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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: AUG 23 2005

IN RE: Petitioner: [REDACTED]
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:



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, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a hotel front office 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$47,230 per year.

On the petition, the petitioner stated that it was established on January 1, 1999 and that it employs 18 workers. The petition states that the petitioner's gross annual income is \$1,281,735 and that its net annual income is \$60,596.¹ On the Form ETA 750B, 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 Medina, Ohio.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1065, U.S. Return of Partnership Income. That return shows that the petitioner declared a loss of \$60,596 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$68,808 and current liabilities of \$7,600, which yields net current assets of \$61,208.

¹ The petitioner apparently intended to state that its net annual income was a loss, rather than a profit, in that amount.

Counsel submitted a letter, dated May 13, 2003 in which he notes that the petitioner's 2001 depreciation deduction exceeds its net loss for that year by \$165,987. Counsel characterized that amount as the petitioner's net income.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on September 16, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested a copy of the petitioner's 2002 tax return and that, if the petitioner employed the beneficiary during 2001 or 2002, that it provide the Form W-2 Wage and Tax Statements showing wages it paid to her.

In response, counsel submitted (1) two pages of the petitioner's 2002 Form 1065, U.S. Return of Partnership Income, (2) a letter, dated September 25, 2003, from the petitioner's accountant, (3) the petitioner's compiled profit and loss statements for 2001 and 2002, and (4) copies of monthly statements pertinent to the petitioner's bank account. The petitioner provided no W-2 forms.

The portions provided of the petitioner's 2002 tax return show that during that year the petitioner declared ordinary income of \$135,977. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$205,886 and current liabilities of \$7,600, which yields net current assets of \$198,286.

The accountant's letter notes, as counsel did previously, that the petitioner's 2001 depreciation deduction exceeded its loss for the year. From that difference, the accountant subtracted the petitioner's "total principal sum." The accountant characterized the remainder as the petitioner's net income.

The accountant performed the same calculations pertinent to 2002, and noted that, again, based on that formula, the petitioner had a positive net income. The accountant also stated, "It should be noted that in this industry, traditionally the ramp up period is no less than 3 years."

The director found 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 March 22, 2004, denied the petition.

On appeal, counsel argues that the petitioner's average cash balance from its bank account, its depreciation and amortization deductions, and its owner's assets should also be considered funds available to pay the proffered wage. Counsel also argued that the petitioner's owner's equity in the business could be used as collateral for a loan, and that the loan the petitioner's owner would be able to obtain with that collateral should also be considered in determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Finally, counsel states that the petitioner's business has improved during each successive year since 2001. As support for that position, counsel submits the first page of the petitioner's 2003 tax return. That return shows that during that year the petitioner declared ordinary income of \$259,328.

Counsel's reliance on the bank statements in this case is misplaced. 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.² Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel's reliance on the petitioner's unaudited financial statements is also 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. Although the accountant's report, which should always accompany audited, reviewed, or compiled financial statements whenever they are presented for any purpose, was not provided, the portions of the financial statements which the petitioner chose to submit each state, "See accountant's compilation report," indicating that the statements were compiled, rather than audited or reviewed. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's reliance on the petitioner's depreciation and amortization deductions is similarly misplaced. The assertion that the petitioner's depreciation and amortization deductions should be added back to the petitioner's income is unconvincing. Counsel is correct that those deductions do not represent specific cash expenditures during the year claimed. They are systematic allocations of the cost of long-term assets, tangible and intangible, respectively.

The depreciation deduction 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. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While those expenses do not require or represent the current use of cash, neither are they available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *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 selection of an accounting method and a depreciation schedule 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.

² 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. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

The same is true of amortization. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its redistribution to other years as convenient.

The petitioner's counsel and the petitioner's accountant urged two different calculations of the petitioner's net income. As both of those calculations included the petitioner's depreciation deduction as a fund available to pay additional wages, however, they will both be disregarded.

Counsel urges consideration of the petitioner's owner's assets in the determination of the petitioner's ability to pay the proffered wage. The petitioner, however, is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy the same limited liability as the owners of a corporation. It is a legal entity separate and distinct from its owners. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the company are not the debts and obligations of the owners or anyone else.³

Because an LLC is a separate and distinct legal entity from its owners and shareholders, and the owners and others are not obliged to pay its debts, the income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, are irrelevant to this matter. 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. See *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The assets of the petitioner's shareholders or of other enterprises cannot be considered in determining the petitioner's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The petitioner must show the ability to pay the proffered wage out of its own funds. The income and assets of the petitioner's owner shall not be further considered.

Counsel urges that the petitioner's owner's ability to borrow money using his equity in the petitioning business as collateral should also be considered. An indication of available credit is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel states that the "ramp up period" for businesses like the petitioner is no less than three years. Although counsel does not explain precisely what he means by that phrase, he apparently implies that losses or low profits are to be expected during the first three years in such a business. Counsel implies that those characteristic low profits or losses should be discounted or disregarded in the determination of a petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2), however, makes no allowance for businesses during their "ramp up" periods. Pursuant to 8 C.F.R. § 204.5(g)(2), petitioner's are generally obliged to show, using copies of annual

³ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

reports, federal tax returns, or audited financial statements, that they had had the continuing ability to pay the proffered wage beginning on the priority date.⁴

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 that 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages 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 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 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. Only the petitioner's current assets, those expected to be 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.

The proffered wage is \$47,230 per year. The priority date is April 24, 2001.

During 2001 the petitioner declared a loss. The petitioner cannot demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year, however, the petitioner had net current assets of \$61,208. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001 out of its net current assets.

⁴ An exception to that general rule is carved out in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

During 2002 the petitioner declared ordinary income of \$135,977. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$259,328. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated that ability to pay the proffered wage during 2003.

The petitioner has demonstrated its ability to pay the proffered wage during all three of the salient years. Therefore, the petitioner has sufficiently established its 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.