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U.S. Citizenship
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Services

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FILE: LIN 06 020 52375 Office: NEBRASKA SERVICE CENTER Date: OCT 16 2007

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, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a landscape design and maintenance company. It seeks to employ the beneficiary permanently in the United States as a landscaper. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 10, 2003. The proffered wage as stated on the Form ETA 750 is $12 per hour, which equals $24,960 per year.

The Form I-140 petition in this matter was submitted on October 26, 2005. On the petition, the petitioner stated that it was established on January 1, 1987 and that it employs ten workers. The petition states that the petitioner's gross annual income is $590,000. The petitioner did not state its net annual income in the space provided for that purpose.

On the Form ETA 750, Part B, signed by the beneficiary on January 24, 2003, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Columbia Station, Ohio.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

In the instant case the record contains (1) copies of the petitioner's 2003 and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) a letter dated October 20, 2005 from the petitioner's owner, (3) a letter dated January 4, 2006 from the petitioner's accountant, (4) a spreadsheet showing the petitioner's monthly debt service on long-term business assets and vehicles, (5) a letter from an institutional lender dated December 20, 2005, and (6) other documents from institutional lenders. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a subchapter S corporation, that it incorporated on July 15, 1997, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2003 the petitioner declared Schedule K, Line 23 Income of $1,281. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner declared a loss of $12,540 as its Schedule K, Line 23 Income. At the end of that year the petitioner's current liabilities exceeded its current assets.

In his October 20, 2005 letter the petitioner's owner stated that he would, if he had been permitted to employ the beneficiary during 2003 or 2004, have foregone some of his own compensation or declined to make some of its purchases of business assets in order to pay the beneficiary the proffered wage.

The acting director denied the petition on December 6, 2005. In that decision the acting director misstated that the petitioner suffered a loss of $26,271 during 2003, rather than correctly stating that the petitioner declared a loss of $12,540 as its Schedule K, Line 17e Income.

On appeal, counsel submitted the January 4, 2006 accountant's letter. In that letter the accountant stated, correctly, that the petitioner had declared ordinary income of $26,271 during 2003, rather than declaring a loss as the acting director stated in the decision of denial. Counsel is correct that the petitioner declared ordinary income of $26,271. Ordinary income, however, is only one component of a Subchapter S corporate taxpayers income during a given year. All if its income and loss is shown, in summation, as Schedule K, Line 17e Income.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The accountant also stated that the petitioner's owner paid himself compensation "to minimize the amount of taxable income for the corporation," and to allow higher contributions to social security, and to increase his wage base for retirement purposes. The accountant stated that the petitioner's owner could forego his compensation as necessary to pay the proffered wage. This office reiterates that the petitioner is a subchapter S corporation.

Further, the accountant stated that the petitioner's owner owns the building that the petitioner leases and in which it conducts business. The accountant stated that the petitioner's owner could also have foregone some of the income he receives from leasing that building to the petitioner, thus increasing the petitioner's ordinary income in an amount sufficient to show the ability to pay the proffered wage.

The accountant also noted that the petitioner decreased its long-term debt by approximately $30,000 during 2004, reducing its debt service by $1,652 per month. The petitioner's 2004 Schedule L at lines 20(b) and 20(d) confirms the reduction in principle. The spreadsheet mentioned above and the institutional lender's letter mentioned above confirm the reduction in the petitioner's monthly debt service.[2] The accountant stated that had the petitioner been able to employ the beneficiary, then paying down the principal on those loans could have been delayed.

Further still, the accountant stated that the petitioner paid $54,000 to subcontractors during 2004, which amount, had the petitioner been able to hire the beneficiary, would have been available to pay the beneficiary's wages.

The petitioner's 2003 and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation show Schedule A, Line 5 Other Costs of $86,691 and $82,655, respectively. An appended itemization of those other costs shows that the petitioner paid $46,929 and $54,196 to subcontractors during those years. If some portion of those amounts were paid to landscapers performing the duties of the proffered position, and the petitioner was free to replace the subcontractors with the beneficiary in the event he had been able to hire the beneficiary during those years, then those amounts were available to pay the proffered wage during those years.

The petitioner did not demonstrate, nor even allege, that those amounts were paid to contract landscapers. If those amounts were paid for equipment and vehicle repair, for instance, rather than landscape work, then the petitioner could not have obviated that expense by hiring the beneficiary as a landscaper. No portion of the petitioner's payments to contractors has been demonstrated to be available to pay additional wages.[3]

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[2] The other documents from institutional lenders show terms of the various loans on the petitioner's trade equipment.

[3] Further, the underlying purpose of the visa category pursuant to which the petition in this case was filed is to provide foreign workers for positions that U.S. employers are unable to fill with U.S. workers. If the work is currently being performed and the petitioner is seeking to replace the incumbent or incumbents with the beneficiary out of preference, rather than necessity, that might be inconsistent with the purpose of the instant visa category. Because this consideration formed no part of the basis for the decision of denial, however, and the petitioner has not been accorded an opportunity to reconcile its claim of inability to fill the proffered position with a U.S. worker with its willingness to discharge a current worker and pay his wages to the

The argument that the petitioner paid out its profits as officer compensation to avoid corporate taxation is perplexing. The petitioner is a subchapter S corporation. As this office understands the accountant's position, he is suggesting that a subchapter S corporation may pay out its income, as Officer Compensation or otherwise, to avoid corporate taxation.[4] This is not so because subchapter S corporations are not taxed at the corporate level.

A subchapter S corporation is a pass-through entity. Pass-through entities; S-corporations, partnerships, and limited liability companies, do not pay taxes on their income, but pass it through to their owners, who are taxed on it. The income thus passed through retains its character as ordinary income, interest income, dividend income, etc., and is added to the amounts in those categories on the pass-through entity's owner's or owners' tax returns.

Because these various types of income will retain their character during and after the pass-through, they are shown in various locations on the pass-through entity's tax return, thus indicating what type of income they are, just as they will subsequently be entered in various places on the owners' tax returns and taxed in various ways pursuant to the intricacies of the tax code. However, a subchapter S corporation's ordinary income, for instance, no matter how high it is, is not subject to taxation at the corporate level. There is therefore no tax incentive, at the corporate level, to diminish it.

In fact, a difference exists between levies on amounts paid as Compensation of Officers and those paid as a distribution of ordinary income, but it works counter to the accountant's argument. Amounts paid as Compensation of Officers are treated as wages. They are reported on Form W-2 Wage and Tax Statements and are subject to FICA and Medicare. Distributive shares of ordinary income, or actual distributions of ordinary income, on the other hand, are not subject to FICA and Medicare. The owner of an S-corporation effectively pays both the employer's and the employee's share of those contributions, which are approximately 15% of the wages paid, on the amounts declared as Compensation of Officers, but not on the amounts declared as ordinary income or on actual distributions. An S-corporation will typically declare as much as possible of its funds as Ordinary Income, rather than Compensation of Officers, to avoid this levy.

The accountant implied that the petitioner paid its profits as Compensation of Officers, rather than declaring it as Ordinary Income, to avoid double taxation. As S-corporation Ordinary Income and other types of income, however, are not taxed at the corporate level, no tax incentive exists to characterize S-corporation income as

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beneficiary, that issue plays no part in today's decision. This office notes, however, that even if the petitioner had satisfied CIS on the issue of its ability to pay the proffered wage, the petition could not be approved until the petitioner had addressed this issue.

[4] Because an S-corporation's income is attributed to the shareholders and subject to tax on its owners' tax returns whether or not it is actually paid to its shareholders a "phantom income" problem sometimes exists, in which the owners are forced to pay taxes on income they did not actually receive. This tax effect is peculiar to pass-throughs entities. It does not, however, accord an incentive that encourages a pass-through entity to disguise its income as Compensation of Officers on its tax return as counsel appears to imply and does not, therefore, explain the petitioner's low profits.

Compensation of Officers.[5] S-corporation taxation at the individual level, rather than at the corporate level, does not explain why the petitioner's ordinary income was low during the salient years.[6]

Nevertheless, the accountant has asserted that the petitioner's owner could have foregone some portion of his compensation as necessary to pay the proffered wage. The record, however, contains no evidence of the petitioner's owner's adjusted gross income during the salient years, the size of his household, his assets, or his monthly recurring expenses. Further, his compensation during 2003 and 2004 was onl[redacted] respectively. The record does not demonstrate, nor will this office assume, that the petitioner's owner could have greatly reduced his compensation and still supported his household. Although the accountant has asserted that the petitioner's owner could have foregone compensation, the only other evidence in the record in support of that proposition is the petitioner's owner's own assertion, in his October 20, 2005 letter, that he would have foregone some of his own compensation or declined to make some business purchases in order to pay the beneficiary the proffered wage.[7] Those assertions, absent evidence in their support, are insufficient to show that the petitioner's owner could have foregone any significant amount of his compensation. The petitioner's officer compensation has not, therefore, been shown to have been available to pay wages.

Similarly, the accountant asserted that the petitioner's owner could forego some portion of the rent due to him as owner of the premises in which the petitioner conducts business. The record contains insufficient evidence to demonstrate that the petitioner's owner is able to forego that compensation. Further, to forego that income to inflate the petitioner's profits is tantamount to the petitioner's owner offering to pay the proffered wage out of his own funds.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. [redacted]. The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments* [redacted] (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "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."

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[5] In fact, the accountant's argument would have been more valid if it were applied to a subchapter C corporation. Because a C-corporation is taxed at the corporate level it may have a tax incentive to characterize or disguise its income as Compensation of Officers or other expenses in order to avoid taxation.

[6] Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). In the instant case, the letter from a professional accountant misrepresents the taxation of S corporations, which leads this office to wonder what other facts may have been misrepresented in the petitioner's evidence.

[7] The record does not contain, for instance, a copy of the petitioner's owner's individual tax return and a list of the petitioner's owner's recurring monthly expenses or budget.

As the owners, stockholders, and others are not obliged to pay the petitioner's 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 to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds. None of the amount it paid as rent has been shown to be available to pay additional wages.

The accountant asserts that the petitioner was not obliged to pay the loans on its equipment during the salient years, but could have paid those debts during subsequent years, thus inflating its ordinary income. This office does not generally look favorably upon an assertion that a petitioner could have handled its finances differently and thus had greater net income or net current assets.

Further, the loan payment spreadsheet appears to indicate that the payments the petitioner made were merely ordinary amortization, monthly payments made toward principle and interest pursuant to an agreed upon amortization schedule, rather than an early lump sum repayment that could, consistent with the amortization schedule, have been spread into later years. Thus, the evidence does not demonstrate that the petitioner was not, as the accountant asserts, obliged to make those payments during the salient years.

Further still, amortization of loans for equipment are an expense that may wax and wane during various years. The fact that the petitioner has paid off loans on some equipment does not demonstrate that it will not incur additional equipment expense, and loans secured by the underlying equipment, in the future and is not, therefore, proof that the petitioner will enjoy greater profits in the future. When the petitioner may be obliged to replace its vehicles and equipment is unknown to this office, and the assumption that it will not have to is improper.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

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 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, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. [redacted]ne 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 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 minus 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 the Schedules L submitted in the instant case the petitioner's current assets are found at lines 1(d) through 6(d). Year-end current liabilities are typically shown on lines 16(d) through 18(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 $24,960 per year. The priority date is February 10, 2003.

During 2003 the petitioner declared Schedule K, Line 23 Income of $1,281. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared a loss of $12,540 as its Schedule K, Line 23 Income. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no other reliable evidence of funds at its disposal during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2004.

The petition in this matter was submitted on October 26, 2005. On that date the petitioner's 2005 tax return was unavailable. Evidence pertinent to the petitioner's ability to pay the proffered wage during 2005 was never subsequently requested. For the purpose of today's decision only, the petitioner is therefore relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2004. 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.