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U.S. Citizenship
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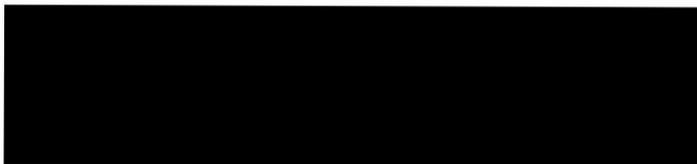
FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **DEC 19 2006**
SRC 04 142 52714

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. 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 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 May 10, 2002. The proffered wage as stated on the Form ETA 750 is \$16.00 per hour, which amounts to \$33,280 per annum. The ETA 750 B, signed by the beneficiary on April 13, 2004, indicates that the petitioner has employed the beneficiary since December 2002. The beneficiary was substituted for another beneficiary, identified as [REDACTED] on the labor certification.

The Immigrant Petition for Alien Worker (I-140) was filed on April 22, 2004. Part 5 of the I-140 indicates that the petitioner was established in 1979, employees fourteen workers, and reports a gross annual income of \$566,400.

In support of its ability to pay the beneficiary's proposed wage offer of \$33,280 per year, the petitioner initially provided a letter, dated April 12, 2004, from its accountant, [REDACTED] who affirmed that the petitioner could pay the proposed wage offer.

On December 6, 2004, the director requested additional evidence of the petitioner's continuing ability to pay the proffered wage including copies of its 2002 and 2003 federal tax returns accompanied by the corresponding Wage and Tax Statements (W-2s).

In response, the petitioner supplied copies of its Form 1120, U.S. Corporation Income Tax Return for 2001. They reflect that the petitioner files its federal tax returns using a fiscal year running from October 1st to September 30th of the following year. Thus, the 2002 and 2003 corporate returns cover a period running from October 1, 2002 to September 30, 2004. They contain the following information:

	2002	2003
Taxable Income before the net		
operating loss (NOL) deduction	-\$ 7,133	-\$ 180,762
Current Assets (Sched. L)	\$ 40,142	\$ 23,125
Current Liabilities (Sched. L)	\$ 140,634	\$140,988
Net current assets	-\$ 100,492	-\$117,863

As noted above, 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, CIS will examine a petitioner's net current assets as a readily available cash or cash equivalent resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). 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.

The petitioner additionally provided copies of the employees' W-2s for 2002 and 2003. They include the beneficiary's W-2s. She received \$480 in wages in 2002 and \$27,596.35 in wages in 2003. Also provided is a copy of an internal document, dated February 28, 2005, labeled as the petitioner's "accounts receivable," as well as a copy of a document, dated February 28, 2005, and labeled "net worth." Counsel's transmittal letter, submitted with the response, indicates that this is the owner's net worth and that the accounts receivable total of \$89,363.89 is sufficient to cover the proffered wage. He further cites figures representing the beginning of the year total assets as shown on Schedule L of the petitioner's 2002 and 2003 tax returns. Counsel additionally mentions the provision of a copy of the beneficiary's "unofficial" W-2 issued to the beneficiary for 2004, but this document is not contained in the materials submitted.

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.

The director denied the petition on April 6, 2005, determining that the petitioner's continuing ability to pay the proffered salary had not been established based on the information already provided.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage and provides copies of financial statements, prepared by the petitioner's accountants, covering the petitioner's financial position as of the end of September 30, 2001 and the end of September 30, 2002. They are in the form of compilations. Also supplied is an accountant's compilation of the petitioner's president, (and spouse) financial position as of April 15, 2005. Counsel additionally provides another letter, dated June 27, 2005, from , who cites the \$224,135 in cumulative wages paid by the petitioner in 2004 and notes that , the petitioner's owner, could pay the proffered salary out of his personal assets if necessary.

A letter from is also provided. He states that the petitioner has been able to pay other dental technicians the prevailing wage on form ETA 750 the time the ETA 750 was filed. However, "we weren't required by law to pay [the beneficiary] the ETA-750 any fixed wage when she was here on J-1 status." He emphasizes that two full-time dental technicians were employed with the petitioner at the time the beneficiary began working in December 2002, but quit shortly a few weeks after the beneficiary started. affirms that the petitioner can and will pay the prevailing wage as set forth on the ETA 750.

In reviewing a 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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record indicates that the petitioner has employed and paid wages to the beneficiary in 2002 and 2003 in the amounts of \$480 and \$27,596.35, respectively. It represents a shortfall of \$32,800 in 2002 and \$5,683.65 in 2003.

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. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)).

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as set forth above.

In this case, while it is noted that the fiscal year(s) covered by the corporate tax returns do not exactly correspond it is clear that the negative balances reflected as the petitioner's net income and net current assets on both the 2002 and 2003 tax returns could not cover any shortfalls occurring during the periods covered.

Relevant to the compilations provided covering the petitioner's financial condition as of September 30, 2002, it is noted that according to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage during a given period, those statements must be audited. A compilation is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). It is restricted to information based upon the representations of management. *See Barron's Accounting Handbook*, 37071 (3rd ed. 2000). This disclaimer is usually found at the beginning of a compilation where the accountant explains that no form of assurance or opinion can be expressed based on the figures presented. As such, the compiled income statement for the period ending September 30, 2002, cannot be considered as determinative of the petitioner's ability to pay a proffered salary.

It is noted that the petitioner's owner's individual assets will not be considered as part of the evaluation of the petitioner's ability to pay the proffered wage. The named petitioner on the preference petition is a corporation and must individually establish that it has had the continuing ability to pay the proffered wage. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, 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." Similarly, the financial information presented on the other corporation's tax returns cannot be included in the consideration of the petitioning corporation's individual ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, 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.

That said, [REDACTED]'s letter submitted on appeal suggests that the petitioner had the ability to pay the two dental technicians who left the petitioner's employment shortly after the beneficiary began her employment. It is not specifically alleged that the beneficiary was the intended replacement for one of these individuals. It is also not clear if [REDACTED] was the beneficiary for which the current alien is proposed as a substitute on the labor certification, is the same person as [REDACTED] mentioned as one of the petitioner's employees. In this case where the tax returns reflect all negative figures as net income and net current assets, if an assertion that the beneficiary was hired in 2002 as an intended replacement for a specific employee is made, then the evidence should clearly establish the identity, salary, position, and dates of employment of the replaced employee.

In summary, based on the evidence contained in the underlying record, as well as the evidence and argument submitted on appeal, it can be concluded that the petitioner failed to establish its continuing ability to pay the proffered wage as of the visa 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.