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U.S. Citizenship  
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Services

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FILE: EAC-02-296-52326 Office: VERMONT SERVICE CENTER Date: **NOV 07 2005**

IN RE: Petitioner:  
Beneficiary:

PETITION: 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an interior design firm. It seeks to employ the beneficiary permanently in the United States as an interior designer. 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.

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 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:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$69,347.00 per year. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary claimed to have worked for the petitioner beginning in April 1998 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on September 16, 2002. On the petition, the petitioner claimed to have been established on March 15, 1990, to currently have five employees and to have a gross annual income of \$2 million. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated February 4, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on April 23, 2004.

In a decision dated June 8, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and no additional evidence. Counsel also submits a copy of an Interoffice Memorandum dated May 4, 2004 by [REDACTED] to Service Center Directors and other CIS officials, and a copy of a decision of the AAO in an unrelated case in which counsel in the instant appeal was also counsel. The copy of the memorandum by [REDACTED] and the copy of an AAO decision are not evidentiary documents, but are submitted by counsel as legal authorities.

Counsel states on appeal that the petitioner's net assets and depreciation allowance establish the petitioner's ability to pay the proffered wage. Counsel also states that funds paid to other employees performing identical functions to those in the offered position are also available to pay the proffered wage, since the petitioner anticipates terminating those employees at the time of the submission of the labor certification underlying the instant petition.

Since no new evidence is submitted on appeal, the AAO will evaluate the director's decision based on the evidence submitted prior to the director's decision.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, 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 instant case, on the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary claimed to have worked for the petitioner beginning in April 1998 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 2001, 2002 and 2003. The beneficiary's Form W-2's show compensation received from the petitioner as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$19,500.00	\$69,347.00	\$49,847.00
2002	\$31,600.00	\$69,347.00	\$37,747.00
2003	\$32,800.00	\$69,347.00	\$36,547.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As another 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 for a given year, 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000, 2001 and 2002. The petitioner's tax year runs from March 1 until February 28 of the following year. The record before the director closed on April 23, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available, covering the period March 1, 2002 until February 28, 2003.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2000	\$9,017.00	not applicable	not applicable
2001	\$9,477.00	\$49,847.00*	-\$40,370.00
2002	\$8,148.00	\$37,747.00**	-\$29,599.00

\* Crediting the petitioner with the \$19,500.00 actually paid to the beneficiary in 2001.

\*\* Crediting the petitioner with the \$31,600.00 actually paid to the beneficiary in 2002.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 or 2002. As noted above, the petitioner's tax year begins on March 1 each year, two months after the calendar year begins. Even if it were possible to apportion the petitioner's income on each tax return to the calendar years in which the income was earned, the magnitude of the above deficits indicates that the result of the analysis would remain the same.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current

liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2000	\$51,950.00	-\$55,960.00	not applicable
2001	-\$55,960.00	\$31,672.00	\$49,847.00*
2002	\$31,672.00	-\$3,008.00	\$37,747.00**

\* Crediting the petitioner with the \$19,500.00 actually paid to the beneficiary in 2001.

\*\* Crediting the petitioner with the \$31,600.00 actually paid to the beneficiary in 2002.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002.

Counsel states in his brief that the petitioner's net assets and depreciation allowance establish the petitioner's ability to pay the proffered wage.

Counsel asserts that the Interoffice Memorandum dated May 4, 2004 by [REDACTED] supports an analysis based on the petitioner's net assets. However, that memorandum does not state that a petitioner's net assets may be found sufficient to establish the petitioner's ability to pay the proffered wage, but rather that net current assets may be the basis for such a finding. See [REDACTED] Interoffice Memo. to Service Center Directors and other CIS Offices, (May 4, 2004), at 2. CIS considers only current assets and current liabilities, since current assets represent items which can be expected to be converted into cash within a short period of time, and since current liabilities are items which can be expected to require payments of cash by the petitioner within a short period of time.

With regard to depreciation, while it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054.

If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements. Moreover, even in situations where a petitioner's net income and net current assets for a given year are insufficient to establish the petitioner's ability to pay the proffered wage, the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In his brief, counsel also states that funds paid to other employees performing identical functions to those in the offered position are available to pay the proffered wage, since the petitioner anticipating terminating those employees at the time of the submission of the labor certification underlying the instant petition. Counsel cites a July 11, 2002 decision of the AAO in case number EAC-01-058-50789 in support of the petitioner's position on that point, and submits a copy of that decision on appeal. The copy of the AAO decision relied upon by counsel contains no indication that it is a precedent decision, and counsel provides no citation to and official publication of that decision.

While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

With regard to the content of the decision in case number EAC-01-058-50789, the decision finds that the evidence in that case establishes that the petitioner spent substantial sums on outside contractors for work which it indented the beneficiary to perform after being hired and that the money spent on outside contractors could be considered as financial resources available to the petitioner to pay the proffered wage to the beneficiary. The reasoning in that decision is sound, but the evidence in the instant petition fails to establish facts which would support such an analysis.

The record contains a letter dated April 6, 2004 from the petitioner's president and sole shareholder. The president states that two of its employees, [REDACTED] were not U.S. workers at the time the labor certification was filed, and that the petitioner had no assurance that they would remain as permanent employees. The petitioner states that both employees have in fact left the petitioner's employ, so that funds used to compensate them are now available to pay the beneficiary. The president states that during 2001 and 2002 the beneficiary, [REDACTED] and [REDACTED] each received compensation from the petitioner and from an affiliated corporation of the petitioner, [REDACTED], which acted as the petitioner's payroll agent during 2001 and 2002.

The petitioner has submitted copies of Form W-2 Wage and Tax Statements of the beneficiary and of [REDACTED] and [REDACTED] for the years 2001, 2002 and 2003. The petitioner has also submitted copies of Form W-2's for 2001 and 2002 issued by [REDACTED] a corporation which has the same address as the petitioner.

In 2001, the beneficiary received \$19,500.00 from the petitioner and \$14,400.00 from [REDACTED] for a total of \$33,900.00. [REDACTED] received \$21,400.00 from the petitioner and \$5,060.00 from [REDACTED] for a total of \$26,460.00. [REDACTED] received \$22,200.00 from the petitioner and \$5,280.00 from [REDACTED] for a total of \$27,480.00.

In 2002, the beneficiary received \$31,600.00 from the petitioner and \$14,200.00 from [REDACTED] for a total of \$45,800.00. [REDACTED] received \$21,800.00 from the petitioner and \$5,280.00 from [REDACTED] for a total of

\$27,080.00. [REDACTED] received \$21,800.00 from the petitioner and \$5,280.00 from [REDACTED], for a total of \$27,080.00.

In 2003, the beneficiary received \$32,800.00 from the petitioner; Hiroko Abe received \$22,200.00 from the petitioner; and [REDACTED] received \$22,200.00 from the petitioner. No Form W-2's issued by [REDACTED] for 2003 were submitted in evidence.

The evidence in the record fails to specify the nature of the affiliation between the petitioner and [REDACTED]. No corporate documents, tax returns, or other information about [REDACTED] were submitted in evidence. 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). The president's letter of April 6, 2004 states that [REDACTED] acted as the petitioner's payroll agent in 2001 and 2002. However, the president provides no further details. Nor is any explanation offered for the fact that Form W-2's were issued both by the petitioner and by [REDACTED] in those years. For the foregoing reasons, payments made by [REDACTED] to the beneficiary or to other employees of the petitioner will not be considered in evaluating the petitioner's ability to pay the proffered wage.

Concerning the possible use of the compensation paid by the petitioner to its employees [REDACTED] the evidence fails to establish that the salaries paid to those employees would have been available in 2001, 2002 and 2003 to pay the proffered wage to the beneficiary. The beneficiary was already on the petitioner's payroll during those years. The record does not indicate the number of hours that the beneficiary worked per week for the petitioner during that period, nor the number of hours worked per week by [REDACTED] and [REDACTED]. The evidence therefore fails to establish that the petitioner intended to replace either [REDACTED] or [REDACTED] by hiring the beneficiary at the full proffered wage.

In her April 6, 2004 letter, the president also states that the petitioner's location is close to the site of the September 11, 2001 attacks, and that for the year 2001 the petitioner's income was adversely affected by that attack. A check of an Internet map service shows that the petitioner's location is about one and one half miles northeast of the site of the former World Trade Center. *See Google, Local*, <http://maps.google.com>, *search 57 Great Jones Street, New York, NY; get directions to Vesey St and Church St., New York, NY.* (accessed October 26, 2005). Although it is reasonable to expect that some financial harm in the petitioner's business occurred as a result of the September 11, 2001 attacks, the evidence in the record fails to establish the amount of any such harm. According to the petitioner's tax returns, the petitioner's gross receipts or sales were \$2,199,563.00 in 2000; \$2,289,440.00 in 2001 and \$2,379,668.00 in 2002. The petitioner's net income figures were \$9,017.00 in 2000; \$9,477.00 in 2001 and \$8,148.00 in 2002. Those figures indicate that the petitioner's business remained relatively stable during those three years.

For the foregoing reasons, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director correctly stated the petitioner's net income for 2000, 2001 and 2002 and correctly calculated the petitioner's net current assets for those years. The director also correctly declined to consider salary payments made to other employees of the petitioner as funds that were available to pay the proffered wage to the beneficiary. The decision of the director to deny the petition was correct. For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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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.