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Washington, DC 20529

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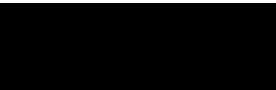


U.S. Citizenship  
and Immigration  
Services



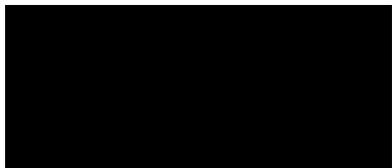
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FILE: EAC 02 237 52868 Office: VERMONT SERVICE CENTER Date: **MAY 25 2005**

IN RE: Petitioner:   
Beneficiary: 

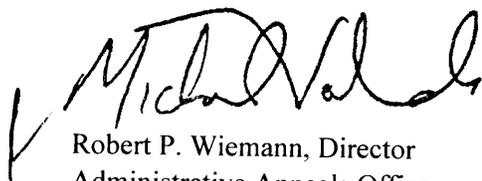
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 diesel truck repair facility. It seeks to employ the beneficiary permanently in the United States as a 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 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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$22 per hour, which equals \$45,760 per year.

On the petition, the petitioner stated that it was established on October 27, 1998 and that it employs 17 workers. The petition states that the petitioner's gross annual income during "2000 – 2001" was \$242,997.<sup>1</sup> In the space reserved for reporting net annual income the petitioner entered "Cash Flow; \$67,972."

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1999. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in North Arlington, New Jersey.

In support of the petition, counsel submitted a copy of the first page of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports taxes based on a fiscal year

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<sup>1</sup> As noted below, the petitioner's tax returns show that it reports taxes pursuant to a fiscal year.

which runs from October 1 of the nominal year to September 30 of the following year. During its 2000 fiscal year, which ran from October 1, 2000 to September 30, 2001, the petitioner declared a loss of \$4,842 as its taxable income before net operating loss deduction and special deductions. Because the corresponding Schedule L was not included the petitioner's net current assets at the end of that fiscal year could not then be calculated.

In addition, counsel submitted a letter, dated June 5, 2002, from the petitioner's president. That letter states that the petitioner, "Prorama, Inc. USA, is a subsidiary of Prorama, Inc. based in Puerto Rico, which provides general financial support to our operations in Arlington, NJ." Counsel provided a letter, dated February 25, 2002, from the president of Prorama, Incorporated of Jayuya, Puerto Rico, stating, ". . . we are the home office of Prorama U.S.A., Inc. and therefore provide various forms of support including funding for all expenses incurred. Funds are arranged by wire transfer, a sample of which is attached."

Four Funds Transfer Notifications dated June 8, 2001, July 12, 2001, August 15, 2001, September 7, 2001, October 3, 2001, and November 16, 2001 shows that Prorama Incorporated of Puerto Rico transferred \$10,000, \$8,000, \$10,200, \$10,000, \$8,500, and \$8,000 on those dates, respectively, from its account to that of the petitioner.

Further still, counsel submitted a letter, dated May 20, 2002, from the petitioner's accountant, stating, "Prorama, Inc., located in Puerto Rico guarantees all operations of its subsidiary cooperation, Prorama USA, Inc."

Finally, counsel provided a copy of a 2001 Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary \$15,600 in wages during that year.

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 May 23, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested the petitioner's complete 2001 and 2002 tax returns and that, if it employed the beneficiary during 2002, it submit a copy of the 2002 W-2 form showing wages it paid to the beneficiary.

In response, counsel submitted a letter, dated July 14, 2003, in which he stated that he was providing "copies of the petitioner's tax returns covering 2001 and 2002" and a letter from the petitioner's accountant explaining that the petitioner's depreciation deduction is not a cash expense.

In fact, the letter from the petitioner's accountant, dated May 22, 2003, does not state that depreciation is not a cash expense. This office takes notice, however, that a depreciation deduction does not necessarily require or represent the use of cash during the year taken.

In fact, counsel submitted only the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. Because the petitioner reports taxes based on the fiscal year described above, that return does cover part of 2001 and part of 2002, specifically, from October 1, 2001 to September 30, 2002. Although that response does not appear to be perfectly responsive to the Service Center's request for the petitioner's 2001 and 2002

tax returns, this office notes that the petitioner's tax return for the 2002 fiscal year was unavailable on the date of counsel's response.

Pursuant to 8 C.F.R. § 204.5(g)(2), however, the petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The tax return submitted does not cover the priority date or the period from the priority date to September 30, 2001.

The fiscal year 2001 return shows that between October 1, 2001 and September 30, 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$34,395. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$24,920 and current liabilities of \$4,842, which yields net current assets of \$20,078.

Counsel submitted a copy of the beneficiary's 2002 W-2 form. The W-2 form shows that the petitioner paid the beneficiary \$20,800 during 2002. Counsel also submitted a copy of the petitioner's Certificate of Incorporation, which states that the petitioner incorporated on October 27, 1998.

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 14, 2003, denied the petition.

On appeal, counsel states,

“Numerous documentation [sic] was submitted demonstrating that Prorama USA, Inc. is the subsidiary of PRORAMA based in Puerto Rico. The accountant provided documentation stating that the finances and paychecks are issued from Puerto Rico. In addition, there is evidence of wire transfers from Puerto Rico.”

Counsel states that, therefore, the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

With a brief filed to supplement the appeal, counsel provides (1) a letter, dated October 8, 2003, from the CFO of Prorama, Incorporated of Puerto Rico, (2) a letter, dated October 9, 2003, from the petitioner's accountant, (3) copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2002 and the first three quarters of 2003, (4) complete copies of the petitioner's 1998, 1999 and 2000 tax returns, (5) copies of the beneficiary's 2001 and 2002 personal tax returns, (6) documents in Spanish that appear to be the 2000, 2001, and 2002 corporate income tax returns of Prorama of Puerto Rico, (7) audited statements pertinent to the finances of Prorama of Puerto Rico, (8) copies of checks drawn by Constructora Orama, Incorporated, of Jayuya, Puerto Rico, including some drawn to the order of the petitioner, (9) copies of monthly statements pertinent to the petitioner's bank account, and (10) additional Fund Transfer Notifications and other documents showing transfers of funds from Prorama of Puerto Rico to the petitioner.

The letter from the CFO of Prorama of Puerto Rico states that it is the petitioner's parent company. That letter further states that, based on the financial support of Prorama of Puerto Rico the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The letter from the petitioner's accountant reiterates that the petitioner is a subsidiary of Prorama of Puerto Rico and that it has, therefore, the ability to pay the proffered wage.

The petitioner's quarterly returns show that it paid total wages of \$5,200 during each of those quarters. Because the quarterly returns show that the petitioner paid a total of \$20,800 in wages during 2002, and the beneficiary's W-2 form shows that the petitioner paid him \$20,800 during 2002, the statement on the Form I-140 petition that the petitioner employs 17 workers is clearly a misstatement.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The petitioner's 1998 and 1999 tax returns cover the fiscal years ending September 30, 1999 and September 30, 2000, respectively. Because the priority date is April 19, 2001, evidence pertinent to the petitioner's finances during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's 2000 Schedule L shows that the petitioner ended that fiscal year with current assets of \$4,400 and current liabilities of \$1,868, which yields net current assets of \$2,532.

The propositions that counsel intended to support with the beneficiary's personal tax returns and the copies of checks drawn by Constructora Orama are unknown to this office.

The corporate tax returns of Prorama of Puerto Rico are in Spanish. Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. 103.2(b)(3). Because the Puerto Rican tax returns were submitted without the required translation, their contents shall not be considered.

Counsel states that the documents provided clearly show the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel has demonstrated that the petitioner is a subsidiary of Prorama of Puerto Rico. Counsel has also demonstrated that, in the past, Prorama of Puerto Rico has subsidized the petitioner's operations. Counsel has not, however, demonstrated that Prorama of Puerto Rico is obliged to continue funding the petitioner, or that it would choose to do so if it was contrary the perceived best interests of Prorama of Puerto Rico.

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). This is so whether the owners or stockholders are individuals, corporations, or some other entities. 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 parent corporation shall not be further considered.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. As was noted above, counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements 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 show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.<sup>2</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.

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 submitted W-2 forms to establish that it employed the beneficiary during 2001 and 2002 and paid him \$15,600 and \$20,800 during those years, respectively. The petitioner's Form 941 quarterly returns for the first three quarters of 2003 show that the petitioner paid the beneficiary \$5,200 during each of those quarters, for a total of \$15,600. Having demonstrated the ability to pay the beneficiary those amounts, the petitioner is obliged to demonstrate the ability to pay the balance of the proffered wage.

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<sup>2</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.

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.

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 \$45,760 per year. The priority date is April 19, 2001.

The determination of the petitioner's ability to pay the proffered wage is complicated by the fact that it reports taxes based on a fiscal year, whereas wages are reported on W-2 forms pursuant to the calendar year. The petitioner demonstrated that it paid the beneficiary \$15,600 during the 2001 calendar year. That amount will be apportioned to the petitioner's 2000 and 2001 calendar years to facilitate computations with figures from the petitioner's fiscal year tax returns.

The most reasonable assumption is that the petitioner paid uniform wages to the beneficiary throughout the year.<sup>3</sup> Pursuant to that assumption, three quarters of the wages shown on the beneficiary's 2001 W-2 form, or \$11,700 is attributable to the petitioner's 2000 fiscal year, in which the priority date fell.<sup>4</sup> The remaining one-quarter of the amount shown on the 2001 W-2 form, or \$3,900 is attributable to the 2001 fiscal year.<sup>5</sup>

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<sup>3</sup> The Forms 941 lend considerable support to that assumption.

<sup>4</sup> Those are the wages paid from January through September of 2001, which period fell within the petitioner's 2000 fiscal year.

In addition, three-quarters of the amount shown on the beneficiary's 2002 W-2 form, or \$15,600, is attributable to the is attributable to the 2001 calendar year.<sup>6</sup> The remaining one-quarter, or \$5,200, is attributable to the petitioner's 2002 fiscal year.<sup>7</sup>

Finally, the Forms 941 for the first three-quarters of 2003 show that the petitioner paid the beneficiary \$15,600 during those three quarters. That entire amount is attributable to the petitioner's 2002 fiscal year.

The petitioner has demonstrated, therefore, that it paid approximately \$11,700 to the beneficiary during its 2000 fiscal year, approximately \$19,500<sup>8</sup> to the beneficiary during its 2001 fiscal year, and approximately \$20,800<sup>9</sup> to the beneficiary during its 2002 fiscal year.

Having demonstrated that it paid the beneficiary approximately \$11,700 during its 2000 fiscal year, the petitioner must demonstrate the ability to pay the \$34,060 balance of the proffered wage during that fiscal year. During that fiscal year the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of profits during that year. The petitioner ended that fiscal year with net current assets of \$2,532. That amount is also insufficient to pay the balance of the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during its fiscal year 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

Having demonstrated that it paid the beneficiary \$19,500 during its 2001 fiscal year, the petitioner is obliged to show that it could have paid the remaining \$25,260 of the proffered wage during that year. During its 2001 fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of \$34,395. That amount is sufficient to pay the proffered wage during that fiscal year. The petitioner has demonstrated the ability to pay the proffered wage during its fiscal year 2001.

Having demonstrated that it paid the beneficiary \$20,800 during its 2002 fiscal year, the petitioner would ordinarily be obliged to demonstrate the ability to pay the remaining \$24,960 of the proffered wage. The Request for Evidence in this matter, however, was issued on May 21, 2003, when the petitioner's fiscal year 2002 was not yet finished and its fiscal year 2002 tax return was unavailable. When the appeal in this matter was submitted, on September 15, 2003, the petitioner's 2002 fiscal year still had not ended and the petitioner's fiscal year 2002 return was still unavailable. Counsel submitted the appeal brief in this matter on

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<sup>5</sup> Those are the wages paid during October, November and December of 2001, which fell within the petitioner's 2001 fiscal year and the 2001 calendar year. The nine previous months of 2001 fell within the petitioner's 2000 calendar year.

<sup>6</sup> This is because the first nine months of the 2002 calendar year fell within the petitioner's 2001 fiscal year.

<sup>7</sup> These are the wages paid during October, November, and December of 2002.

<sup>8</sup> \$3,900 + \$15,600.

<sup>9</sup> That amount includes \$5,200 during the last three months of 2002 plus \$15,600 during the first nine months of 2003.

October 16, 2003. The petitioner's 2002 fiscal year had ended only a few weeks before, and the petitioner's 2002 tax return was still probably not available. The petitioner is excused, therefore, from providing its fiscal year 2002 returns, and has sufficiently shown the ability to pay the proffered wage during its fiscal year 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during its fiscal year 2000. 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.