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U.S. Citizenship
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Services

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BE

FILE:

[REDACTED]
EAC 02 261 51603

Office: VERMONT SERVICE CENTER

Date: OCT 24 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:

[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, 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 case will be dismissed.

The petitioner is an automotive repair firm. 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 asserts that the director erred in relying on the petitioner's tax returns.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$20.76 per hour, which amounts to \$43,180.80 annually. On the Form ETA 750B, signed by the beneficiary on April 11, 2001, the beneficiary claims to have worked for the petitioner since February 1998.

On Part 5 of the petition, the petitioner claims to have been established in 1978, to have a gross annual income of \$600,000, a net annual income of \$50,000, and to currently employ five workers.

In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. It shows that the petitioner files its taxes using a standard calendar year. In 2001, the petitioner reported ordinary income of -\$45,940. Schedule L of the tax return reflects that the petitioner had current assets of \$154,714 and current liabilities of \$130,398, resulting in \$24,316 in net current assets. Net current assets are the difference between the petitioner's current assets

and current liabilities and represent a measure of a petitioner's liquidity during a given period.¹ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on line(s) 1(d) through 6(d) and on line(s) 16(d) through 18(d) of Schedule L of the tax return. If a corporation's year-end 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.

With the initial petition, the petitioner also provided a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001. It shows that the petitioner paid \$26,190 in wages to the beneficiary. A letter from the petitioner's principal shareholder, [REDACTED] accompanied the initial submissions. He urges prorating the proffered salary in 2001 based on the April 16, 2001 priority date. [REDACTED] also contends that the depreciation expense should be factored back into the petitioner's available income as it was not an actual expense.

On April 28, 2003, the director requested additional evidence pertinent to the petitioner's financial ability to pay the proffered salary of \$43,180.80. He requested that the petitioner submit a copy of its 2002 federal tax return and a copy of the beneficiary's W-2 if the petitioner employed him during that year.

In response, the petitioner, through former counsel, submitted the requested items. The petitioner's 2002 federal tax return revealed that the petitioner declared -\$31,579 in ordinary income. Schedule L of the tax return indicates that the petitioner had \$187,847 in current assets and \$190,201 in current liabilities, yielding -\$2,354 in net current assets.

The beneficiary's 2002 W-2 shows that the petitioner paid \$27,016.25 in wages to the beneficiary. In addition to the 2002 documents, the petitioner submitted another letter, dated July 16, 2003, from [REDACTED] who again suggests adding back the 2002 depreciation expense to the petitioner's net income as a non-cash expense. [REDACTED] also summarizes four real property holdings and attached mortgages that he states he has owned during the time in question and asserts that they support the petitioner's ability to pay the proffered wage.

The director reviewed the information contained on the petitioner's tax returns determining that it failed to establish that the petitioner had the continuing ability to pay the proffered wage and, on September 17, 2003, denied the petition.

On appeal, counsel resubmits copies of the principal shareholder's letters to the record and contends that the director relied too much on the tax returns and failed to consider the totality of the circumstances. Citing

¹ 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.

some prior AAO decisions that employed this rationale, counsel points to the petitioner's operation of a well-known automotive franchise since 1978. She also observes that a petitioner's general motivation would be to minimize its tax liability.

Counsel also asserts that current CIS rule-making agenda reflects that the regulation at 8 C.F.R. § 204.5(g)(2) will be amended to omit specific references to an ability to pay the proffered wage and urges the approval of the petition on this basis.

At the outset, it is noted that the prescribed evidence necessary to demonstrate a petitioner's financial ability to pay a proffered wage is currently defined in 8 § C.F.R. 204.5(g)(2). If a petitioner is concerned that a federal tax return would present a less persuasive financial profile because it reveals the petitioner's desire to minimize its tax liability, then it may elect to submit an audited financial statement or an annual report. This regulation is currently in force and has not been amended. The rulemaking activity that counsel refers to is the unified agenda published semiannually. This regulatory agenda is a "semiannual summary of all current and projected rulemakings, as well as actions completed since the publication of the last regulatory agenda." See 70 Fed. Reg. 26892 (May 16, 2005). This agenda provides information about the actions of the Department of Homeland Security (DHS) and provides the public with information and opportunity to effectively participate in the Department's regulatory process. *Id.* Until the current regulation at 8 C.F.R. § 204.5(g)(2) is amended, it remains as guidance as to the evidence required to establish a petitioner's ability to pay a proffered wage.

The focus of the review of a petitioner's financial documentation is to ensure that the data supports the petitioner's obligation to pay the certified wage agreed upon in the approved labor certification. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. If a shortfall results from a comparison between a lesser salary paid and the certified wage, the petitioner may still demonstrate its ability to pay the proffered wage if the shortfall can be covered by either the petitioner's net income or net current assets. In the instant case, the W-2 submitted to the record shows that the petitioner paid the beneficiary \$26,190 in 2001. This represents a difference of \$16,990.80 when compared to the proffered wage of \$43,180.80. The petitioner's 2001 net current assets of \$24,316, however, are sufficient to demonstrate the petitioner's ability to pay the proffered salary in 2001.²

² We reject a process whereby CIS prorates the proffered wage for the portion of the year that occurred after the priority date. We will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), that is not at issue here.

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). Merely looking at gross receipts or sales is not sufficient. This figure, while important, represents only a portion of a petitioner's particular financial status. It is also necessary to examine the expenses incurred in order to generate such revenue. 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. (Original emphasis.) *Chi-Feng* at 536.

personal assets will not be considered in reviewing the petitioner's financial ability to pay the proposed wage offer of \$43,180.80. The petitioner is a corporation. 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). In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court stated, "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."

In this case, although the petitioner demonstrated sufficient net current assets to cover the difference between the actual wages paid in 2001 and the proffered wage, the figures were not favorable in the following year. In 2002, the difference between the \$27,016.25 paid to the beneficiary and the proffered wage is \$16,164.55. Neither the petitioner's net income of -\$31,579 nor its net current assets of -\$2,354 was sufficient cover this

difference. As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered salary.

Counsel cites two prior AAO cases in support of the notion that sometimes a petitioner's net income and net current assets are not indicative of its ability to pay a proffered wage. The facts of those cases are not before the AAO in the instant matter. Moreover, the cases cited by counsel are not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions.

It is noted that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), may apply in some cases where a petitioner's increasing profits support its future prospects for success and establish its ability to pay the proffered wage. In *Matter of Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the five tax returns contained in the record do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. Here, while it is recognized that the petitioner has been in business for an extended length of time, the two tax returns submitted to the record do not form a framework of profitable years. Although the petitioner's reported loss of net income lessened in 2002, its net current assets went from \$24,316 to -\$2,354. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

Based on a review of the evidence contained in the record and the argument and evidence submitted on appeal, the AAO concludes that the petitioner has failed to demonstrate its continuing financial ability to pay the proffered salary.

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.