

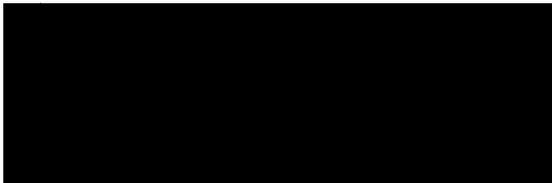
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U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC-02-255-51700

Office: VERMONT SERVICE CENTER

Date: NOV 17 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:

SELF-REPRESENTED

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

CC: [REDACTED]

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 a software development and computer consultancy firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the petitioner submits a statement and additional evidence. The record of proceeding reflects a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative indicating that the petitioner was represented by counsel earlier in these proceedings. The petitioner did not explain that it terminated its relationship with counsel. Thus, although counsel did not submit correspondence on appeal, a copy of this decision will be provided to him.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

Here, the Form ETA 750 was accepted on July 3, 2001. The proffered wage as stated on the Form ETA 750 is \$57,429 per year. The Form ETA 750 states that the position requires two years experience in the job offered or an occupation in the IT or computer science related field and a bachelor's degree in computer

science or a related field, or alternatively, an associate's degree in computer science related field and 4 years of experience in the job offered or occupations in IT or computer science related field.

Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); *see* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 (Mathew Bender & Company, Inc. 2004) (available at "LexisNexis" Mathew Bender Online). Therefore, the approved ETA 750's underlying any withdrawn petitions retain potential relevance to the petitioner's total proffered wage commitments for a given year.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$1.5 million, and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on June 27, 2001, the beneficiary claimed to have worked for the petitioner since August 1999.

With the petition, the petitioner submitted its corporate tax return for 2001.

On April 14, 2003, 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, the director requested additional evidence pertinent to that ability. The director specifically noted the petitioner's low net income in 2001 as reflected on its corporate tax and requested additional evidence and information such as whether or not the beneficiary would fill a newly created position and evidence of wages actually paid to the beneficiary.

In response, the petitioner submitted a letter stating that the position is not new and has existed since 1999 and that the prior employee holding the position, [REDACTED], terminated his employment on December 30, 2000 for failing to report for duty. The petitioner stated that no one was in the position from 2001 through the date the beneficiary commenced employment in 2002. The petitioner submitted evidence of wages actually paid to [REDACTED] in 2000¹, wages actually paid to the beneficiary in 2002 with a W-2 form reflecting wages in the amount of \$12,250.09 and pay stubs for 2003; a compiled balance sheet for part of 2003; and its 2002 corporate tax return.

The director denied the petition on March 31, 2004, finding that the evidence submitted with the petition and in response to its request for evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner asserts that it has never had a loss since its inception in 1994; that its product is employee "skills" so it only hires employees as business opportunities develop and its revenues are directly related to its employees; that its total sales were \$1.696 million in 2001; that the director failed to consider that profits of \$112,000 were disbursed to the petitioner's single owner because the petitioner is structured as an S corporation in discretionary fashion; and that the petitioner has a line of credit in the amount of \$195,000

¹ Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

but has only used 25% of it for the purpose of investments and cash flow. The petitioner submits copies of W-2 forms issued by it to the beneficiary in 2003 reflecting wages paid in the amount of \$37,136.58; copies of its bank statements; an explanation of discretionary disbursements of compensation to its sole shareholder; and reviewed financial statements.

At the outset, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The unaudited financial statements submitted on appeal and in response to the director's request for evidence are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation and a review rather than an audit. A compilation is the management's representation of its financial position and is the lowest level of financial statements relative to other forms of financial statements. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the accountant's report also makes clear, financial statements produced pursuant to a compilation or review are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 2001, 2002, or 2003. The petitioner did not pay the beneficiary or a prior employee working in the proffered position in 2001. Instead, the petitioner paid partial wages in the amounts of \$12,250.09 in 2002 and \$37,136.58 in 2003, which are \$45,178.91 less than the proffered wage in 2002 and \$20,292.42 less than the proffered wage in 2003. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$57,429 per year from the priority date:

In 2001, the Form 1120S stated net income² of \$10,155.

In 2002, the Form 1120S stated net income of \$6,696.

The record of proceeding closed before the director in March 2004, which would have preceded the deadline for the petitioner's filing of its 2003 corporate tax return and thus is not included in the evidence before the AAO.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the full proffered wage in 2001 or the difference between the wage paid and the proffered wage in 2002.

If the net income the petitioner demonstrates it had available during that period, if 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. We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage³. 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.⁴ 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 the total of a corporation's end-of-year net current assets and

² Ordinary income (loss) from trade or business activities as reported on Line 21.

³ The director's figures for total assets do not match the petitioner's total assets or net current assets.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets during 2001 were \$12,867.
The petitioner's net current assets during 2002 were -\$43,819.

The petitioner's net current assets in each year are less than the full proffered wage in 2001 and less than the difference between the proffered wage and wages actually paid in 2002 and thus do not demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage or the difference between the wage paid and the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner claims that it has a line of credit available to it. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The petitioner's line of credit argument will also not be considered since the record of proceeding does not contain any corroborating evidence pertaining to its existence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner's appellate argument concerning officer compensation is compelling. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an

expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock. According to the petitioner's 2001 and 2002 corporate tax returns on Line 7 (Compensation of Officers) of the first page, [REDACTED] elected to pay himself \$100,000 and \$50,000, respectively. Quarterly wage reports submitted in response to the director's request for evidence reflect that [REDACTED] paid himself \$77,708.39 in 2000. We note here that the compensation received by the company's owner during these two years was not a fixed salary.

CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

In the present case, however, the petitioner is not suggesting that CIS examine the personal assets of the petitioner's owner, but, rather, the financial flexibility that employee-owners have in setting their salaries based on the profitability of the corporation. Although the petitioner shows that it pays substantial amounts in wages and cost of labor, those amounts are already expended, and there is no evidence that Mr. Lokula could forego his salary in order to pay the beneficiary the proffered wage. Additionally, the AAO has accessed an internal CIS database that reflects that the petitioner filed five other immigrant petitions from 2001 through 2002 that were all approved. The petitioner must show that it had sufficient income to pay all the wages at the priority date and continuing⁵. Assuming that the proffered wages in the other cases are similar to the proffered wage in the instant petition, the petitioner could not demonstrate that it could pay the beneficiary's proffered wage and the wages of its other multiple petitions from an analysis of its net income, net current assets, or from a consideration of applying Mr. Lokula's compensation.

The evidence submitted failed to establish that the petitioner has 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.

⁵ There is no evidence in the record of proceeding reflecting that the beneficiaries of those petitions have been actually paid the wages proffered to them in their immigrant visa petitions during those years.