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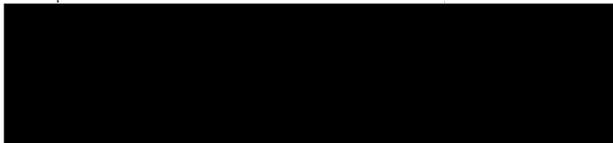
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

[Redacted]
EAC 03 244 53602

Office: VERMONT SERVICE CENTER

Date: APR 25 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner¹ is a builder. It seeks to employ the beneficiary permanently in the United States as a mason. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. 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. The director denied the petition accordingly.

The AAO affirmed the director's decision. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated April 12, 2004, and, the AAO's decision dated October 20, 2005, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Accompanying the motion, counsel submits a legal statement and copies of the following documents: the AAO's decision dated October 20, 2005; a letter from [REDACTED]'s accountant dated November 14, 2005 with exhibits that are examples of financial statements² for other companies and an excerpt entitled "From Practitioner's Publishing Company" on the subject of current assets.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services

¹ The petitioner and the applicant stated on the labor certification is Artisans Designers and Builders with [REDACTED] noted as owner. We accept, and it is a basis of our decision, that [REDACTED] trades and does business as Artisans Designers and Builders based upon statements found in the record and financial evidence submitted.

² While the financial statements were submitted as examples and they were not prepared for the petitioner, we note that they are reviewed not audited financial statements. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the motion are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the accountant's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

(CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion does not qualify as a motion to reconsider because counsel fails to identify any erroneous conclusion of law or statement of fact for the appeal, and, he asserts no precedent decisions for any position.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion does qualify as a motion to reopen. There are new facts presented here by counsel that related to his initial evidence accompanying the petition, or to the issue of whether or not on the priority date of the alien labor certification application the petitioner had the ability to pay the beneficiary the proffered wage.

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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 16, 2001.³ The proffered wage as stated on the Form ETA 750 is \$21.56 per hour (\$44,844.80 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

³ It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form

Relevant evidence in the record of proceeding includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; Form 1099-MISC statements from [REDACTED] (Federal Employer Identification Number, "FEIN," [REDACTED]) to the beneficiary in his business name that is "[REDACTED]" for 2001, 2002 and 2003;⁴ a Wage and Tax Statement (W-2) from [REDACTED] Mgmt. Co., Inc. to [REDACTED] for year 2003 as well as his personal tax return for that year; U.S. Internal Revenue Service Form 1120 tax returns for 2001, 2002 and 2003 for [REDACTED] letters from [REDACTED]'s accountant dated February 5, 2004, and May 10, 2004 that has an attachment marked Exhibit A; approximately 11 business checking account statements of the petitioner for the period February 1, 2003 to December 31, 2003; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1978⁵ and, at the time the petition was prepared, to employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 9, 2001, the beneficiary did not claim to have worked for the petitioner, although the beneficiary has worked for the petitioner as an independent contractor in 2001 and 2002.

On motion dated November 18, 2005, counsel asserts that the director should have considered "loans receivable-shareholder in its calculations of net current assets." Counsel contends that the "excess corporate earnings" taken by the sole shareholder of the petitioner are evidence of the ability to pay the proffered wage. Counsel asserts that the amounts received by the beneficiary as an independent contractor together with officer's compensation are evidence of the ability to pay the proffered wage. Further, counsel states that the fact that the petitioner has not paid the beneficiary the proffered wage in any year for which evidence has been submitted is not evidence, and according to counsel "does not impact," the petitioner's ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 CFR § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

⁴ The FEIN number is obscured for privacy purposes. There is also a Form 1099-MISC submitted for 2000 but since it was issued prior to the priority date, it has no value as independent, objective evidence of the petitioner's ability to pay the proffered wage from the priority date of March 16, 2001.

⁵ According to the tax returns submitted, [REDACTED] Inc. was incorporated in 1984.

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. Counsel states on appeal that the fact that the petitioner has not paid the beneficiary the proffered wage in any year for which evidence has been submitted is not evidence, and according to counsel "does not impact," the petitioner's ability to pay the proffered wage. 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. Form 1099-MISC statements were submitted into evidence from [REDACTED] Co., Inc. to the beneficiary in his business name [REDACTED] d/b/a [REDACTED] for 2001, 2002 and 2003. The Form 1099-MISC statements state compensation in the amounts of \$18,880.00, \$20,513.00 and \$6,631.28 respectively for those years. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$44,844.80 per year from the priority date. It would have to demonstrate that it is able to pay the difference between wages paid and the proffered wage.

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). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits 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*, 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. *Id.* at 1084. 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 that 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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120 stated net income⁶ of \$0.00.
- In 2002, the Form 1120 stated net income of \$0.00.
- In 2003, the Form 1120 stated net income of \$0.00.

Since the proffered wage is \$44,844.80 per year, the petitioner did not have the ability to pay the proffered wage from an examination of its net income for years 2001, 2002 and 2003, or the difference between compensation actually paid and the proffered wage for those years.

If the net income the petitioner demonstrates it had available during the 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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001, 2002, and 2003 were <\$348,394.00>⁸, <\$555,321.00>, and <\$414,859.00> respectively.

Therefore, for the years examined, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages or compensation paid to the beneficiary, or its net income or net current assets.

Counsel asserts that the director should have considered "loans receivable-shareholder" in its calculations of net current assets." "Loans receivable-shareholder" has not been identified by counsel with reference to the tax returns. The financial statements containing this item are for other companies and are not relevant to the

⁶ IRS Form 1120, Line 28 that states the petitioner's taxable income before net operating loss deduction and special deductions, will be referred to as net income in these proceedings.

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁸ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

data in the petitioner's tax returns. Current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand, and, current liabilities are shown on lines 16 through 18. "Loans receivable-shareholder" is not one of the current assets line items. Further, if the petitioner wishes to rely on loans receivable-shareholder as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the loans receivable-shareholder will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although debt is an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The petitioner has failed to submit a detailed business plan and audited cash flow statements to support the contentions that loans receivable-shareholder are assets and evidence of the ability to pay the proffered wage.

Counsel asserts that officer's compensation is evidence of the ability to pay the proffered wage. A review of the record demonstrates that this assertion is counsel's statement not the petitioner's statement.⁹ While the petitioner has received substantiation compensation on a yearly basis, there is no indication whatsoever that he would be willing or able to forego any portion of the officer's compensation he received. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation'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 a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel has submitted a statement from petitioner's accountant dated November 14, 2005, that asserts in part that the petitioner's earnings are deferred "until the job is totally complete." The accountant stated in the letter that this and other accounting practices utilized reduced the gross profits of the petitioner. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that other methods of accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the

⁹ For example a signed and notarized declaration by the officer(s). 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)).

petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The evidence submitted fails to establish that the petitioner has 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 motion will be granted, the previous decision of the AAO is affirmed, and the petition will remain denied.