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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
SRC 06 132 50531

Office: TEXAS SERVICE CENTER Date:

**JUL 31 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:



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

The petitioner is an automobile insurance agency. It seeks to employ the beneficiary permanently in the United States as a secretary. 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$30,202 per year.

The Form I-140 petition in this matter was submitted on March 22, 2006. On the petition, the petitioner stated that it was established during 2000 and that it employs three workers. The petition states that the petitioner's gross annual income is \$160,000 and that its net annual income is \$54,000.<sup>1</sup> On the Form ETA 750, Part B the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Houston, Texas.

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<sup>1</sup> The tax returns and other evidence provided do not support that estimate of net income.

The AAO reviews *de novo* issues raised on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup>

In the instant case the record contains (1) the petitioner's 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) the petitioner's unaudited 2001, 2002, 2003, and 2004 income statements, (3) the petitioner's unaudited 2000, 2001, 2002, 2003, and 2004 balance sheets, and (4) the petitioner's owner's unaudited 2003, 2004, and 2005 statements of assets and liabilities (balance sheets). The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on April 10, 2000, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2001 the petitioner declared a loss of \$22,514 as its ordinary income. On the corresponding Schedule L the petitioner listed current assets of \$297 and no current liabilities, which yields net current assets of \$297.

During 2002 the petitioner declared a loss of \$9,809 as its ordinary income. On the corresponding Schedule L the petitioner listed current assets of \$2,142 and current liabilities of \$800, which yields net current assets of \$1,342.

During 2003 the petitioner declared a loss of \$14,522 as its ordinary income. On the corresponding Schedule L the petitioner listed current assets of \$758 and no current liabilities, which yields net current assets of \$758.

During 2004 the petitioner declared ordinary business income of \$7,638. On the corresponding Schedule L the petitioner listed no current assets and no current liabilities, which yields no net current assets.

The director denied the petition on March 28, 2006.

On appeal, counsel cited the amount of the petitioner's depreciation deductions and its Schedule L, Line 23, Additional Paid-in Capital (APIC) as funds available to pay additional wages.

Counsel further stated that the petitioner's owner's bank balance at the end of 2004 was over \$41,000, but, other than the petitioner's owner's unaudited balance sheet, offered no evidence in support of that assertion.

Finally counsel stated,

While [CIS] correctly states that [the petitioner] has significant liability, this liability was, in fact, for a long term capital lease on equipment. Since the expenses of the lease are amortized over a term of several years, the Petitioner's financial condition is not nearly as

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

poor as the Service Center would have us believe. Long term leases/contracts are typical of any business, and the Service Center should know full well that factoring this issue into a financial statement presents and inaccurate and gross distortion of the true financial picture.

Contrary to counsel's assertion, the service center did not comment on the petitioner's long-term debt. The decision of the service center discussed the petitioner's net profits and its net current assets. Neither of those financial statistics involves the petitioner's long-term liabilities, including those for long-term equipment leases, even peripherally. This office will not further address counsel's point pertinent to the petitioner's long-term debt.

Counsel's reliance on unaudited financial records 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

Some of the unaudited balance sheets pertain to the petitioner's owner's personal assets and liabilities and were provided to demonstrate the petitioner's owner's own net worth. Those balance sheets are unreliable for the same reason that the petitioner's unaudited financial statements are unreliable, that is, because they are unsupported assertions. In addition, however, the petitioner's owner's personal wealth, even if reliably demonstrated, is irrelevant to the determination of the petitioner's ability to pay additional wages.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), 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 with no legal obligation to pay the wage."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel cited the petitioner's owner's bank balance as an index of the ability of the petitioner to pay the proffered wage. The amount in the petitioner's owner's bank account, even if it were reliably demonstrated, and even if it were shown to be available to the petitioner, could not typically demonstrate the petitioner's ability to pay additional wages.

First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8

C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.<sup>3</sup>

Although counsel did not provide any concrete argument for including the petitioner's APIC in the calculations pertinent to the petitioner's ability to pay additional wages, this office will address the abstract assertion that its inclusion is appropriate.

APIC is the amount in excess of par value that was paid to the petitioner for its stock. APIC is not an asset, but a counterbalancing entry on the petitioner's balance sheet that indicates that the source of a given asset, often cash,<sup>4</sup> was a stock sale at a price greater than par value. In the determination of the funds available to the petitioner, whether the petitioner still has that cash is relevant, but where it initially came from is not. The petitioner's cash on hand will be considered in the context of calculating its net current assets, which calculation is detailed below. Capital stock and APIC have no place in that equation.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to 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 are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

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<sup>3</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

<sup>4</sup> The petitioner's APIC may have counterbalanced an asset, current or non-current, other than cash. For instance, a sale of stock in a small company may also be paid for with a pledge. The petitioner's APIC may have never counterbalanced any liquid asset.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>5</sup> Counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered 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 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 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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. 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.

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

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<sup>5</sup> Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

beneficiary during that 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. 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 minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>6</sup> shown on lines 16(d) through 18(d). 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.

The proffered wage is \$30,202 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit. At the end of that year the petitioner had net current assets of \$297. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to the petitioner during that year with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit. At the end of that year the petitioner had net current assets of \$1,342. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to the petitioner during that year with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit. At the end of that year the petitioner had net current assets of \$758. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to the petitioner during that year with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared ordinary business income of \$7,638. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had no net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to the petitioner

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<sup>6</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

during that year with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on March 22, 2006. Absent an extension, the petitioner's 2005 tax return was due on March 15, 2006. That return should have been available when the petition was submitted. The petitioner did not submit that return or any other evidence pertinent to its ability to pay the proffered wage during 2005. The petitioner failed to demonstrate its ability to pay the proffered wage during 2005.

When the petition was submitted the petitioner's 2006 tax return was unavailable. That tax return was never subsequently requested, nor was other evidence of its ability to pay the proffered wage during 2006. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, 2004, and 2005. 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.