U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 13 2005
EAC 03 009 51195

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[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 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 real estate investment company. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. 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 statement.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is $10 per hour, which equals $20,800 per year.

On the petition, the petitioner did not state, in the spaces provided, the year it was established, the number of workers it employs, its gross annual income, or its net annual income. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, counsel submitted the 2001 Form 1065, U.S. Return of Partnership Income of [redacted] That return shows that the petitioner reports taxes based on the calendar year and that during 2001 it declared a loss of $428,725 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted the 1998 and 1999 Form 1120S, U.S. Income Tax Returns for an S Corporation of S. Bina, Incorporated dba Days Inn of the same address as the petitioner.

In a cover letter dated October 1, 2002, counsel explains that the petitioner bought the motel from Incorporated, and closed it from January 3, 2001 to June 1, 2001 for renovation. Counsel further explained that the petitioner continued the renovations after reopening the motel, incurring additional expenses until January 2002. Counsel cites the previous owner's gross receipts as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 March 19, 2003, requested, *inter alia*, 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.

In response, counsel submitted a copy of the 2002 Form 1065, U.S. Return of Partnership Income of Sharda Realty, LLC. That return shows ordinary income of $9,362. The corresponding Schedule L shows current assets of $10,075 and no current liabilities, which yields net current assets of $10,075.

In a cover letter dated June 12, 2003 counsel stated, "[The petitioner] continues to have sufficient funds in its capital account to pay the proffered wage. In 2001 it had $230,000 in cash to cover the $18,000 salary. At the current time that account is going to do [sic] in excess of $236,000." Counsel thus argued that the petitioner's partners' capital accounts show its ability to pay the proffered wage.

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 August 18, 2003, denied the petition.

On appeal, counsel states,

> Petitioner, Realty Corporation, in 2001 purchased a Motel which it intended to rehabilitate. It sought to employ the beneficiary, as a Maintenance Mechanic at an annual salary of $18,200. In support of its Petition Realty Corporation provided a copy of its 2001 tax returns. Petitioner explained that the net operating loss was caused by the Motel being closed for rehabilitation. It explained that although it had a major operation loss, it had sufficient assets to cover the proffered wage. Despite that fact the Service denied the Petition, erroneously asserting that the Petitioner did not have the ability to pay the offered wage.

No other information, argument, or documentation has been submitted by the petitioner or by anyone acting on his behalf.

Initially, this office notes that counsel has misplaced the burden of proof in this matter. The decision of denial did not state that the petitioner is unable to pay the proffered wage. That decision noted that the petitioner is obliged to demonstrate that it has the ability to pay the proffered wage, and that the petitioner had failed to sustain that burden.

The tax returns of the petitioner's predecessor-at-interest in the motel are of no use in determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date. First, those returns cover the 1998 and 1999 calendar years, and the priority date in the instant case is April 30, 2001. They reveal nothing about the ability to pay the proffered wage beginning on the priority date. Second, those returns relate to the income and assets of the petitioner's predecessor, and provide no insight into the income and assets of the petitioner. Those tax returns will not be considered further.

Counsel's implication that the petitioner could pay the proffered wage out of it Accounts is incorrect. Although an explanation of double-entry accounting is beyond the scope of today's decision, Accounts are an offsetting credit to some asset and are not, in themselves, assets. They are not an account out of which the petitioner can withdraw funds to pay wages. They are not a fund available to pay 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. In the instant case, the petitioner did not establish that it employed and paid 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, 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 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.

The proffered wage is $20,800 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its profits. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of $9,362. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of $10,075. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel explains that the reason the petitioner suffered a large loss during 2001 and had small profits during 2002 is that it closed the motel for renovation. That statement, however, neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of demonstrating that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient to pay the proffered wage.

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.