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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 02 230 52058 Office: VERMONT SERVICE CENTER Date: MAR 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) 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, Vermont 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 custom furniture manufacturer. It seeks to employ the beneficiary as a hand woodcarver. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present. The director also determined that the petitioner did not establish that the beneficiary met the experience requirements as listed on the Form ETA 750.

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 April 27, 2001. The proffered salary as stated on the labor certification is \$16.00 per hour or \$33,280 per year.

With the petition, counsel submitted a copy of the beneficiary's diploma showing that the beneficiary received the qualification of Decorative Wood Engraver of the 4<sup>th</sup> category. Counsel also submitted a letter from EKER Joint Venture stating that it had employed the beneficiary from February 20, 1994 through February 1996. No evidence of the petitioner's ability to pay the proffered wage was provided. The director considered this documentation insufficient and on April 1, 2003, he requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of April 27, 2001 and continuing to the present. The director specifically requested that the financial documentation be in the form of copies of annual reports, copies of federal tax returns including all schedules and attachments, or audited financial statements. The director also requested a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement, if the petitioner employed the beneficiary during 2001. The director further informed the petitioner that the

documentation provided as evidence of the beneficiary's prior employment failed to establish that the beneficiary had the necessary two years of experience as required by the Form ETA in that it failed to provide an exact date of employment termination. The director requested additional evidence that the beneficiary met the two years of experience in the job offered as of April 27, 2001.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. Counsel did not provide any additional evidence of the beneficiary's work experience. The 2001 tax return reflected an ordinary income of -\$2,032 and net current assets of -\$505,487.

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 or that the beneficiary met the experience requirements as stated on the Form ETA 750 and, on April 27, 2003, denied the petition.

On appeal, counsel submits a letter from the owner of the business stating, "in April of 2001, I had and still have over \$99,000 in my personal funds, the amount in total is available to pay the beneficiary's salary." Counsel also provides copies of two of the petitioner's personal bank statements as verification of the petitioner's claim. Counsel states:

Attached please find the company owner's statement wherein he assumed personal responsibility for paying proffered wage to the beneficiary as well as a copy of the bank statement establishing the balance available as of now and available in the company owner's bank account as of the date of filing. This is much more than the wage offered in this case.

\* \* \*

In total, employer in this case demonstrated that he has the funds available to pay the beneficiary's \$33,280 annual salary as follows:

- \$2,036 in petitioner's company's income in 2001;
- \$99,000 in the petitioner company's owner personal funds in 2001;
- over \$92,000 available at the company owner's bank account as of August 2003;

Please note that the company owner submitted signed statement wherein he assumed personal responsibility for paying proffered wage to the beneficiary. Therefore, petitioner established they were able to pay the beneficiary the proffered wage as of the time of filing [and] continuing to the present. BCIS incorrectly denied the petition instead of requesting this supplemental information more expressly. Consequently BCIS decision should be reserved and the underlying petition should be approved.

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 at a salary equal to or greater than the proffered wage.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.<sup>1</sup> 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 were -\$505,487. The petitioner could not have paid the proffered wage in 2001 from its net current assets.

Counsel points to the owner's avowal and personal bank statements as evidence of the petitioner's ability to pay the proffered wage. Contrary to counsel's primary assertion, 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

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

*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 court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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."

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has only provided tax returns for 2001, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

The 2001 tax return reflects an ordinary income of -\$2,032 and net current assets of -\$605,487. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2001.

The second issue in this proceeding is whether the beneficiary meets the experience requirements as stated on the Form ETA 750.

The regulation at 8 C.F.R. § 204.5(1)(3) states, in pertinent part:

- (ii) *Other documentation* – (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or

employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 27, 2001.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 contained the only information appearing in these sections. This information appears as follows:

Education 10 Yrs	College Degree Required 2 Yrs
Experience Job Offered 2 Yrs	Related Occupation 0 Yrs.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of hand woodcarver must have two years of experience as a hand woodcarver.

Counsel initially submitted a letter from the beneficiary's prior employer stating that he employed the beneficiary from February 20, 1994 through February 1996. On April 1, 2003, the petitioner was informed that without an exact date of termination, CIS was unable to determine if the beneficiary possessed the full two years of experience as required by the ETA 750.

In response to the request for evidence and on appeal, the petitioner has failed to provide an exact date that the beneficiary ended his prior employment. Therefore, it is impossible for the AAO to determine if the beneficiary met the experience requirements as stated on the ETA 750.

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.