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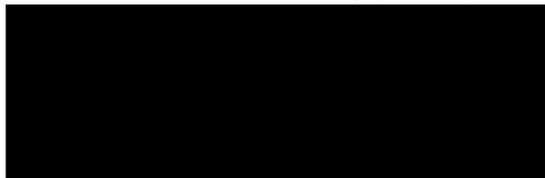
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC 06 014 53396 Office: VERMONT SERVICE CENTER Date: APR 09 2007

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: 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 an optical sales firm. It seeks to employ the beneficiary permanently in the United States as an optical assistant manager. As required by statute, Form ETA 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits further evidence and contends that it has demonstrated its continuing financial ability to pay the proffered wage.

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 filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, ETA Form 9089 was accepted for processing on September 5, 2005. The proffered wage as stated on ETA Form 9089 is \$16.44 per hour, which amounts to \$34,195.20 per year. On Part K of ETA Form 9089, accompanying the petition, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the preference petition, the petitioner claims to have been established on December 28, 2004,¹ to have a gross annual income of \$650,000, a net annual income of \$50,000 and to currently employ six workers.

In support of its ability to pay the proffered salary and in response to the director's request for evidence, the petitioner provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2004. It indicates that the petitioner files its taxes using a standard calendar year. The return contains the following information relevant to the petitioner's income, compensation paid to employees, and current assets and liabilities:

¹ Other information in the record indicates that the business has been operating as a franchise location since December 1994.

Ordinary Income ²	\$12,976
Current Assets (Sched. L)	\$37,045
Current Liabilities (Sched. L)	\$ 78,132
Net current assets	-\$ 41,087

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage.³ Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown 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 also provided a financial report consisting of reviewed but unaudited financial statements for 2004. Also provided is a 2003 Wage and Tax Statement (W-2) issued by the petitioner to an employee [REDACTED] who is identified as someone that the beneficiary would replace. [REDACTED] earned \$21,145.50 in 2003.

On May 22, 2006, the director denied the petition, concluding that neither the petitioner's reported net income nor its net current assets could support the payment of a proposed wage offer of \$34,195.20 per year. The director also noted that [REDACTED]'s earnings represented compensation paid in 2003 and not in the year of filing (2005) and further represented substantially less than the proffered wage.

On June 22, 2006, the petitioner filed an appeal from the director's decision of May 22, 2006.⁴ The petitioner asserts that the director failed to appreciate that the petitioner is a subchapter S corporation and that pursuant to the accountant's financial report for 2004, it showed a net profit of \$155,132 including the addition of officer's compensation of \$103,815 and depreciation of \$38,341. The petitioner resubmits the 2004 financial report and additionally provides a financial report for 2005.

The petitioner's contentions are not persuasive. Regarding the documentation submitted to the record consisting of unaudited, reviewed financial statements, it is noted that such financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. As noted by the accountant's letter accompanying these reports, a review is substantially less in scope than an audit, and is based upon an analysis of the

² For the purpose of this review, ordinary income will be treated as net income.

³ 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.

⁴ The petitioner also filed a motion to reconsider or reopen the director's decision on July 10, 2006. On August 7, 2006, this motion was dismissed as untimely by the director.

information provided by company personnel. As these reports are not audited as required by the 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during the period represented, nor would they be accepted as a substitute in lieu of federal income tax returns for the relevant year.

It is noted that wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of [REDACTED] involved the same duties as those set forth in the Form ETA 9089. If that employee performed other kinds of work, then the beneficiary could not have replaced her. Finally as noted by the director, her wages of \$21,145.50 were substantially less than the proffered wage of \$34,195.20. Similarly, officer compensation represents compensation to individuals who materially participate in the business. Many of the duties performed by an officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. It is also noted that none of the officers of this corporation have been identified by any of the documentation provided. The petitioner cites no legal authority in support of its contention in that such compensation should be automatically added back to the petitioner's net income.

It is further noted that 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." 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.

In determining a petitioner's ability to pay a certified wage, CIS will examine whether a petitioner may have employed and paid wages to a beneficiary during a given period. If a petitioner establishes by credible 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 either the petitioner's net taxable income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, no evidence has been submitted to establish that the petitioner employed and paid wages to the beneficiary.

CIS will then examine the net taxable income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. As noted above, it will also review a petitioner's current assets and current liabilities as reflected on Schedule L of the tax return as an alternative method of determining a petitioner's ability to pay the proffered wage. 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). 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. Similarly, depreciation will not be added back to a petitioner's net taxable income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, 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.

As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources. 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, a 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.

In this case, the petitioner's 2004 tax return reveals that neither its \$12,976 in ordinary income, nor its -\$41,087 in net current assets could support payment of the proposed wage offer of \$34,195.20 or establish its ability to pay during this period. The petitioner did not provide probative evidence of its ability to pay the certified wage for 2005, consisting of either a federal tax return, an *audited* financial statement, or an annual report. Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition.

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.