[illegible] prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 23 2006

EAC 04 023 50165

IN RE: Petitioner:
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:

[redacted]

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a new home developer. It seeks to employ the beneficiary permanently in the United States as a mason. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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 statement.

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 regulation at 8 C.F.R. § 103.2(b)(8) states, in pertinent part,

> *Request for evidence.* If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by [CIS] prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence . . . .

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 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 $18.97 per hour, which equals $39,457.60 per year.

On the petition the petitioner stated that it was established during 1993. The petition further indicates that the petitioner currently employs no workers, but relies on contract labor. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The Form ETA 750 indicates that the petitioner will employ the beneficiary in Danbury, Connecticut.

In support of the petition, counsel submitted the petitioner's 2001 and 2002 Form 1065 U.S. Returns of Partnership Income. Those returns show that the petitioner is a limited liability company (LLC), that it commenced business on March 1, 1993, and that it reports taxes pursuant to the calendar year and cash convention accounting.

The 2001 return shows that during that year the petitioner declared ordinary income of $7,643. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $283 and no current liabilities, which yields net current assets of $283.

The 2002 return shows that during that year the petitioner declared ordinary income of $3,856. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $639 and no current liabilities, which yields net current assets of $639.

The acting 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 July 13, 2004, denied the petition. In that decision the acting director noted that no request for evidence was issued in this case because the petition was submitted with all of the requisite initial evidence.

On appeal counsel requests that the matter be remanded to the service center. Counsel states that the petitioner is an LLC rather than a corporation and should, therefore, have been accorded an opportunity to submit additional evidence pertinent to the petitioner's assets. Counsel did not explain how that conclusion follows from the petitioner's LLC status.

Counsel may be implying that, because the petitioner is an LLC rather than a corporation, it is in some regards more similar to a sole proprietorship. Counsel may be implying that, because of this similarity, the rules pursuant to which corporations are obliged to show their ability to pay the proffered wage are inapplicable, and those pertinent to sole proprietorships should be applied. Reference to the basis for the distinction demonstrates that counsel's implicit assertion does not follow.

Although structured and taxed as a partnership, the owners of an LLC 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. It is for this reason that the personal income and assets of the owner or owners of a corporation are not considered in determining the entities ability to pay the proffered wage, and the same reasoning dictates that the income and assets of an LLC should not be included.

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. *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.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that evidence pertinent to a petitioner's ability to pay the proffered wage must be submitted with the petition. That regulation also states that the evidence shall include copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 103.2(b)(8) states that, if the evidence submitted with the petition is incomplete, the service center shall issue a request for evidence according the petitioner an additional chance to submit the missing portions of the initial evidence. That regulation does not state that the initial evidence submitted must be deemed incomplete merely because it fails to establish eligibility.

If, for instance, the evidence submitted with the petition had not included copies of annual reports, federal tax returns, or audited financial statements, as required by 8 C.F.R. § 204.5(g)(2), then the initial evidence would have been incomplete, thus triggering the provision of 8 C.F.R. § 103.2(b)(8) mandating issuance of a request for evidence.

The evidence submitted in this instance, however, included the petitioner's tax returns. The service center was not required to issue a request for evidence in this case.

Had counsel chosen to submit additional evidence on appeal, this office would, if appropriate, have considered that evidence to determine whether it demonstrated the petitioner's ability to pay the proffered wage. Counsel submitted no such additional evidence and the appeal will be considered based on the evidence of record.[1]

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*

[1] If counsel wishes additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date to be considered that evidence may submitted with a motion to reconsider/review.

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 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. 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.

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 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 net of 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 Form 1065 Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[2] shown on lines 15(d) through 17(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 $39,457.60 per year. The priority date is April 30, 2001

During 2001 the petitioner declared ordinary income of $7,643. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of $283. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it with which it could have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

[2] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

During 2002 the petitioner declared ordinary income of $3,856. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of $639. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it with which it could have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petition in this matter was submitted on October 29, 2003. On that date the petitioner's 2003 tax returns were unavailable. No request for evidence was issued. The petitioner is excused, therefore, from providing evidence of its ability to pay the proffered wage during 2003 and subsequent years.

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