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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

BE

PUBLIC COPY

[REDACTED]

FILE: [REDACTED]
SRC 04 033 50661

Office: TEXAS SERVICE CENTER Date: **MAY 23 2006**

IN RE: Petitioner:
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 Director, Texas Service Center, denied the instant preference visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a manager. 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 21, 2001. The proffered wage as stated on the Form ETA 750 is \$35,000 per year.

On the petition, the petitioner stated that it was established during 1997 and that it employs eight workers. The petition states that the petitioner's gross annual income is \$627,694. The space reserved for the petitioner to report its net annual income was left blank. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Jacinto City, Texas.

In support of the petition, counsel submitted what purports to be the first page of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, and the first two pages of its 2002 return. Those pages of those returns show that the petitioner is a corporation, that it incorporated on July 15, 1997, and that it reports taxes pursuant to the calendar year and accrual convention accounting.

On the 2001 return the petitioner reported ordinary income of \$23,649. Because the corresponding Schedule L was not submitted the petitioner's end-of-year net current assets could not be calculated.

On the 2002 return the petitioner reported ordinary income of \$48,267. Because the corresponding Schedule L was not submitted the petitioner's end-of-year net current assets could not be calculated.

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 September 10, 2004, denied the petition.

On appeal, counsel submits (1) the complete 2001 and 2002 Form 1120S, U.S. Income Tax Return for an S Corporation of the petitioner, Vimjee Incorporated, (2) a compiled income statement¹ showing the income and expenses of Vimjee for December 2001 and for the entire year, (3) a compiled income statement showing the income and expenses of Vimjee Incorporated during August of 2004 and during the eight months ending August 31, 2004, (4) the joint 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse, (5) a letter dated October 5, 2004 from the petitioner's accountant, and (6) a brief.

The petitioner's complete 2001 and 2002 tax returns include corresponding Schedules L showing that at the end of those years the petitioner's current liabilities exceeded its current assets.

The accountant's October 5, 2004 letter states that the petitioner "has annually paid the beneficiary employee's salary since 2001, and has the capability of paying same annual salary of \$35,000 in the future. The accountant did not state the basis of those statements or provide any documentation in support of them.

The 2001 and 2002 personal tax returns show that the petitioner's owner and owner's spouse had four dependents during both of those years. Those returns also contain Schedules C showing the petitioner's² receipts and expenses during those years.

In his brief counsel argues that the director erred in not considering the petitioner's net current assets.³ Counsel further states that a subchapter S corporation, such as the petitioner in this case, "is treated for tax

¹ Although the accountant's report, which should always accompany the financial statement whenever it is presented for any purpose, was not submitted, the financial statement itself indicates that it was prepared pursuant to a compilation rather than an audit.

² The petitioner is Vimjee Incorporated dba Village Pizza and Seafood, which does business at 11033 Market Street in Jacinto City, Texas. The Schedules C are for Village Pizza and Seafood. Although the petitioner's owner did not provide the address of that entity in the space provided on the Schedule C for that purpose, the similarity in the receipts, expenses, and net income shown for the petitioner on the 2001 Form 1120, U.S. Corporation Income Tax Returns and that shown for Village Pizza and Seafood on the Schedules C suggests that the entity allegedly reporting on the Form 1120 and the entity allegedly reporting on the Schedule C are the same entity. The only other possibility apparent to this office is that the petitioner's owner owns a corporation and a separate sole proprietorship with the same name and very similar finances. In that event, either the corporate tax return or the Schedule C, whichever does not pertain to the instant petitioner, is not directly relevant.

³ When the decision of denial was issued the record contained no evidence from which the petitioner's net current assets could be calculated.

purposes as a sole proprietorship” and that the petitioner’s owner’s personal income and assets should therefore be included in the determination of the petitioner’s ability to pay the proffered wage.

Counsel cites the petitioner’s net worth and its total wage expense as indices of its ability to pay additional wages. Counsel asserts that the Schedules C included with the petitioner’s owner’s Form 1040 U.S. Individual Income Tax Return shows the petitioner’s receipts and expenses, but does not explain why the petitioner would file both a Schedule C and a Form 1120S, U.S. Income Tax Return for an S Corporation.

Counsel cites a May 4, 2004 memorandum from the Associate Director for Operations for the proposition that a petitioner may show its ability to pay the proffered wage with its net current assets, and notes that the petitioner’s current assets, as shown on its unaudited financial statements, exceed the annual amount of the proffered wage.

A fundamental discrepancy is apparent in the evidence submitted. The Form 1120S, U.S. Income Tax Returns for an S Corporation submitted suggests that the petitioner is a Subchapter S corporation. The petitioner submitted what purport to be its 2001 and 2002 corporate tax returns. The petitioner also submitted what purport to be the petitioner’s owner’s Form 1040 U.S. Individual Income Tax Returns for the same years, including Schedules C purporting to show the petitioner’s receipts and expenses, and which counsel asserts show the petitioner’s income and expenses.

Schedule C is used by entities with no obligation to file their own tax return. Only entities with no obligation to file any other form of income tax return are able to report taxes on a Schedule C.⁴ A corporation never reports receipts and expenses on a Schedule C. Further, and in any event, a corporation would not report its receipts and expenses on two different tax forms. Although it would flow through untaxed to its owner or owners’ personal tax returns,⁵ activity from a Form 1120S, U.S. Income Tax Return for an S Corporation would never be carried over to a Schedule C.

At least one of the tax returns that purport to show the petitioner’s revenue and its expenses is not a legitimate tax return or does not pertain to the petitioner. 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).

Counsel is incorrect that an S corporation and a sole proprietorship⁶ are treated the same for income tax purposes⁷ and, in any event, their income tax treatment would not be dispositive of the issue of the petitioner’s continuing ability to pay the proffered wage beginning on the priority date.

⁴ This would generally be a sole proprietorship, although single owner limited liability companies may report on a Schedule C.

⁵ Most of the activity would be flow through to the owner or owners’ Schedule E.

⁶ That an S corporation is obliged to file its own return, separate from that of its owner or owners, is one example of a difference for tax purposes between an S corporation and a sole proprietorship.

The issue is not whether income from the entity flows untaxed to the tax return of its owner or owners, but whether the owner or owners are legally obliged to pay the entity's debts and obligations. The owner of a sole proprietorship is so obliged, and the sole proprietor's personal income and assets are correctly considered in determining the company's ability to pay the proffered wage. Similarly, the general partners of a partnership are obliged to pay the entity's debts and obligations, and their personal income and assets are correctly a consideration.

The petitioner, however, is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders.⁸ *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). 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 with 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 owner shall not be further considered.

Counsel's citation of the petitioner's gross receipts and its total wage expense as indices of the petitioner's ability to pay additional wages is unconvincing. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁹ or otherwise increased its net income,¹⁰ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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.

Counsel's reliance on the unaudited financial statements submitted is misplaced. 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. The financial statements state that they were produced pursuant to a compilation rather than an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form.¹¹ The unsupported

⁷ The similarity that counsel is apparently relying on in making this statement is the flow-through treatment of the revenue and expenses of an S corporation. That similarity is not germane to any issue before this office.

⁸ Notwithstanding that the activity of an S corporation flows untaxed to its owner or owners.

⁹ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

¹⁰ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

¹¹ If the accountant's reports had accompanied those financial statements, as they are required to whenever the report is

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, 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 beneficiary did not claim, on the Form ETA 750B, to have worked for the petitioner.¹² Subsequently, the petitioner submitted a letter from its accountant stating that the petitioner has employed the beneficiary since 2001 and paid him \$35,000 during each of the ensuing years. No Form W-2 Wage and Tax Statements or any other form of contemporaneous evidence was submitted to support that assertion. Especially in view of the contradictory evidence previously submitted this office finds that the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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).

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.¹³ Only the petitioner's current assets, the petitioner's year-end cash and those assets expected to be consumed or 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.

presented for any purpose, they would have made clear that the accountant expressed no assurance that the figures on those financial statements are accurate.

¹² The instructions to the Form ETA 750B required the beneficiary to "list all jobs held during the past three years" and to "list any other jobs related to" the proffered position. The assertion that the petitioner was employing the beneficiary in the proffered position on July 8, 2002, the date of the beneficiary signed that form, is directly contradicted by the beneficiary.

¹³ This is the reason that counsel's citation of the petitioner's net worth as an index of its ability to pay the proffered wage is unconvincing.

The proffered wage is \$35,000 per year. The priority date is March 21, 2001

During 2001 the petitioner reported ordinary income of \$23,649. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no other reliable evidence in support of its ability to pay the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2001.

During 2002 the petitioner reported ordinary income of \$48,267. That amount is sufficient to pay the proffered wage. Ordinarily that would be sufficient to show the petitioner's ability to pay the proffered wage during 2002. In view of the contradictory evidence submitted in this case, however, this office declines to find the petitioner's 2002 tax return to be reliable evidence. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. 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.