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**U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

BL

FILE:

SRC 02 072 55898

Office: TEXAS SERVICE CENTER

Date: JAN 26 2005

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
In
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The matter will be remanded for further consideration and action.

The petitioner is a cabinet-making shop. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. 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 December 18, 1997. The proffered wage as stated on the Form ETA 750 is \$15.60 per hour, which equals \$32,448 per year.

On the petition, the petitioner stated that it was established during 1984 and that it employs five workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1995. The petition states that the petitioner will employ the beneficiary in Rockwall, Texas. The Form ETA 750 indicates that the petitioner will employ the beneficiary in Royse City, Texas. Although an apparent discrepancy exists, those municipalities are only five miles from each other and are both in Rockwall County. The prevailing wage determination is not, therefore, affected by that discrepancy.

In support of the petition, counsel submitted the joint 1998, 1999, and 2000 Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and the owner's spouse. A Schedule C attached to each return indicates that Precision Cabinet as a sole proprietorship during each of those years.¹

The 1998 Schedule C indicates that Precision Cabinet suffered a loss of \$4,533 during that year. The petitioner's owner reported adjusted gross income of \$33,233 during that year, including the petitioner's loss.

The 1999 Schedule C indicates that Precision Cabinet produced a profit of \$13,597 during that year. The petitioner's owner reported adjusted gross income of \$53,551 during that year, including the petitioner's profit.

The 2000 Schedule C indicates that Precision Cabinet produced a profit of \$9,959 during that year. The petitioner's owner reported adjusted gross income of \$65,432 during that year, including the petitioner's profit.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on November 20, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date and continuing to the date of that request. The Service Center also specifically requested bank statements; Form W-2 Wage and Tax Statements for each of the petitioner's employees during 1997, 1998, 1999, 2000, and 2001; and any other evidence of the petitioner's ability to pay the proffered wage.

In response, counsel submitted the Form 941 Employer's Quarterly Federal Tax Returns of Precision Cabinet Shop for all four quarters of 2002. Counsel submitted the beneficiary's 1997, 1998, and 1999 Form 1040 U.S. Individual Income Tax Returns. Counsel also submitted W-2 forms showing that Precision Cabinet Shop paid the beneficiary \$19,918.66 during 1997, \$21,350.58 during 1997, \$1,315.92 during 1998, \$23,612 during 1999, and \$24,860.02 during 2000. Counsel declined to provide bank statements or the W-2 forms of the remainder of Precision Cabinet Shops employees on privacy grounds.

Counsel also submitted the 1997 and 2001 joint Form 1040 Individual Income Tax Returns of the petitioner's owner and the owner's wife.

The 1997 Schedule C shows that the petitioner suffered a loss of \$4,170 during that year. During that year the petitioner's owner and the owner's wife declared adjusted gross income of \$31,826, which includes the petitioner's loss.

The 2001 Schedule C shows that the petitioner suffered a loss of \$8,211 during that year. During that year the petitioner's owner and the owner's wife declared adjusted gross income of \$72,110, which includes the petitioner's loss.

¹ The petition and the Form ETA 750 both indicate that the petitioner in this matter is Precision Framing and is a corporation. The petitioner's owner's tax returns indicate that his company is named Precision Cabinet and is a sole proprietorship. This discrepancy is addressed further below.

Based on an analysis of the figures from the petitioner's owner's tax return and from the Schedules C pertinent to the performance of Precision Cabinet the director determined 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 26, 2003, denied the petition.

On appeal, counsel states

Attached are analyses comparing Petitioner's gross income to what amounts essentially to the one real cost of Petitioner's business- payroll. For the year 2001 the ratio of payroll to gross receipts was only 39.30% of costs, for the year 1998, this ratio was only 37.01% of payroll versus gross receipts and for 1997, the ratio is even a smaller 32.61% percent [sic] for the payroll burdens. Slight differences are attributable to variations for sales, economic factors, and pay rates for the various employees. Petitioner would respectfully submit the most important factor for consideration is the fact that Petitioner's most significant costs are its payroll.

Although counsel characterizes the petitioner's wage expense as amounting, essentially, to the petitioner's "one real cost" of doing business, the Schedules C submitted in this case demonstrate that the petitioner had other expenses. By characterizing the petitioner's wage expense as its only "real" expense, counsel is apparently urging that the petitioner's other expenses are false or unnecessary. If not, counsel's meaning is unclear.

Subsequently, counsel stated, "the ratio of payroll to gross receipts [during 2001] was only 39.30% of costs." Counsel apparently means that the petitioner's payroll was 39.3% of its gross receipts during that year, which statement is correct.

Counsel further states that during 1998 wages were 37.01% of gross receipts and that they were 32.61% of gross receipts during 1997. Counsel urges that those statistics, and the fact that the "Petitioner's most significant costs are its payroll," support the assertion that the petitioner is able to pay the proffered wage. This office is not convinced that comparing a petitioner's payroll to obligations to its gross receipts can demonstrate whether or not the petitioner is able to pay a specific wage amount.

Counsel also argues that not just the petitioner's profits and the petitioner's owner's adjusted gross income, but also the petitioner's assets should be considered in determining the petitioner's ability to pay the proffered wage. In addition counsel argues that hiring the beneficiary will "have a positive financial effect" on the petitioner.

With the appeal the counsel provides W-2 forms, W-3 forms, 1099 forms, and other documentation pertinent to the wages it paid to its employees and a contractor during 2001. Counsel also provides income and expense statements pertinent to 1997, 1998, and 2001, balance sheets pertinent to the end of 1997, 1998, and 2001. Counsel provides no evidence that those financial statements were audited.

Finally, counsel provides a Vendor YTD Activity Report, dated April 30, 2003 and apparently showing the purchases of one client from the petitioner. The proposition that document was intended to support is unknown to this office.

On appeal, counsel implied, but neither stated nor supported with evidence, that hiring the beneficiary might result in a net gain to the petitioner after the petitioner paid the beneficiary's wages and the other expenses associated with employing an additional worker. If counsel had somehow supported this implicit assertion, that might have demonstrated the ability to pay the proffered wage. Merely implying it, or even explicitly stating it, however, is insufficient.

Counsel's reliance on the unaudited financial statements submitted 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.

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, counsel submitted evidence to establish that Precision Cabinet Shop employed and paid the beneficiary \$19,918.66 during 1997, \$21,350.58 during 1997, \$1,315.92 during 1998, \$23,612 during 1999, \$24,860.02 during 2000. Assuming that Precision Cabinet Shop is the petitioner in this case, the petitioner need only demonstrate the ability to pay the balance of the proffered wage during each of those years.

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 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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

Counsel is correct that a petitioner's net current assets may be used as an indication of its ability to pay the proffered wage. Counsel, however, has submitted no reliable evidence from which the petitioner's net current assets may be calculated.² As such, the petitioner's net current assets cannot be considered in this case.

Assuming that Precision Cabinet Shop is the petitioner in this case, however, means that the petitioner is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the proffered wage out of his adjusted gross income and supported himself and his family on the amount remaining.

The proffered wage is equals \$32,448 per year. The priority date is December 18, 1997.

Having established that Precision Cabinet Shop paid the beneficiary \$19,918.66 during 1997, \$21,350.58 during 1997, \$1,315.92 during 1998, \$23,612 during 1999, and \$24,860.02 during 2000 the petitioner must now establish the ability to pay the balance of \$12,530, \$12,098, \$8,836, \$7,588, and \$8,903 during those years, respectively.

During 1997 the petitioner's owner declared adjusted gross income of \$31,826, including the loss incurred by Precision Cabinet Shop. If obliged to pay the \$12,530 balance of the proffered wage out of that amount, the petitioner's owner would have been left with a balance of \$19,296 upon which to support himself and his wife. Although the record contains no evidence pertinent to the petitioner's owner's recurring monthly expenses,³ this office is not prepared to find that the petitioner's owner could not have supported himself and his wife on that amount. The petitioner's owner has submitted evidence sufficient to demonstrate the ability to pay the proffered wage during 1997.

During 1998 the petitioner's owner declared adjusted gross income of \$33,233, including the loss incurred by Precision Cabinet Shop. If obliged to pay the \$12,098 balance of the proffered wage out of that amount, the petitioner's owner would have been left with a balance of \$21,135 upon which to support himself and his wife. Although the record contains no evidence pertinent to the petitioner's owner's recurring monthly expenses,⁴ this office is not prepared to find that the petitioner's owner could not have supported himself and his wife on that amount. The petitioner's owner has submitted evidence sufficient to demonstrate the ability to pay the proffered wage during 1998.

During 1999 the petitioner's owner declared adjusted gross income of \$53,551, including the petitioner's profit. If obliged to pay the \$8,836 balance of the proffered wage during that year out of his adjusted gross income, the petitioner's owner would have been left with \$44,715 with which to support himself and his wife.

² In the case of a corporate petitioner, current assets and current liabilities can be derived from figures on the Schedule L attached to its Form 1120 U.S. Corporation Income Tax Return or Form 1120S, U.S. Income Tax Return for an S Corporation. The Schedule C filed with a Form 1040 U.S. Individual Income Tax Return to report profit or loss from a sole proprietorship, however, contains no balance sheet.

³ No such evidence was requested.

⁴ Again, no such evidence was requested.

That amount appears sufficient to support two people. The petitioner's owner has submitted evidence sufficient to demonstrate the ability to pay the proffered wage during 1999.

During 2000 the petitioner's owner declared adjusted gross income of \$65,432, including the petitioner's profit. If obliged to pay the \$7,588 balance of the proffered wage during that year out of his adjusted gross income, the petitioner's owner would have been left with \$57,844 with which to support himself and his wife. That amount appears sufficient. The petitioner's owner has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner is obliged to demonstrate the ability to pay the \$8,903 balance of the proffered wage. The 2001 Form 1040 tax return in the file shows that the petitioner's owner declared adjusted gross income of \$72,110, including the petitioner's profit. If obliged to pay the \$8,903 balance of the proffered wage during that year out of his adjusted gross income, the petitioner's owner would have been left with \$63,207 with which to support himself and his wife. That amount appears sufficient. The petitioner's owner has demonstrated the ability to pay the proffered wage during 2001.

Assuming that the petitioner in this matter is Precision Cabinet, rather than Precision Framing, Incorporated, the petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during all of the salient years. Therefore, in that event, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

An additional discrepancy exists in the evidence that was not noted in the decision of denial. The Form I-140 petition and the Form ETA 750 in this case indicate that the petitioner is named Precision Framing, Incorporated. The record contains a sample of the petitioner's letterhead that also indicates that the petitioner's name is Precision Framing, Incorporated.

The petitioner's owner's tax returns, however, which were relied upon as evidence of the petitioner's ability to pay the proffered wage, state that the name of the company is Precision Cabinets. The W-2 forms submitted also indicate that the company name is Precision Cabinet Shop. That the company's profits and losses were reported on a Schedule C indicates that the company is held as a sole proprietorship. A discrepancy exists, then, not only pertinent to the name of the petitioner in this matter, but as to the form of its ownership.

The distinction between a sole proprietorship and a corporation is critical to the determination of the ability of a company to pay a proffered wage. As was noted above, a sole proprietorship may rely upon the income and assets of its owner to show the ability to pay a wage. In contrast, a corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (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.⁵ As the owners, stockholders, and others are not obliged to pay those 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. A sole proprietorship must show the ability to pay the proffered wage out of its own funds.

⁵ 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.

This matter will be remanded for clarification of the petitioner's identity and form of ownership. The director may request additional evidence pertinent to those issues and any other evidence relevant to whether the instant petition may be approved, including evidence pertinent to the petitioner's owner's monthly budget.

ORDER: The petition is remanded for further consideration and action in accordance with the foregoing.