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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **SEP 06 2006**  
EAC-04-116-50075

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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: 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, Chief  
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 a construction and restoration company. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 4, 2004 decision denying the petition, the single issue on appeal is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$85,134.00 per year.

The AAO reviews appeals on a *de novo* basis. *See Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and no new evidence. The petitioner also submits duplicate copies of tax returns of the petitioner which had been submitted prior to the decision of the director.

Relevant evidence in the record includes copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002; copies of Form 1120S U.S. Income Tax Return for an S Corporation of [REDACTED], for 2001 and 2002; copies of New York State income tax returns corresponding to each of the foregoing federal income tax returns; copies of Form 941 Employer's Quarterly Federal Tax Returns of the petitioner for the second, third and fourth quarters of 2003; a letter dated March 1, 2004 from the petitioner's president; a letter dated March 2, 2004 from a certified public accounting firm; a copy of an academic equivalency evaluation for the beneficiary; copies of educational documents of the beneficiary; copies of checks drawn on an account of a plumbing business owned by the beneficiary; and a copy of a bank statement dated January 18, 2001 for an account of the beneficiary.

On appeal, the petitioner states that the petitioner was organized in 2001 as an S corporation and that because its income passes through to its owners for income tax purposes, the accounting categories of net income and net current assets are not suitable as the bases for analysis of the petitioner's ability to pay the proffered wage. The petitioner states that in 2001 the petitioner had substantial total assets, sales and gross profits, and paid substantial amounts in salaries and wages to over 35 employees. The petitioner also states that non-cash expenses, including depreciation, should be considered as additional financial resources of the petitioner. The petitioner also states that compensation for the petitioner's president in the amount of \$22,000.00 in 2001 was not a required payment. The petitioner states that in the following years the petitioner also had strong financial figures more than sufficient to pay the proffered wage.

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 June 26, 2003, the beneficiary did not claim to have worked for the petitioner and not other evidence in the record indicates that the beneficiary has worked for the petitioner.

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 ETA 750 application for labor certification was filed under the name [REDACTED]. The I-140 petition was filed under the name [REDACTED]. The record contains a letter dated March 1, 2004 from the petitioner’s president which states that [REDACTED] changed its name to [REDACTED] but that all assets and liabilities remain the same. The record also contains a letter from a certified public accounting firm which states that all assets and liabilities of [REDACTED], now belong to [REDACTED].

For the purpose of analysis of the petitioner’s ability to pay the proffered wage it will be assumed that the petitioner, [REDACTED], is a successor in interest to [REDACTED]. The issue of whether the evidence establishes that the petitioner is a successor in interest to [REDACTED], will be discussed below.

The record contains copies of Form 1120S U.S. Income Tax Returns for an S Corporation of [REDACTED] for 2001 and 2002. The record also contains copies of the Form 1120 U.S. Corporation Income Tax Return for 2002 of the petitioner, [REDACTED].

The I-140 petition was submitted on March 8, 2004. As of that date, the petitioner’s Form 1120 tax return for 2003 was not yet due, therefore its Form 1120 tax return for 2002 was the most recent return then available.

For a regular 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.

For an S corporation, where the corporation’s income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s Form 1120S. Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. *See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.* Similarly, some deductions appear only on the Schedule K. *See Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>; Internal Revenue Service, Instructions for Form 1120S (2003), at 22, available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>.*

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Line 23 of the Schedule K, for income.

In the instant petition, the Form 1120S of [REDACTED], shows no additional income or additional relevant deductions on the Schedule K. Therefore, for 2001 the corporation’s figures for ordinary income and for income on Schedule K, Line 23 are the same. For 2002, the Form 1120S tax return for [REDACTED] indicates additional relevant deductions on Schedule K. For this reason, the net income of [REDACTED], in 2002 must be considered as the figure on Line 23 of the Schedule K, for income.

The amounts on line 23 Schedule K of the Form 1120S tax returns of [REDACTED], are shown in the table below. Also shown in the table are the taxable income on line 28 of the petitioner’s Form 1120 tax return for 2002 and the combined total net income in 2002 of [REDACTED], and the petitioner.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001 [1120S]	\$(5,242.00)	\$85,134.00*	\$(90,376.00)
2002 [1120S]	\$(6,825.00)		
2002 [1120]	\$(18,519.00)		
2002 [total]	\$(22,779.00)	\$85,134.00*	\$(107,913.00)

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

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

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 tax returns of [REDACTED], and the tax return of the petitioner yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001 [1120S]	\$(187,037.00)	\$85,134.00*	\$(272,171.00)
2002 [1120S]	\$(195,793.00)		
2002 [1120]	\$(27,075.00)		
2002 [total]	\$(245,971.00)	\$85,134.00*	\$(331,105.00)

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

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

The record also contains copies of New York State tax returns which correspond to the federal income tax returns in the record. Those returns contain no significant relevant information beyond the information in the federal income tax returns discussed above.

The petitioner states that the petitioner was organized in 2001 as an S corporation and that because its income passes through to its owners for income tax purposes, the accounting categories of net income and net current assets are not suitable as the bases for analysis of the petitioner's ability to pay the proffered wage. Nonetheless, the fact that income of an S corporation is deemed to be income of the petitioner's shareholder

or shareholders for federal income tax purposes does not change the fact that an S corporation is an independent legal entity. Any income earned by an S corporation remains the property of the corporation unless actual transfers are made to the shareholder or shareholders, such as through payments for compensation of officers. Therefore it is appropriate to base an analysis of the petitioner's ability to pay the proffered wage on the petitioner's net income and on its net current assets.

The petitioner asserts that non-cash expenses, including depreciation, should be considered as additional financial resources of the petitioner. 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>.

For the foregoing reason, 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.

The petitioner states that compensation paid to the petitioner's president in 2001 should be considered as additional financial resources of the petitioner, since that compensation was not a required payment. The Form 1120S of [REDACTED] for 2001 shows expenses for compensation of officers in the amount of \$22,000.00. The Schedule K-1 attached to that Form 1120S shows that the corporation's president was the corporation's sole shareholder that year. In certain circumstances it may be appropriate to consider officer compensation to a sole shareholder as additional financial resources of the petitioner. 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.

Nonetheless, in the instant petition, even if the \$22,000.00 paid in compensation in 2001 to the president of [REDACTED], was considered as additional income available to the petitioner for other expenses, the amount of officer compensation paid that year was far short of the amount which would have been needed to allow the petitioner to pay the proffered wage of \$85,134.00, since paying the full proffered wage that year would still have left the petitioner with a large deficit in net income, in the amount of -\$68,376.00. Moreover, for the year 2002, the tax returns in the record show no amounts paid for officer compensation either by [REDACTED] c., or by the petitioner. Therefore, even if officer compensation is considered as additional income of the [REDACTED], or of the petitioner, the net income figures still fail to establish the petitioner's ability to pay the proffered wage during either of the years at issue in the instant petition.

The petitioner also states that in 2001 the petitioner had substantial total assets, sales and gross profits, and paid substantial amounts in salaries and wages to over 35 employees. Concerning the petitioner's total assets, CIS does not rely on total assets, but only on current assets, as discussed above. Moreover, current liabilities must also be considered in order to ascertain whether any of the petitioner's current assets may be considered to be available to pay the proffered wage in a given year.

Concerning the petitioner's total sales and gross profits, the Form 1120S tax returns of [REDACTED] show gross receipts in 2001 of \$6,323,989.00 and total income of \$1,535,020 that year, and gross receipts in 2002 of \$2,153,201.00 and total income that year of \$732,104.00. The Form 1120 tax return of the petitioner shows gross receipts in 2002 of \$243,708.00 and total income that year of \$96,165.00. Although the figures

for the two corporations indicate that the petitioning business has had substantial cash flows, the returns show large expense deductions, resulting in the negative net income figures on each return which are discussed above.

The record contains copies of Form 941 Employer's Quarterly Federal Tax Returns of the petitioner for the second, third and fourth quarters of 2003. Those returns show total wages, tips and other compensation paid in the amounts of \$86,353,83 in the second quarter, \$174,442.35 in the third quarter and \$146,440.09 in the fourth quarter. Although those compensation payments are significant, the beneficiary's proffered wage of \$85,134.00 would be a significant additional expense to a payroll level of the size indicated by the petitioner's Form 941 returns.

For the foregoing reasons, the figures for total sales, total income, and payroll expenses of [REDACTED] Inc., and the petitioner fail to establish the petitioner's ability to pay the proffered wage in either of the years at issue in the instant petition.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, 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 relevant net income figures for 2001 and 2002. The director correctly calculated the year-end net current assets of [REDACTED], for 2001. However, in calculating the combined net current assets figure for [REDACTED], and the petitioner for 2002, the director found that current liabilities exceeded current assets by \$222,268.00, though the correct figure is \$245,971.00. The director found that the net income figures and net current assets figures failed to establish the petitioner's ability to pay the proffered wage in those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of the petitioner on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the evidence in the record fails to establish that the petitioner is in fact a successor in interest to [REDACTED], the corporation which filed the ETA 750 application for labor certification. Although the petitioner's president states in a letter dated March 1, 2004 that [REDACTED] Inc., changed its name to [REDACTED], the tax returns in the record show that Plaza [REDACTED], and [REDACTED], are two separate corporations. The addresses on the tax returns of the two corporations are different, showing an address in Brooklyn, New York, on the Form 1120S tax returns of [REDACTED], and an address in Scarsdale, New York, on the Form 1120 tax return of [REDACTED]. The employer identification number on the Form 1120S tax returns of [REDACTED] is a number ending in the three digits [REDACTED], while the employer number on the Form 1120 tax return of [REDACTED] is a number ending in the three digits [REDACTED]. The IRS tax number of the petitioner as shown on the I-140 petition is the latter number, ending in the three digits [REDACTED].

The Form 1120S tax returns of [REDACTED] show the date of election as an S corporation as January 15, 1998. The Form 1120S tax return of [REDACTED] for 2002 is not marked as a final return, as would be appropriate if that corporation ceased doing business in 2002. The Form 1120 tax return of [REDACTED], is for a C corporation and the return states the corporation's date of incorporation as January 27, 1999, a date which shows that that corporation already existed in 2001 when [REDACTED], submitted the ETA 750 application for labor certification.

For the foregoing reasons, the statement of the petitioner's president in his March 1, 2004 letter that the petitioner simply changed its name is inconsistent with the information on the tax returns in the record.

The record also contains a letter dated March 2, 2004 from a certified public accounting firm. That letter states in relevant part as follows:

Please be advised that [REDACTED] is an ongoing business venture that formally [sic] was known as [REDACTED]

Note that all liabilities and assets of [REDACTED] has been assured [sic] and belonged now [sic] to [REDACTED]. Also please note that our address is the same.

(Letter from certified public accounting firm, March 2, 2004)

The letter is on the letterhead of firm named [REDACTED] of Great Neck, New York. The letterhead refers to the firm as Certified Public Accountants. The letter bears the signature of no individual. Rather, the closing of the letter contains only the typed firm name and the words "Certified Public Accountants." Above the firm name in the space where a signature would normally appear are the handwritten words "[REDACTED]"

The letter contains several grammatical errors. It uses the word "formally" where the apparent intended word is "formerly." The second sentence has a plural subject, "all liabilities and assets," but a singular verb form, "has been assured."

For the foregoing reasons, the March 2, 2004 letter is not considered as credible evidence. The internal errors indicate that it was not written by a certified public accountant. Moreover, in asserting that [REDACTED] was formerly known as [REDACTED], the letter is inconsistent with the tax returns in the record, which, as discussed above, show that names refer to two separate corporations.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the inconsistencies in the evidence noted above.

To qualify a petitioner as a successor in interest requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The evidence fails to establish that the petitioner [REDACTED], is a successor in interest to [REDACTED] Inc., the corporation which filed the ETA 750 Application for Alien Employment Certification.

Any future motion pertaining to this petition should document the relationship between the two entities, [REDACTED], and the petitioner, [REDACTED], including evidence pertaining to the matters discussed above.

In summary, even assuming the existence of a successor in interest relationship, the evidence 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. Moreover, beyond the decision of the director, the evidence in the record fails to establish that the petitioner is a successor in interest to the corporation which filed the ETA 750 application for labor certification.

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.