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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE: [Redacted]  
WAC-03-069-50780

Office: CALIFORNIA SERVICE CENTER

Date: MAY 18 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner installs homes. It seeks to employ the beneficiary permanently in the United States as a house mover. 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 statement 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 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 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 January 8, 1998. The proffered wage as stated on the Form ETA 750 is \$15.03 per hour, which amounts to \$31,262.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 1993.

On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$279,129, and to currently employ 2 workers. In support of the petition, the petitioner submitted Form 1120S, U.S. Income Tax Return for an S Corporation, for the years 1999, 2000, and 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 9, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested the petitioner's quarterly wage reports and asked for evidence from December 2001 to the present.

In response, the petitioner submitted its 2002 corporate tax return and its quarterly wage reports for all four quarters in 2002 and the first quarter in 2003. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 10, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence from January 1998 to the present, signed tax returns, payroll records.

In response, the petitioner submitted its signed corporate tax returns for 1998, 1999, 2000, 2001, and 2002.

The tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>	<u>2000</u>
Net income <sup>1</sup>	-\$16,744	-\$35,835	-\$11,415
Current Assets	\$78,957	\$58,524	\$58,037
Current Liabilities	\$39,219	\$50,908	\$53,812
Net current assets	\$39,738	\$7,616	\$4,225
	<u>2001</u>	<u>2002</u>	
Net income <sup>2</sup>	-\$3,263	-\$12,961	
Current Assets	\$47,963	\$18,049	
Current Liabilities	\$30,243	\$64,724	
Net current assets	\$17,720	-\$46,675	

The petitioner also submitted its quarterly wage report for the second quarter in 2003 that did not reflect any wages paid to the beneficiary. The petitioner submitted copies of paychecks issued to the beneficiary from a different employer, [REDACTED] in 2003, which the beneficiary indicated he worked for from 1985 to 1993 on his ETA 750B, and from 1986 to the present on Form G-325, Biographic Information sheet, submitted in connection with his concurrently filed application to adjust status to lawful permanent resident. The petitioner also submitted paystubs issued to the beneficiary from the petitioner in 2003 as well, amounting to \$4,076.20.

The director considered the totality of evidence and 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 December 17, 2003, denied the petition. The director noted the petitioner's reported losses in its net income in each year and insufficient net current assets in each year to pay the proffered wage. Additionally, the petitioner noted that the paystubs submitted in response to the director's second request for evidence reflected that the petitioner paid an hourly pay rate of \$12.66 from April to June, that increased to \$15.00 per hour from July to August.

On appeal, counsel asserts that the owner of the petitioner is also the owner of [REDACTED] and uses resources from [REDACTED] "to pay for many of the expenses of [the petitioner]." Counsel asserts that the petitioner paid the "prevailing wage" to the beneficiary through [REDACTED] since 1998. Counsel also states that the petitioner did not need to pay the "prevailing wage" rate until the beneficiary acquires permanent resident status. The petitioner submits corporate documents, corporate tax returns, and quarterly wage reports from Tri-

<sup>1</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>2</sup> See note 1, *supra*.

Omega., Inc., as well as a quarterly wage report for the third quarter in 2003 reflecting that the petitioner paid the beneficiary \$4,666.90 in that quarter<sup>3</sup>.

At the outset, counsel is correct that the petitioner need not show that it is currently paying the prevailing wage rate or the proffered wage rate until permanent employment is finalized. However, Citizenship and Immigration Services (CIS) will examine actual wage payments made to the beneficiary as evidence of a petitioning entity's continuing ability to pay the proffered wage beginning on the priority date as will be discussed below.

Counsel's reliance on the assets of [REDACTED] is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003). [REDACTED] has an employer identification number (EIN) of 95-3272360 while the petitioner's EIN is 95-4421210. There is no evidence contained in the record of proceeding that the petitioner and [REDACTED] are the same corporation with the same legal obligations. Thus, [REDACTED] financial situation and payment of wages to the beneficiary are irrelevant to these proceedings.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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 the full proffered wage in 1998, 1999, 2000, 2001, 2002, or 2003. The petitioner established that it paid the beneficiary \$4,666.90 in 2003<sup>4</sup>.

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, CIS will next examine the net income figure 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. 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 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 the Service should have considered income before expenses were paid rather than net income.

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

<sup>3</sup> The paystubs were represented in that quarter.

<sup>4</sup> Since the petitioner has not provided evidence pertaining to 2003, presumably because such information was unavailable at the time of the petitioner's submissions in these proceedings, the AAO's analysis will end with 2002.

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>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 has not demonstrated that it paid any wages to the beneficiary during 1998, 1999, 2000, 2001, or 2002. In each year, the petitioner reports a loss and thus cannot demonstrate its ability to pay the proffered wage out of its net income in any relevant year. The petitioner's negative net current assets are only greater than the proffered wage in 1998 but not in any other year. Thus, the petitioner can demonstrate its ability to pay the proffered wage in 1998 out of its net current assets but not in any other year. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, or 2002. 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 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.

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<sup>5</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.