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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER
LIN 03 193 50548

Date: APR 19 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:

[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, 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 is a real estate development and construction company. It seeks to employ the beneficiary permanently in the United States as supervisory carpenter. 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 submits Form I-290B and states that the petitioner does have the ability to pay the proffered wage, based on the beneficiary's ability to generate income, and based on the petitioner's personal assets, tax returns, and other personal financial documents that may be used to establish the petitioner's ability to pay the proffered wage. Counsel submits no 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.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is an annual salary of \$61,256. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 1992.

On the petition, the petitioner claimed to have been established in 1987 and to have a gross annual income of \$250,000. The petitioner has 4 employees.

The director, at the request of the petitioner, previously terminated the petitioner's first petition for the beneficiary, which was submitted with the petitioner's federal income tax returns for 1998, 1999, and 2000. The petitioner subsequently submitted a new I-140 petition for the beneficiary utilizing the initial ETA 750. The record is not clear as to what materials the petitioner submitted in its second petition for the beneficiary, or what materials the director reviewed. On July 31, 2003, the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage as of the priority date of January 14, 1998, and requested additional evidence, stating that such evidence could include audited profit/loss statements, bank account records, and/or personnel records. The director also requested the petitioner's most recent Form 941 Employers Quarterly Federal Tax Form, and Form IU-3/40, the state of Illinois Employer's Contribution and Wage Report Form, with accompanying supplements that identify all employees by name and social security number. The director also asked for the beneficiary's Form W-2 Wage and Tax Statement or Form 1099-MISC for the years 1998 through 2002. The director also requested evidence the beneficiary had obtained the required two years of work experience for the job prior to January 14, 1998. The director stated that such evidence of work experience had to be in the form of letters from current or former employers giving the name, address, and title of the employer, a description of the beneficiary's work experience, including specific dates of employment and specific duties.

In response, counsel submitted IRS Forms 1120S, the petitioner's corporate tax returns for the years 1998 and 1999, along with the petitioner's sole shareholder's individual income tax return, IRS Form 1040, for 2000, 2001, and 2002. Counsel also submitted the petitioner's IRS Forms 1120S for 1998, 1999, 2000, and 2002.¹ In addition, counsel submitted copies of the petitioner's deed for real estate property in Florida, appraisal documents on properties owned by the petitioner in Illinois, a title document for a car, the sole shareholder's joint IRA banking and money market accounts, checking, and financial services accounts. Counsel submitted three statements from [REDACTED] signed by [REDACTED] that indicated the sole shareholder's assets and liabilities in January and November 2002, as well as of December 31, 1999. Counsel submitted a letter from [REDACTED] identified as principal for the petitioner, who stated the beneficiary was only employed by the petitioner as an independent contractor in 1997 and 1998, and that copies of Form 1099-MISC were submitted in response to the director's request for further evidence. [REDACTED] further stated that there were no present employees in the firm except for himself and the beneficiary, and that the petitioner did not submit quarterly tax return Form 941. [REDACTED] also stated that the position of carpenter supervisor at the proffered wage of \$62,000 was still available.² The Forms 1099 submitted by counsel indicate that the beneficiary was compensated \$12,085 in 1997 and \$10,370 in 1998.

With regard to the beneficiary's work experience, the petitioner submitted a letter from [REDACTED] that stated the beneficiary had worked at the letter writer's carpentry shop from May 1984 to May 1990, and his duties were that of primary production manager and supervisory carpenter.

On January 9, 2004, the director denied the petition. The director examined the compensation paid to the beneficiary in 1997 and 1998, and also the petitioner's ordinary income from 1998 to 2002. He then stated that the petitioner's ordinary income from 1998 to 2002 was significantly less than the proffered wage of

¹ After extensive review of the record, the petitioner's IRS Form 1120S for 2001 is not found in the record.

² The actual proffered wage, as stated on Form ETA 750 is \$61,256.

\$61,256. The director further stated that Citizenship and Immigration Services (CIS), with regard to the petitioner's ability to pay the proffered wage, examines the financial documents that pertain to the petitioner, and not the financial documents of the petitioner's shareholders and officers.

On appeal, counsel states that the director did not properly apply the requirements affecting the petitioner's ability to pay a specific wage. Counsel also states that CIS should consider the employee's ability to generate income when determining the ability to pay salary. Counsel cites to [REDACTED]

[REDACTED] counsel also states that the director erroneously concluded that if the petitioner is an S corporation or a close corporation or run by a single stockholder, that only the financial records pertaining to the petitioner may be used to support the petition. Counsel states that this is not the present law or interpretation of existing regulations on the ability to pay a proffered wage. In specific cases, the CIS may consider personal assets, tax returns, and other personal financial documents. Although counsel states that it is submitting a brief or evidence to the AAO within thirty days, there are no such materials found in the record. Therefore the AAO will consider the merits of the petition on the record as presently constituted.

Although the director in his request for further evidence stated that documents such as audited profit/loss statements, bank account records, and personnel records could be submitted to establish that the petitioner has the ability to pay the proffered wage as of January 14, 1998, these documents are regarded as supplemental documents, and are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), namely, annual reports, federal tax returns, or audited financial statements, required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," neither the director nor the petitioner in this case has 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.

On appeal, counsel states that the assets of a sole shareholder may be used to establish the petitioner's ability to pay the proffered wage. Although counsel states that current law and regulations support his assertion, he submits nothing on appeal to further substantiate his assertion. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without further clarification or explanation, counsel's reliance on the assets of the two shareholders 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). 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).

Counsel also urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a carpenter supervisor will significantly increase profits for a petitioner that claims to have only two employees, one of which is the sole

shareholder. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

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. Although the petitioner submitted Form 1099-MISC statements for the beneficiary for the years 1997 and 1998, since the priority date for the petition is January 14, 1998, the beneficiary's compensation in 1997 is not dispositive in the present proceedings. Therefore, only the IRS Form 1099-MISC for 1998 is considered in this proceeding. Based on this document, the petitioner paid the beneficiary compensation of \$10,370, which is \$50,886 less than the proffered annual wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998 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.

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 *[redacted]* 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 returns show the following amounts of ordinary income for tax years 1998, 1999, 2000 and 2002: \$20,003 in 1998; \$21,918 in 1999; -\$18,405 in 2000, and -\$8,797 in 2002. These figures fail to establish the ability of the petitioner to pay the proffered wage. In addition, even if the petitioner's net income had been sufficient in the years 1998, 1999, 2000, and 2002 without information on the petitioner's ordinary income for tax year 2001, the petitioner could not establish that it had the ability to pay the proffered wage from 1998 to the present time.

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. With regard to the petitioner's Forms 1120S for 2000 and 2002, the petitioner did not submit Schedules L for these two returns. Therefore it is not possible to utilize the net current assets analysis for 2000 and 2002 with regard to the petitioner's ability to pay the proffered wage. As previously stated, the petitioner's Form 1120S for 2001 is also not found in the record. As a consequence, the AAO will only examine the petitioner's corporate income tax returns with regard to net current assets for the years 1998 and 1999. The petitioner submitted the following information for tax years 1998 and 1999:

	1998	1999
Ordinary Income	\$ 20,003	\$ 21,918
Current Assets	\$ 10,507	\$ 12,591
Current Liabilities	\$ 0	\$ 0
Net current assets	\$ 10,057	\$ 12,591

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 to the beneficiary in 1998 or 1999. In 1998, the petitioner shows a net income of \$20,003, and net current assets of only \$10,057, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. In 1999, the petitioner shows a net income of \$21,918, and net current assets of only \$12,591, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner's net current assets for 2000, 2001 and 2002 are not analyzed based on insufficient evidence. It should be noted that even if the petitioner had established it had sufficient net current assets to pay the proffered wage in 1998 and 1999, it would still have failed to establish that it had the ability to pay the proffered wage as of the priority date and onward. In addition, as noted previously, the assets of a shareholder 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 1998 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.

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.

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.