination that such an alternative method of calculating ability to pay is acceptable. Furthermore, unless the source the petitioner would cite is a binding precedent decision, it will not be considered. It is noted that [REDACTED] investor, has promised to pay the beneficiary's salary until the company's income is sufficient to cover his wages. However, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

The 2001 tax return reflects an ordinary income of -\$212,184 and net current assets of -\$397,261. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2001.

The 2002 tax return reflects an ordinary income of \$22,979 and net current assets of -\$406,805. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2002.

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.