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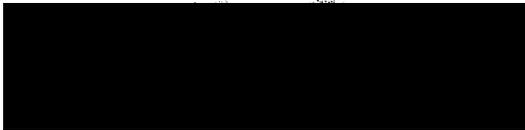
FILE: [Redacted] Office: VERMONT SERVICE CENTER
EAC 03 027 50950

Date: **APR 05 2005**

IN RE: Petitioner: [Redacted]
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:



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, Director
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 identified itself as an industrial and residential construction company in the I-140 petition. It also identified itself as the provider of janitorial services on its federal tax return. It seeks to employ the beneficiary permanently in the United States as an electrician. 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 the petitioner has over 100 employees and that the petitioner's financial officer had submitted a statement confirming the petitioner's ability to pay the proffered wage. Counsel submits further documentation.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

That regulation provides further that: "In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage."

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 16, 2001. The proffered wage as stated on the Form ETA 750 is \$32.95 an hour, or an annual salary of

\$68,536. On the Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1995 and to have a net annual income of \$150,000. The petitioner indicated it had 120 employees. In support of the petition, the petitioner submitted evidence of the beneficiary's qualifications and passport information.

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 March 19, 2003, the director requested additional evidence pertinent to that ability. The director provided the following list of types of additional evidence that the petitioner could submit: a copy of the beneficiary's 2001 W-2 Wage and Tax Statements; a statement from a financial officer of the company that establishes the petitioner's ability to pay the proffered wage; the petitioner's 2001 federal corporate income tax returns, with all schedules and attachments; an annual report for 2001, accompanied by audited or reviewed financial statements.

In response, counsel submitted copies of the petitioner's 2001 and 2002 financial statements with net profits of \$182,893 and \$323,051 for the respective years.¹ Counsel stated that these statements were reviewed and audited. Counsel also stated that the petitioner did not employ the beneficiary. Counsel stated that the petitioner, based on the net profits outlined in the financial statements, had clearly demonstrated the ability to pay the proffered wage of \$68,536.

On August 4, 2003, the director denied the petition. In his decision, the director described the financial statements for 2001 and 2003 submitted by the petitioner as compilations primarily of the representations of the petitioner's management, and that the preparer of the statements cannot state as to whether the statements fairly represent the petitioner's financial position. Thus, the director determined that only limited reliance could be placed on the facts in the submitted financial statements.

On appeal, counsel states that the director requested the petitioner's federal tax returns as evidence that the petitioner was capable of paying the proffered wage. Counsel then states that the petitioner submitted the statement by the petitioner's financial officer that confirmed the petitioner's ability to pay the proffered wage. Counsel states that the director indicated in his request for further evidence that a statement from the petitioner's financial officer would be sufficient to establish the ability to pay, and then changed his position, and denied the case based on the lack of tax returns. Counsel states that the regulations expressly provide that a statement from the petitioner's financial officer is sufficient to establish the ability to pay. Counsel indicates that the petitioner had over four million dollars in gross receipts in 2001 and over seven million dollars in gross receipts in 2002. Counsel states that the petitioner's tax returns differ from the petitioner's financial statements only with regard to how the documents treat depreciation costs. The tax returns reflect depreciation, while the financial statements reflect these monies as cash. Counsel states that this is a fully legitimate practice as the petitioner is allowed to deduct such depreciation amounts from taxable income, at

¹ These figures are identified as net income on the page entitled Statements of Income and Retained Earnings.

the same time, these depreciation funds are available to pay the beneficiary's salary and may be reflected as such in financial statements.

Counsel further notes that, although the petitioner's tax returns establish a net income of -\$73,522 in 2001 and a net income of -\$78,106 in 2002, the petitioner still demonstrates ability to pay the proffered wage, and refers to the depreciation costs identified in the tax returns. Counsel also asserts that petitioner's total assets are over \$573,000 at the end of 2001, and over \$616,000 at the end of 2002. Counsel examines the petitioner's bank checking account and states that this bank account in 2001 had an average balance of \$53,000 and in 2002 had an average balance of over \$148,000. Counsel subtracts the negative income figures for both 2001 and 2002 from these average balances for 2001 and 2002 and states that at least \$62,402 in 2001 and \$114,972 in 2002 were funds available to pay the proffered wage. Counsel also notes that the petitioner's average monthly bank account balances in 2001 and 2002 were sufficient to pay the beneficiary's monthly salary of \$5,711.33. In the additional copy of the appeal, counsel also states that the petitioner's president and shareholder is willing to use personal funds to pay the beneficiary's salary, if necessary.

Counsel submits the petitioner's Form 1120S federal corporate income tax return for 2001 and 2002, as well as tax documents for the states of New Jersey, Delaware, Maryland, Pennsylvania, and the District of Columbia. The shareholders of the petitioner are identified as Paul LaTour, a 50 per cent shareholder and Peter Szewczyk, a 50 percent shareholder. The ordinary income for both shareholders for the tax year 2001 was negative \$36,761. With regard to the compensation of the officers, Schedule C identifies the officers as Peter Szewczyk, President and Paul LaTour, Vice-president. They each were compensated \$104,000 for the tax year 2001. The petitioner's 2002 federal income tax returns indicates the two shareholders had ordinary income of \$-39,053, and together received compensation of \$274,154, or \$137,077 each.

Counsel also submits bank statements from First County Bank from April 2001 and March 2003. Further more, counsel submits a securities account statement dated March 31, 2001 for [REDACTED] that shows an account total of \$92,580.90. Another securities account statement from June 2003 establishes that the security account was worth \$106,362. Finally counsel submits a letter from [REDACTED] that states he is owner of 40 percent of the petitioner's shares and the petitioner's president. [REDACTED] states that as of the date of filing the labor certification in April 2001, he had and still has over \$90,000 in personal funds available to pay the beneficiary's salary. [REDACTED] further states that he assumes personal responsibility for payment of the salary to the beneficiary.

Counsel's description of the documentation submitted in response to the director's request for further evidence as a statement from the petitioner's financial officer as to the petitioner's ability to pay the proffered wage based on the petitioner having more than 100 employees is misplaced. The documents submitted by the petitioner in response are unaudited statements by [REDACTED] & Company, LLP. The company letterhead identifies it as a company of certified public accountants and business counselors. Furthermore the accounting company statement states the following: "Management has elected to omit substantially al [sic] the disclosure and statement of cash flows required by generally accepted accounting principles. If the omitted disclosures were included in these financial statements, they might influence the user's conclusion

² The petitioner's tax returns indicate that [REDACTED] owns 50 per cent of the petitioner's shares.

about the company's assets, liabilities, equity, revenues and expenses." Such a document is neither an audited financial statement nor a statement by the petitioner's financial officer that states that the petitioner, with more than 100 employees, has the capability of paying the proffered wage. It is also noted that even if the petitioner had submitted such a statement by its financial officer, the director could have requested further documentation as to the petitioner's ability to pay the proffered wage.

Equally, counsel's reliance on the average balances or ending balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Furthermore, counsel's reliance on the assets of one shareholder is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Even though the petitioner's president in his letter stated that he was willing to fund the beneficiary's salary out of his person assets, CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 at 3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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). 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. For tax year 2001, the petitioner had ordinary income of -\$73,522, and in 2002, the petitioner had ordinary income of \$78,106. These figures fail to establish the ability of the petitioner to pay the proffered wage, in 2001 or 2002.

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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's net current assets during the year 2001, however, were \$58,530. If the annual salary of \$36,000 paid to the beneficiary were added to this figure, \$13,005 would still be lacking from the petitioner's net current assets to pay the proffered wage of \$107,536.

The petitioner submitted the following information for tax years 2001 and 2002:

	2001	2002
Ordinary Income	\$ -73,522	\$ - 78,106
Current Assets	\$ 18,641	\$ 47,856
Current Liabilities	\$ 30,853	\$ 111,268
Net current assets	\$ -12,392	\$ -63,392

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of -\$73,522, and net current assets of -\$12,392, and has not, therefore,

³ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

demonstrated the ability to pay the proffered wage out of its net current assets. In 2002, the petitioner shows a net income of -\$78,106 and net current assets of -\$63,391. The petitioner has not demonstrated the ability to pay the proffered wage out of its net current assets in 2002. As noted previously, the assets of the shareholders are not viewed as corporate assets. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. 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 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.