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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**

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FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date: **MAY 25 2005**

SRC 03 083 50650

IN RE:

Petitioner:

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:

[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*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 software development and computer consultancy firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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 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 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 \$75,000 per year.

On the petition, the petitioner stated that it was established during 2000 and that it employs two workers. The petition states that the petitioner's gross annual income is \$150,210 but did not reveal its net annual income in the space provided. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The petition indicates that the petitioner will employ the beneficiary in Nashville, Tennessee.

In support of the petition, counsel submitted copies of the petitioner's bank statements and a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The tax return shows that the petitioner reports taxes pursuant to the calendar year and that it declared a loss of \$11,781 as its ordinary income during 2001. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of \$0.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on October 7, 2003, requested 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. The Service Center also specifically requested that, if the petitioner had employed the beneficiary since the priority date, it provide Form W-2 Wage and Tax Statements showing the wages it paid to him.

In response, counsel submitted (1) a letter, dated December 29, 2003, from the petitioner's accountant, (2) a letter, dated December 18, 2003, from the petitioner's Executive Officer, (3) the unaudited balance sheet of American Homes and Construction, Incorporated, a company apparently also owned by the petitioner's owner, (4) a copy of a contract, dated November 30, 2003, between the petitioner and another company, and (5), counsel's own letter, dated January 6, 2004.

With that response, counsel did not provide copies of annual reports, federal tax returns, or audited financial statements pertinent to 2002. Further, counsel did not state any reason for that omission.

The December 29, 2003 accountant's letter states that the petitioner has an existing contract pursuant to which it will be paid \$136,000 during the ensuing 12 months. The accountant also stated that the petitioner's owner provided the accountant with a personal financial statement showing him to have a net worth of \$335,489.<sup>1</sup>

The Executive Officer's letter states that the petitioner has the ability to pay the proffered wage, stating that in the past it hired contract consultants to perform the duties of the proffered position.

The November 30, 2003 contract retains the petitioner's consulting services at a rate of \$68 per hour, but makes no provision for any minimum number of hours for which it will employ the petitioner's consultants.

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 January 20, 2004, denied the petition.

On appeal, counsel submits a letter, dated December 5, 2003, from the petitioner's bank stating that on that date the petitioner had \$50,011.29 in its account, and a letter, dated December 18, 2003, from the petitioner's accountant. The accountant's letter reiterates that the petitioner has an existing contract pursuant to which it will, according to the accountant, be paid \$136,000.

Counsel argues that the evidence shows that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date, citing the amount in the petitioner's bank account and its existing contract.

Counsel mischaracterizes the accountant's letter and the November 30, 2003 contract by stating that the accountant stated that, pursuant to that contract, the petitioner "will be paid \$136,000 every year." In fact, the

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<sup>1</sup> The unaudited balance sheet provided shows a net worth of \$335,489 and is clearly, therefore, the document to which the accountant refers. However, the document is not a "personal financial statement" but a corporate balance sheet. Contrary to the accountant's assertion, it does not even purport to state the petitioner's owner's net worth. These mischaracterizations detract markedly from the credibility of the accountant's other assertions.

contract in evidence provides that it will terminate on January 5, 2005, one year after taking effect on January 5, 2004.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner, including assets shown on the unaudited<sup>2</sup> balance sheet of another company the petitioner's owner ostensibly owns, shall not be further considered.

Counsel's reliance on the bank statements and the bank letter in this case is misplaced. First, bank statements and letters pertinent to bank balances are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements and the bank letter show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.<sup>3</sup> 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 reported on its tax returns.

The November 30, 2003 contract in this case, the accountant's statements pertinent to that contract, and counsel's statements pertinent to that same contract, even if they were consistent with each other, would not be convincing evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. First, although the other party to that contract agreed to pay the petitioner \$68 per man/hour for its assistance, it does not commit that other party to purchasing any particular number of hours of that assistance. The assertion by the petitioner's accountant that the contract will result in \$136,000 in gross receipts to the petitioner is apparently based on a projection not supported by the evidence in the record.

Second, the record contains no evidence of the amount of net income that contract would yield, if any, which would remain after payment of other expenses, and which would be available to pay additional wages. Third, that contract is for one year, and cannot, therefore, show the *continuing* ability to pay the proffered wage. Finally, the priority date is April 30, 2001 and that contract, by its own terms, did not take effect until June 5, 2004. The contract, for this additional reason, cannot demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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<sup>2</sup> Even if the petitioner's owner's personal assets were considered to be funds available to pay the proffered wage in this case, pursuant to 8 C.F.R. § 204.5(g)(2), the *unaudited* financial statement would not be persuasive evidence of assets.

<sup>3</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

The statement of the Executive Officer in the letter of December 18, 2003 that the petitioner previously employed contractors to perform the duties of the proffered position, does not, in itself, demonstrate the petitioner's ability to pay the proffered wage. Payments to contract workers are usually shown on a Form 1120S, U.S. Income Tax Return for an S Corporation on Schedule A, Line 3, Cost of Labor. The petitioner's 2001 tax return shows Cost of Labor of \$0. Further, even if the petitioner had demonstrated, rather than alleged, that it paid contractors to do the work that the beneficiary would do, it did not state the hourly wage those contractors were paid. Without that information,<sup>4</sup> no calculation can be performed to demonstrate the amount of the contract labor payments that would be obviated by hiring the beneficiary full-time.

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 corporate 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

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<sup>4</sup> Another necessary figure in that calculation would be the amount of the additional costs, beyond the beneficiary's salary, that the petitioner would incur by hiring the beneficiary.

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 \$75,000 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had no 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 during that year. The petitioner has submitted no reliable evidence of its ability to pay the proffered wage during 2001.

The petitioner did not submit copies of annual reports, federal tax returns, or audited financial statements pertinent to 2002. Those documents are the mandatory types of evidence of the petitioner's ability to pay the proffered wage according to 8 C.F.R. § 204.5(g)(2). Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The appeal in this matter was submitted February 18, 2004. On that date the petitioner's 2003 tax return may not have been available. The petitioner is excused, therefore, for failing to produce evidence of its ability to pay the proffered wage during 2003.

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.

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.