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20 Mass. Ave., N.W., Rm. A3042
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U.S. Citizenship and Immigration Services

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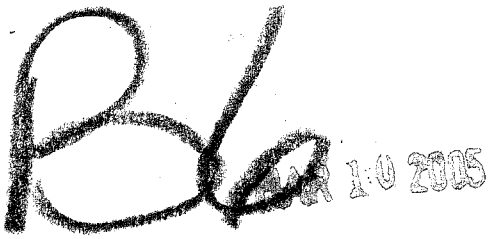

[redacted]

FILE: EAC-03-253-54248 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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:

[redacted]

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 and on a motion by petitioner to remand. The motion to remand will be denied and the appeal will be dismissed.

The petitioner is a residential rental real estate company. It seeks to employ the beneficiary permanently in the United States as a high-end finish 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 states that the director erred in interpreting the petitioner's tax returns. However, after submitting the notice of appeal counsel submitted two letters, a motion to remand, and additional evidence. In those documents, counsel seeks to return the case to the director for new evidentiary proceedings.

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 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:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is January 24, 2002. The proffered wage as stated on the Form ETA 750 is $20.46 per hour, which amounts to $42,556.80 annually. On the Form ETA 750B, signed by the beneficiary on January 23, 2002, the beneficiary did not claim to have worked for the petitioner

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of $400,000 and to currently have two employees. The item for net annual income was left blank on the petition.

In support of the petition, the petitioner submitted a copy of a letter from Dan Kitchens of Weston, Ontario, Canada, stating the beneficiary's former employment as a finish carpenter from September 1995 to December

1997; a copy of an undated Form 9003 Additional Questions to be Completed by All Applicants for permanent Residence in the United States of the beneficiary; a letter dated July 30, 2003 from the petitioner's president stating a job offer for the beneficiary; copies of the petitioner's Form W-3 Transmittals of Wage and Tax Statements for 2001 and 2002; copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the fourth quarter of 2001 and for all four quarters of 2002; and copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000 and 2001.

The director issued a notice of intent to deny the petition (ITD) dated May 17, 2004. In the ITD the director stated that the evidence did not establish the petitioner's ability to pay the proffered wage. The director stated that the petitioner's tax returns for 2000 and 2001 showed no gross receipts or sales. The director also requested copies of the petitioner's federal tax returns for 2002 and 2003, or, in the alternative, audited or reviewed financial statements for 2002 and 2003. The ITD gave the petitioner 30 days within which to submit additional evidence.

In response to the ITD, counsel submitted a letter dated June 8, 2004 accompanied by the following evidence: a letter dated June 3, 2004 from a certified public accountant; duplicate copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000 and 2001; and copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2002 and 2003.

In a decision dated October 29, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

In his notice of appeal counsel states, "USCIS erred as a matter of fact and law in interpreting said tax returns as it relates to the ability of [the petitioner] to pay the offered wage." On the notice of appeal, which was received by CIS on November 19, 2004, counsel also states that he will submit a brief and/or evidence to the Administrative Appeals Office (AAO) within 30 days. On December 11, 2004, after the record had been transmitted to the AAO, the director received a letter dated December 9, 2004 from counsel stating that in preparing a response to the director's decision counsel had discovered that the tax returns submitted in support of the petition were not substantially correct. In the letter, counsel requested that the tax returns be withdrawn and that the petitioner be granted an additional thirty days to submit new evidence. The director later transmitted counsel's letter to the AAO.

On December 30, 2004 the AAO received a letter dated December 28, 2004 from counsel, accompanied by a motion captioned "Petitioner's Expedited Motion to Remand Case to the U.S. Department of Homeland Security." In support of the motion, counsel submits a document dated December 2004, with no date of the month specified, entitled "Spinoff, Assignment, Acquisition of Business and Joint Venture Agreement," signed by the petitioner's owner in two capacities, once as an officer of the petitioner, and once in his individual capacity, doing business as '[redacted]'

The AAO will first evaluate the decision of the director, based on the record before the director. The letters of counsel and other documents submitted after the director's decision will then be considered.

In determining the petitioner's ability to pay the proffered wage 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, however, the petitioner did not establish that it had previously employed the beneficiary.

As another 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 for a given year, 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is structured as an S corporation. The record before the director included a letter dated June 3, 2004 from a certified public accountant explaining the petitioner's tax returns, which were submitted on Form 1120S, U.S. Income Tax Return for an S Corporation. The accountant states that in 2000 and 2001 the petitioner was primarily engaged in activities as a rental real estate entity, and that in 2002 and 2003 the company engaged in both a trade or business and in activities as a rental real estate entity. The accountant states that the petitioner's income from a trade or business is reported on page one of the Form 1120S tax returns, and that the petitioner's income from its real estate activity is reported on Forms 8825 and 4794 and on Schedule K's, all of which are attached to the petitioner's Form 1120S tax returns.

The accountant's explanations of the petitioner's tax returns are consistent with the instructions on the Form 1120S U.S. Income Tax Return for an S Corporation, which state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21." The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. An S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. An S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irs.gov/pub/irs-03/i1120s .pdf, Instructions for Form 1120, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005).

In the instant petition, the petitioner's tax returns indicate significant income from activities other than from a trade or business, specifically, from residential rental real estate activities. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns do not include significant portions of the petitioner's income. For this reason, the petitioner's net income must be considered as the total of its income from various sources as shown on the Schedule K, minus certain deductions which are itemized on the Schedule K. The results of these calculations are shown on Line 23 of the Schedule K, for income. The IRS instruction to line 23 states that a figure is required to be entered on that line only by S corporations which are required to complete Schedule M-1. In the instant case, the petitioner has entered figures for income on line 23 of each Schedule K attached to the petitioner's Form 1120S tax returns. Therefore, the figures on line 23 of the petitioner's Schedule K's reflect the petitioner's net income for each year in question. For an S corporation which does not enter a figure on line 23 of its Schedule K for a given year, its net income would be the total of the figures shown on lines 1 through 6 of the Schedule K, minus the items listed in the instruction to line 23 of the Schedule K, namely the figures on lines 7 through 11a and on lines 15g and 16b of the Schedule K.

In the instant case, the petitioner's tax returns show the following amounts for income on line 23, Schedule K: $43,819.00 for 2000; $830,452.00 for 2001; -$60,073.00 for 2002; and $46,044.00 for 2003. The figure for 2000 is not directly relevant to the instant petition, since the priority date is January 24, 2002. The figure for 2001 is relevant, because the petitioner's tax returns are on a calendar year basis and its 2001 tax return therefore shows income for the year which ended less than four weeks before the January 24, 2002 priority date. The letter dated June 3, 2004 from the certified public accountant states that the petitioner's relatively large income in 2001 arose from the profits on the sale of two rental properties which had been owned by the petitioner.

The petitioner's income figures for 2002 and 2003 are for years directly at issue in the instant petition. The petitioner's income in 2002 was negative, therefore that income would not alone be sufficient to establish the petitioner's ability to pay the proffered wage that year. The petitioner's income in 2003 was greater than the proffered wage by an amount of more than $3,000.00. Although the petitioner's income in 2002 was negative, the petitioner's relatively large income in the previous year, coupled with the petitioner's positive income in 2003 would be sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the petitioner obtains lawful permanent residence.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. 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 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -$1,172,713.00 for the end of 2000; -$333,649.00 for the end of 2001; -$224,862.00 for the end of 2002; and -$301,357.00 for the end of 2003. The figure for 2000 is not directly relevant to the instant petition, since the priority date is January 24, 2002. The year-end figure for 2001 is relevant, since the end of that year was less than four three weeks before the January 24, 2002 priority date. The year-end figures for 2002 and 2003 are also relevant to the instant petition. Nonetheless, since the petitioner's year-end net current assets in 2001, 2002 and 2003 are negative, those figures fail to provide additional evidence of the ability of the petitioner to pay the proffered wage during those years.

In his decision, the director based his analysis of the petitioner's net income on the figures for ordinary income shown on the petitioner's tax returns. That approach may have conformed with standard CIS procedures, and the use of the ordinary income figure would be an accurate measure of net income for S corporations which receive their income exclusively from conducting a trade or business. However, for S corporations which receive income from other sources, the ordinary income figure fails to reflect all of a corporation's income. In the instant case, the record before the director contained a letter from the petitioner's accountant clearly and succinctly explaining the petitioner's tax returns and the nature of the petitioner's business. The accountant stated that significant portions of the petitioner's income were not shown on page one of the Form 1120S, but were reported on the petitioner's Forms 8825 and 4979 and on its Schedule K's. The director should have taken that information into account and should have based his analysis of the petitioner's net income on the figures shown on line 23 of the Schedule K's attached to the petitioner's Form 1120S tax returns, rather than on the figures shown on line 21 of the Form 1120S.

In his analysis of the petitioner's current assets and current liabilities, the director correctly calculated the petitioner's net current assets for 2002 and 2003 and correctly found that since those figures were negative they failed to establish the petitioner's ability to pay the proffered wage during those years.

For the reasons discussed above, the director's decision that the petitioner had failed to establish its ability to pay the proffered wage during the relevant time period was incorrect, based on the evidence in the record before the director, since the director failed to take into account the letter dated June 3, 2004 from a certified public accountant and failed to take into account all of the petitioner's income as shown on its Schedule K's and related forms. Therefore the evidence before the director would have supported an approval of the petition.

Documents submitted by counsel after the director's decision, however, provide sufficient grounds for affirming the director's decision to deny the petition and for dismissing the instant appeal.

As noted above, on December 11, 2004, after the record had been transmitted to the AAO, the director received a letter from counsel dated December 9, 2004 stating that in preparing a response to the director's decision counsel had discovered that the tax returns submitted in support of the petition were not substantially correct. In the letter, counsel requested that the tax returns be withdrawn and that the petitioner be granted an additional thirty days to submit new evidence. That letter was later transmitted to the AAO and is now a part of the record in the instant appeal. Since the December 11, 2004 letter from counsel informs CIS that the petitioner's tax return evidence is not substantially correct and requests the withdrawal of that evidence from consideration, that request must be granted. With his December 9, 2004 letter counsel did not submit any amended tax returns or other financial evidence. If the tax return evidence submitted previously is not to be considered, the record fails to establish the petitioner's ability to pay the proffered wage during the relevant period, since the petitioner submitted no financial evidence other than its tax returns and associated schedules and statements.

Also submitted by counsel after the director's decision was a letter from counsel dated December 28, 2004, accompanied by a motion captioned "Petitioner's Expedited Motion to Remand Case to the U.S. Department of Homeland Security." The content of the motion indicates that counsel incorrectly believes that the AAO is not a part of the Department of Homeland Security, but in substance, the motion requests a remand to the director for further evidentiary proceedings. In support of the motion, counsel submits a document dated December 2004, with no date of the month specified, entitled "Spinoff, Assignment, Acquisition of Business and Joint Venture Agreement," signed by the petitioner's owner in two capacities, once as an officer of the petitioner, and once in his individual capacity, doing business as "Izad Developing."

In counsel's motion, counsel asserts that the petitioner's owner, in his individual capacity, is a successor in interest to the petitioner. Counsel asserts that the agreement submitted in support of the motion provides sufficient grounds for remanding the petition to the director for additional consideration of that issue.

No regulation specifically authorizes a petitioner to submit a motion to the AAO for a remand to the director. The regulations provide for motions to reopen and motions to reconsider in certain circumstances, but the petitioner's motion for a remand fails to satisfy the requirements either for a motion to reopen or a motion to reconsider. *See* 8 C.F.R. § 103.5(a)(2), (3). Moreover, the motion was received by CIS on December 30, 2004, which was more than thirty-three days after the director's decision of October 29, 2004. The motion therefore did not conform to the 30-day timeliness requirements for motions to reopen and motions to reconsider in 8 C.F.R. § 103.5(a)(2), (3), with the three additional days allowed after service by mailing under 8 C.F.R. § 103.5a(b).

Even if the petitioner's motion is considered without regard to the requirements for a motion to reopen or a motion to reconsider, the motion fails to provide sufficient grounds to support a remand to the director. The agreement attached to the motion is dated December 2004, with no date of the month specified. An agreement dated December 2004 implies that the agreement was executed at least one month after the director's decision of October 29, 2004. Therefore, nothing in that agreement could establish that the owner in his individual capacity was a successor in interest to the petitioner prior to the director's decision. Counsel asserts that the owner in his individual capacity has had taxable income in excess of $100,000.00 for every year since the petition was submitted. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). But even assuming that counsel's assertions about the owner's income are accurate, nothing in counsel's motion alleges that the beneficiary has in fact been employed by the owner in his individual capacity since the petition was submitted, which was on September 11, 2003, or since the priority date of January 24, 2002.

It should be noted that counsel acted properly in informing CIS that the tax return evidence previously submitted by the petitioner had been found by counsel to be not substantially correct. Counsel's motion for a remand is apparently an attempt to establish a new record before the director based on evidence which is correct. However, the evidence submitted by counsel with the motion fails to provide sufficient grounds for granting the motion for a remand.

For the foregoing reasons, the motion for a remand must be denied and the appeal must be dismissed. The dismissal of the appeal is without prejudice to the petitioner or to any successor in interest to the petitioner submitting a new petition based on the same approved ETA 750 labor certification.

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 for a remand is denied. The appeal is dismissed.