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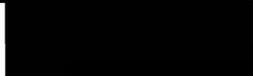
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FILE:



Office: VERMONT SERVICE CENTER

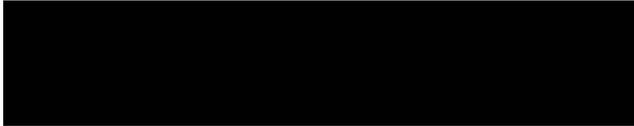
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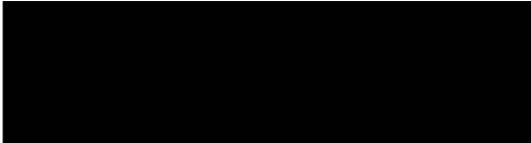
IN RE:

Petitioner:  
Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Unskilled Worker, Other pursuant to section 203(b)(3)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(iii)

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 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 a car wash equipment company. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. 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 both depreciation and goodwill figures contained in the petitioner's tax returns can establish the petitioner's ability to pay the proffered wage. Counsel submits further documentation.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii) 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) also provides

(ii) Other documentation--

(D) *Other Worker.* If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 23, 2001. The proffered wage as stated on the Form ETA 750 is an hourly salary of \$18.97, or an annual salary of \$39,457.60. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June 1996.

On the petition, the petitioner claimed to have been established in 1981, to have twelve employees and a gross annual income of \$565,480. The petitioner did not indicate its net annual income. In support of the petition,

the petitioner submitted a letter of work verification from a business identified as \_\_\_\_\_ The owner of the business stated the beneficiary had worked for him from May 1984 to November 1986. The petitioner also submitted its IRS Form 1120S, the petitioner's corporate income tax return for 2001. This document indicated that the petitioner had ordinary income of \$16,835 in tax year 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 13, 2005, the director requested additional evidence pertinent to that ability. The director stated that the petitioner had to establish its ability to pay the proffered of \$39,457 as of April 23, 2001 to the present.

The director specifically requested that the petitioner provide its 2001, 2002, 2003 and 2004 U.S. federal income tax returns, with all schedules and attachments. The director stated that as an alternative, the petitioner might submit annual reports accompanied by audited or reviewed financial statements for the same years. The director then noted that the Form ETA 750 indicated that the petitioner had employed the beneficiary since 1996. The director asked the petitioner to submit copies of the beneficiary's W-2 forms to show how much the petitioner had paid the beneficiary.

In response, the petitioner resubmitted IRS Form 1120S, the petitioner's corporate tax returns for the year 2001, and submitted for the first item, tax returns for 2002, 2003, and 2004. The petitioner also submitted a copy of a memo from William R. Yates, former Citizenship and Immigration Services (CIS) Associate Director for Operations, dated May 4, 2004 that provided instructions to adjudicators concerning how to determine if a petitioner had the ability to pay a proffered wage. The petitioner also included its calculations as to the petitioner's net income or net current assets in hand-written pages placed in front of the respective tax return.<sup>1</sup> Finally for tax years 2003 and 2004, the petitioner submitted lists of its open invoices for accounts pending as of December 2003 and December 2004.<sup>2</sup>

In examining its 2001 tax return, the petitioner added back depreciation expenses of \$28,129 to the petitioner's ordinary income of \$16,835 and arrived at the sum of \$44,964, as the total amount of net income available to pay the proffered wage in tax year 2001. For tax year 2002, the petitioner's tax return indicated that the petitioner had ordinary income of \$36,846. In examining its 2002 tax return, the petitioner did not add back its depreciation to its ordinary income but rather examined a figure it described as its total current assets. The petitioner combined its accounts receivables, inventory, and cash to arrive at total current assets of \$170,507.19. From this figure, the petitioner subtracted total current liabilities of \$16,539 and arrived at the figure of \$153,968.19 as its net current assets with which the pay the proffered wage.

With regard to tax year 2003, the petitioner's tax return indicated it had -\$15,234 in net income. The petitioner again added up its accounts receivables, cash, and inventories to arrive at a figure of \$141,912.02 for its total current assets for tax year 2003. The petitioner then subtracted its short-term payables, and other

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<sup>1</sup> The AAO does not calculate the petitioner's net current assets, as the petitioner calculated them. The AAO will examine the petitioner's net current assets more fully further in these proceedings.

<sup>2</sup> The petitioner identified the totals on these two documents as its accounts receivable when it calculated its net current assets for tax years 2003 and 2004.

current liabilities from this figure to arrive at net current assets of \$93,692.02 from which the proffered wage could be paid. In tax year 2004, the petitioner added its accounts receivables, cash, and inventories to arrive at total current assets of \$174,471.82. From this figure, the petitioner subtracted total current liabilities which totaled \$31,166, to arrive at net current assets of \$143,305.82.

The petitioner also submitted one-page lists of open invoices with its tax returns for 2003 and 2004. Finally, the petitioner submitted W-2 forms for the beneficiary for tax years 2003 and 2004. These documents indicated the beneficiary earned \$20,645 in 2003, and \$17,800 in 2004.

On February 27, 2006, the director denied the petition. In his decision, the director examined the petitioner's tax return from 2001 and noted the ordinary income of \$16,835. The director stated that the petitioner ended the year with net current assets of \$1,462, and that neither the petitioner's net income nor net current assets was sufficient to pay the proffered wage. The director then noted the petitioner's request to consider its depreciation expenses as an additional source of funds with which to pay the beneficiary. However, the director stated that the petitioner did not submit any evidence that the deduction was not an actual expense to the petitioner's business during 2001 and that the deduction actually represented available funds.

With regard to the petitioner's ordinary income for tax year 2002, the director stated that the petitioner had net income of \$36,846, and described the sum as an amount very close to the proffered wage. With regard to tax year 2003 the director stated that the petitioner's 2003 tax return indicated a net loss of \$26,284 and that the petitioner ended the year with net current assets of negative \$23,564. The director stated that even when counting the beneficiary's salary paid in tax year 2003, the petitioner still had insufficient net income or net current assets to pay the difference between the actual wages and the proffered wage. Finally the director reviewed the petitioner's 2004 tax return and stated that the petitioner had a net loss of \$6,266, and negative net current assets of \$9,688, which again was too little to pay the proffered wage, even when combined with the beneficiary's actual wage. The director stated that in notes submitted in response to the director's request for further evidence, the petitioner submitted lists of invoice lists and asked that these be considered assets in 2003 and 2004. The director stated that CIS was not persuaded by the petitioner's request as there is a line for accounts receivable on Schedule L of the tax returns and the amounts from the open invoice lists are not there. In addition, the director noted that several of the largest amounts of the petitioner's open invoice list were significantly overdue and appeared to be uncollectible. In sum, the director determined that the record did not establish that the petitioner had the ability to pay the proffered wage as of the priority date to the present.

On appeal counsel submits a letter from Mr. [REDACTED] the petitioner's accountant dated March 30, 2006. Mr. [REDACTED] states that his accounting prepared the petitioner's Form 1120S for the year 2001 to 2004. Mr. [REDACTED] then stated that the petitioner each year on its balance sheet on Schedule L includes a figure for goodwill equal to \$35,000. Mr. [REDACTED] states that this figure represents funds that can be made available to the petitioner from its sole shareholder [REDACTED]

On appeal, counsel asserts that the petitioner may use its depreciation expenses in calculating available financial resources. However, precedent case law does not support counsel's assertion. 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

On appeal, counsel also asserts that the petitioner may demonstrate its ability to pay the proffered wage by the amount listed as "goodwill" on the petitioner's tax return. The AAO does not agree. Goodwill is regarded as an intangible asset based on a business's reputation, customer base, and other such factors, and is not, by definition, an asset that will be converted to cash within one year. See *Barron's Dictionary of Finance and Investment Terms* 239, 243 (5<sup>th</sup> Ed.). Counsel and the petitioner's accountant state that goodwill represents funds available; however, there is no evidence of this in the record. Furthermore if the funds described as good will are the petitioner's owners' funds, the corporate veil prevents them from being used to establish the petitioner's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's 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 the beneficiary stated that he had worked for the petitioner since 1996, the petitioner only submitted W-2 forms for the years 2003 and 2004. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward. Therefore the petitioner cannot establish its ability to pay the proffered wage based solely on the beneficiary's prior or current wages.

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, contrary to counsel's assertions, 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.

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, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001, 2002, 2003 and 2004 shows the following amounts of ordinary income: \$16,835 in 2001, \$36,846 in 2002, -\$26,284 in 2003<sup>3</sup> and -\$6,266. These figures fail to establish the ability of the petitioner to pay the proffered wage of \$39,457.60 in the years 2001 and 2002, based on the petitioner's net income. They also do not establish that the petitioner can pay the difference between the beneficiary's wages and the proffered wage in tax years 2003 or 2004 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>4</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 \* and \*:

	2001	2002	2003	2004
Ordinary Income	\$ 16,835	\$ 36,846	\$ -26,284	\$ -6,266
Current Assets	\$ 17,454	\$ 40,869	\$ 24,656	\$ 21,478
Current Liabilities	\$ 15,992	\$ 16,539	\$ 48,220	\$ 31,166
Net current assets	\$ 1,462	\$ 24,330	\$ -23,564	\$ -9,688

<sup>3</sup> This figure is illegible on the first page of Form 1120S. It is taken from line 1, ordinary income, on Schedule K on page two of the petitioner's tax return.

<sup>4</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.

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 or any wages to the beneficiary in tax years 2001 and 2002. In 2001, the petitioner shows a net income of \$16,835, and net current assets of \$1,462, 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 \$36,846, and net current assets of \$24,330, and has not, therefore, demonstrated the ability to pay the proffered wage of \$39,457.60, out of its net income or net current assets. In 2003 and 2004, as previously noted the petitioner establish that it paid wages to the beneficiary; therefore in these two years, the petitioner has to establish that it can pay the difference between the beneficiary's actual wages and the proffered wage from the petitioner's net current assets. In 2003, the difference between the beneficiary's wages of \$20,645 and the proffered wage is \$18,812; however, the petitioner shows a net income of \$16,835, and net current assets of \$1,462, and has not, therefore, demonstrated the ability to pay the difference between the beneficiary's wages and the proffered wage out of its 2003 net income or net current assets. In 2004 the difference between the beneficiary's wages and the proffered wage is \$21,657.60; however, the petitioner shows a net income of -\$6,266, and net current assets of -\$9,668, and has not, therefore, demonstrated the ability to pay the difference between the beneficiary's actual wages and the proffered wage out of its 2004 net income or net current assets. It is noted that the petitioner in its calculations of its net current assets included its end of year accounts receivable in its claimed assets; however, as the director correctly noted, Schedule L does contain a line item, 2a for account receivable, which is blank on all four Schedules L submitted to the record.

On appeal, counsel asserts that goodwill and depreciation are part of the petitioner's financial resources available to pay the proffered wage. As noted previously, neither good will figures or any depreciation expenses contained in the petitioner's tax returns are viewed as sources of additional funds with which the pay the proffered wage. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage.

As stated previously, the petitioner has not established its ability to pay either the proffered wage or the difference between the beneficiary's actual wages and the proffered wage as of April 2001 to the present, based on its net income or net current assets. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and to the present.

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.