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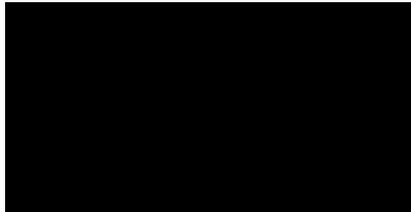
FILE: [Redacted] Office: VERMONT SERVICE CENTER  
EAC 04 055 50155

Date: DEC 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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an architecture and plastering company. It seeks to employ the beneficiary permanently in the United States as a plasterer. 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 states that the petitioner has the ability to pay the proffered wage, and submits further documentation.

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 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 27, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$24.39, or an annual salary of \$50,731.20. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since March of 1999.

On the petition, the petitioner did not state when it was established, however, it stated that it had two employees, a gross annual income of \$251,048, and a net annual income of \$51,286. In support of the petition, the petitioner submitted a letter of employment verification written by Waldino Caro Encina, Santiago, Chile, that stated the beneficiary worked as a master plasterer with his company from January 1995 to November 1998. The petitioner also submitted a birth certificate for the beneficiary and an untranslated document that lists courses taken by the beneficiary at a Santiago night school. The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 2002. This document indicated that the petitioner had taxable income of \$4,114 in 2002.

On August 25, 2004, the director denied the petition. In his decision, the director stated that the petitioner's 2002 tax return showed a net profit of \$4,114, current assets of \$50,253 and current liabilities of \$50,223. The director stated that, based on these figures, it did not appear that the petitioner had the ability to pay the proffered wage.

On appeal, counsel states the petitioner does have the ability to pay the wage as of the priority date, and that the earnings show in his tax record reflect re-investment and expenses as well as income. Counsel submits a letter from Jeffrey L. Kellem (Mr. Kellem), the petitioner's accountant. Mr. Kellem states that the petitioner has been a client since 2000, and that the owner has reinvested in the company via long term equipment purchases that cost \$28,783 over the past three years. Mr. Kellem also states that the owner invested in shorter-term equipment totaling \$22,500 over the past three years as well, and the final sum of reinvestment is \$51,000 over the three years. Mr. Kellem then states that the petitioner's owner has contributed approximately \$16,500 in support of his employees' citizenship efforts that brought the petitioner's financial investment outlay to \$67,500. Mr. Kellem states that these investment amounts are over and above the approximate \$92,000 in payroll expenses per year supporting employees who are seeking citizenship. As a result of the investment and immigration expenses, the petitioner's income for tax purposes was reduced to \$4,114 and \$44,398 in 2002 and 2003 respectively. Mr. Kellem also states that the petitioner's income has been sufficient to support the proffered wage, and refers to an income statement attached to his letter. This unaudited statement is entitled "Income for Supporting Salaries" and provides financial figures for the years ending on December 31, 2001, 2002, and 2003. The document indicates that the net income available, after adding back salaries, depreciation, immigration and legal fees, and equipment purchases was \$118,992 in 2001, \$94,677 in 2002, and \$121,603 in 2003.

Counsel also submits an additional memorandum in support of the appeal. In this memorandum, counsel states that Citizenship and Immigration Services (CIS) should take a wider picture of the petitioner's financial ability, to include gross receipts and costs. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989). Counsel states that in *Masonry*, the specific issue was the petitioner's ability to pay wages in present time and in the future. Counsel states that the court looked to the value of the new worker as a factor. Counsel also states that a stronger factor to be considered in the instant petition could be the existing wages paid and the efforts of the petitioner to reinvest in the company. Counsel states that the petitioner's gross receipts for 2002 were \$251,048, and that the existing wages were one of the petitioner's costs.

Counsel also cites to a Board of Alien Labor Certification Appeals (BALCA) decision, *Ranchito Coletero*, 2002-INA-104 (2004 BALCA). Counsel states that in this decision looked at the overall financial circumstances of the petitioner and its owner. Counsel states that the petitioner's accountant explained the income statement for the years 2001-2003 that shows net income available to support salaries of \$118,992, \$94,677, and \$121,603, for the respective years. Counsel asserts that the petitioner actively and responsibly reinvests in itself. Counsel states that the petitioner is a small but thriving company, and the petitioner seeks to reinvest as much income as is feasible, whether it is capital expenditures, or employment and personnel matters, including immigration costs. Counsel also states that the beneficiary will add to the value of the company, as was discussed in *Masonry*.

Counsel submits the petitioner's federal income tax returns for 2001, and 2003, as well as a copy of the *Ranchito Coletero* and *Masonry Masters* decisions. Counsel resubmits the letter from the petitioner's

accountant dated September 16, 2004. The 2001 and 2003 tax returns indicate the following taxable income: \$24,463 in 2002, and \$95,845 in 2003.

On appeal, counsel raises issues first addressed by the petitioner's accountant with regard to items added back to the petitioner's finances that would have produced higher net incomes. Mr. Kellem, in the income statement submitted with his letter, lists depreciation, long-term and short-term equipment expenditures, immigration legal costs, and labor costs for immigrants, as items that could be added back. First, it should be noted that short-term and long-term equipment purchases can be viewed as a normal part of business operations. Expenditures made during the normal course of a petitioner's business cannot be used to demonstrate funds that instead could have been available to pay the proffered wage.

With regard to adding back depreciation expenses, 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng* at 537.

Counsel also cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), and states that CIS should look at the overall financial circumstances of the petitioner. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

Counsel also cites *Masonry Masters, Inc.*, 875 F.2d at 898 in support of examining the value the beneficiary brings to the petitioner. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment will significantly increase profits for the petitioner, beyond what is already documented on the record in the petitioner's federal income tax returns. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Furthermore, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993)

Furthermore with regard to the income statement submitted by the petitioner's accountant, Counsel's reliance on unaudited financial records is misplaced. The accountant provides no guidance as to whether the figures on the statement were reviewed or audited prior to their submission to the record. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. 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.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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. Although both the beneficiary and the petitioner have indicated that the petitioner employed the beneficiary since either 1998 or 1999, the petitioner provided no evidence of such employment, such as W-2 Forms, Forms 1099-MISC, or pay stubs from the 2001 priority date and onward. Although the initial petition indicates that the petitioner has two employees, and Mr. Kellem, in his letter, mentioned a payroll figure of \$92,000 per year, the record contains no evidentiary documentation of the beneficiary's claimed employment during the period of time in question. Therefore, it is not possible to determine whether the petitioner has paid the beneficiary a salary equal to or greater than the proffered wage. Thus, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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 (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 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 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.

On appeal, counsel states that the petitioner had paid the beneficiary and another employee, and these payroll expenses were factored into the petitioner's tax return figures and net income. The AAO acknowledges that payroll expenses are included as an expense for the petitioner in his tax returns, and that evidence of the actual wages paid to the beneficiary from 2001 to 2003, could be a way to establish that the petitioner's net income for these years was sufficient to pay the difference between the actual wages paid to the beneficiary and the proffered wage of \$50,791.20. However, the petitioner has not provided any documentation as to the employment of the beneficiary. Therefore, it is not possible to gauge whether the petitioner's net income in these years is sufficient to pay the difference between the beneficiary's actual wages and the proffered wage. As a result, the petitioner has to establish it has the ability to pay the entire proffered wage as of the priority date and onward.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, taxable income, of the IRS Form 1120S. The petitioner's tax return for 2001, 2002, and 2003 show the following amounts of taxable income: \$24,463 in

2001, \$4,114 in 2002, and \$44,398 in 2003. These figures fail to establish the ability of the petitioner to pay the proffered wage, based on its net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's 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, the 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. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 submitted the following information for tax years 2001, 2002, and 2003:

	2001	2002	2003
Ordinary Income	\$ 24,463	\$ 4,114	\$ 44,398
Current Assets	\$ 23,294	\$ 50,253	\$ 22,876
Current Liabilities	\$ 16,646	\$ 50,223	\$ 11,938
Net current assets	\$ 6,648	\$ 30	\$ 10,938

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001, 2002, or 2003. In addition, the petitioner has not established that it paid the beneficiary any wages in these three years. Therefore, the petitioner has to establish that it has the liquidity to pay the entire proffered wage, namely \$50,791.20 out of its net current assets for the years 2001, 2002, and 2003. In 2001, the petitioner shows a net income of \$24,463, and net current assets of \$6,658, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. In 2002, the petitioner shows a net income of \$4,114, and net current assets of \$30, and has not, therefore, demonstrated the ability to pay the entire proffered wage out of its taxable income or net current assets. Finally in 2003, the petitioner shows a net income of \$44,398, and net current assets of \$10,938, and has not, therefore, demonstrated the ability to pay the entire proffered wage out of its taxable income or net current assets. As noted previously, adding back expenses such as employee salaries, immigration legal fees, and short and long-term equipment purchase is not viewed as providing the

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

petitioner with additional available funds with which to pay the proffered wage. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. 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 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.