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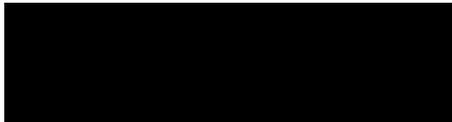
Office: TEXAS SERVICE CENTER

Date: **DEC 21 2005**

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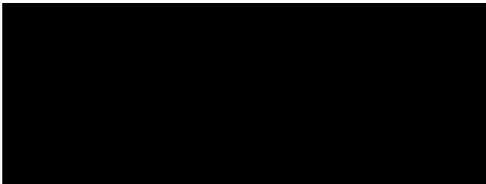
Petitioner:



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, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a manufacturer of plastic parts by injection molding. It seeks to employ the beneficiary permanently in the United States as a controller. 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, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has the financial ability to pay the proffered salary.

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

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

*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. 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 establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 August 20, 2003. The proffered wage as stated on the Form ETA 750 is \$70,000 per year. On the Form ETA 750B, signed by the beneficiary on August 15, 2003, the beneficiary claims to have worked for the petitioner since June 2002.

Part 5 of the petition, filed on November 5, 2003, indicates that the petitioner was established in December 2000, has a gross annual income of -\$581,869, a net annual income of -\$1,927,390, and currently employs thirty workers. In support of its continuing ability to pay the proffered wage, the petitioner provided a letter, dated October 20, 2003, and signed by [REDACTED] as the petitioner's human resources manager. She confirms that the petitioner "would like to continue to employ [the beneficiary] as our controller with a salary of \$70,000 per year." The petitioner also submitted a partial copy of its Form 1120, U.S. Corporation Income Tax Return for 2002, consisting of only the first page. As stated on the preference petition, it reflects that the petitioner reported

net taxable income of -\$1,927,390 before the net operating loss (NOL) deduction. Schedule L of the tax return was not provided so no determination of the petitioner's net current assets could be made. Besides net income, and as an alternative method of reviewing a petitioner's ability to pay a certified wage, CIS will examine a petitioner's net current assets in determining the ability to pay a proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.<sup>1</sup> A corporation's year-end current assets and current liabilities are shown on line(s) 1(d) through 6(d) and line(s) 16(d) through 18(d) of Schedule L of its federal tax return. If a corporation's year-end 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 director denied the petition on August 4, 2004. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director noted that the petitioner had not provided all pages of its 2002 tax return. Since the petition was submitted with incomplete initial evidence, the director should have issued a request for additional evidence pursuant to 8 C.F.R. § 103.2(b)(8) and is now being remanded for that purpose.

On appeal, counsel contends that the petitioner's ability to pay the proffered wage can be established through its parent company in Japan. He asserts, "[redacted] Ltd. owns 100% of [redacted], Inc., which is a holding company. In turn, [redacted], Inc. owns 100% of the petitioner." Counsel maintains that the [redacted] in Japan provided either direct or indirect financial aid to the petitioner.

In support of this argument, counsel submits a letter, dated August 30, 2004, from Ms. [redacted] who also maintains that the petitioner is wholly owned by [redacted], a holding company, which is in turn wholly owned by [redacted] in Japan, and that this relationship mandates consideration of the petitioner as completely owned by [redacted], Ltd. in Japan. Also submitted is a copy of the organizational chart of the three-tiered relationship, and copies of two letters from [redacted], Ltd. to [redacted] and [redacted] & Associates, in the United States. The first letter, dated December 31, 2002, indicates that with reference to [redacted] the Japanese company, [redacted] Ltd, "will continue to provide financial aid and support to this company at least for the next year." The author's signature is not legible. The second letter, dated August 17, 2004, is signed by [redacted]" and similarly states that in connection with the "audits of the financial statements of [redacted] America and [the petitioner], please be advised that [redacted] Ltd. will continue to provide financial aid and support to these companies at least for the next two years."

Counsel submits additional documents, on appeal, related to the organizational structure of these companies, including a stock certificate showing [redacted]'s ownership of 1000 shares of the petitioner's stock, two certificates indicating the ownership of 75,000 and 25,000 shares of [redacted], Inc. by [redacted], Ltd., copies of Internal Revenue Service reflecting proportionate ownership of the petitioner

<sup>1</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.

and [REDACTED] Inc., copies of consolidated financial statements of [REDACTED], Ltd. showing its financial profile in yen, and copies of money transfers from [REDACTED], Ltd., and [REDACTED], Inc. to the petitioner.

Counsel's assertions that the petitioner's ability to pay the proffered wage of \$70,000 per year is established through the documents submitted on appeal are not persuasive. First, it is noted that as the petitioner named in the preference petition is the prospective U.S. employer. As such its offer of employment must be accompanied by evidence in the form of federal tax returns, audited financial statements, or annual reports, which establish its continuing ability to pay the proffered wage as of the priority date. It has not been established here that either [REDACTED] Inc. or [REDACTED], Ltd. are the entities employing and paying the wages of the petitioner's employees, and this beneficiary in particular. See *Avena v. INS*, *Avena v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997).

Second, the petitioner is a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). 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." The fact that [REDACTED] Ltd. has financially aided the petitioner in the past and would continue to provide aid for two additional years as mentioned in Mr. [REDACTED] letter, does not suggest that this promise of future payment for two years establishes a contractual obligation to pay the specific proffered salary on a full-time permanent basis. Further, a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period. In this matter, as the evidence suggests that the petitioner has employed the beneficiary since June 2002, the case will be remanded to the director for further investigation in order to determine how much compensation has been paid to the beneficiary. If through payroll records and/or Wage and Tax Statements (W-2s), the petitioner shows that it has been paying \$70,000 per year to the beneficiary since the priority date of August 20, 2003, then its ability to pay the proposed wage offer, as set forth in the ETA 750A, has been established.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses or some sort of cumulative average of net current assets and net income as suggested by the petitioner. 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 regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary, beginning at the priority date. As noted above, the case will be remanded to the director for further investigation of any wages paid to the beneficiary and the petitioner's continuing ability to pay the certified wage consistent with the regulatory requirements.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.