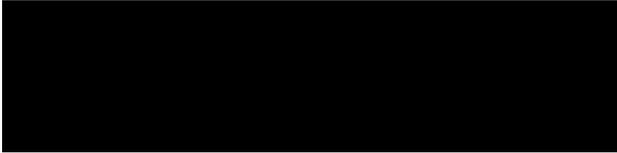




U.S. Citizenship
and Immigration
Services



B6

FILE: [REDACTED]
EAC-03-128-51519

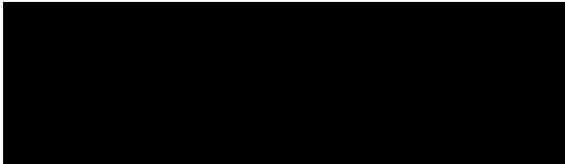
Office: VERMONT SERVICE CENTER

Date: JUL 20 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:



PUBLIC COPY

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 Director of the Vermont Service Center denied the preference visa petition and the matter is now before the Administrative Appeals Office (AAO)¹. The appeal will be sustained. The petition will be approved.

The petitioner provides landscaping services. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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. The AAO affirmed the director's decision.

On motion, counsel submits a brief and additional evidence.

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, 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 December 26, 1997. The proffered wage as stated on the Form ETA 750 is \$16.18 per hour, which amounts to \$33,654.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established on January 1, 1992, to have a gross annual income of \$432,368, and to currently employ 1 worker.

¹ This case is a re-filing after a denial by the director and subsequent denial of a motion to reconsider as well as the AAO's affirmation of the director's decision on the prior case. The acting director initially determined that the petitioner failed to establish its continuing ability to pay the proffered wage because on November 13, 2001 because of the petitioner's low net profits and payments of salaries in 1997 and 2000. On August 22, 2004, the AAO issued a decision affirming the director's decision. On June 24, 2004, the acting director reopened the proceedings acknowledging that it has overlooked the petitioner's motion to reopen or reconsider her prior decision. In that subsequent decision, the acting director determined that expenses cited by the petitioner's owner as income that would have been available if it had been able to hire the beneficiary represented "monies already expended by the corporation" and could not "be considered readily available funds with which to compensate the beneficiary." The petitioner's prior filing contains evidence that is also a part of the record of proceeding and considered in the AAO's decision.

The record of proceeding contains significant relevant evidence², which will be summarized as follows: (1) the petitioner's U.S. Corporation Income Tax Returns on Form 1120 for the years 1997, 1998, 1999, 2000, 2001, 2002, and 2003; (2) W-2 forms issued by the petitioner to the beneficiary showing wage payments in the amount of \$2,970 in 2002 and \$4,481 in 2003; (3) corporate tax returns from the petitioner's owner's other companies; (4) and an undated affidavit from the petitioner's president.

The petitioner's tax returns reflect the following information for the following years:

	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>
Gross receipts/sales	\$261,250	\$239,667	\$274,936	\$316,661
Net income ³	\$6,440	\$58,347	\$45,759	\$29,141
Current Assets	\$9,092	\$9,138	\$43,218	\$8,172
Current Liabilities	\$1,627	\$17,345	\$25,802	\$122,802
Net current assets	\$7,467	-\$8,207	\$17,416	-\$114,630
	<u>2001</u>	<u>2002</u>	<u>2003</u>	
Gross receipts/sales	\$318,868	\$243,724	\$234,692	
Net income ⁴	-\$18,915	\$26,977	\$18,799	
Current Assets	\$15,574	\$17,850	\$13,650	
Current Liabilities	\$40,899	\$907	\$2,187	
Net current assets	-\$25,325	\$16,943	\$11,463	

The acting 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, and, on September 27, 2004, denied the petition. The acting director noted that the petitioner's shareholder could not use the assets from his other companies to show the petitioner's ability to pay and that the petitioner's net income and net current assets in 1997, 1998, and 2001 did not show the petitioner's ability to pay.

On appeal, counsel asserts that the acting director erred by failing to pro-rate 1997, using the proffered wage instead of the prevailing wage rate at the time of the priority date, and failing to consider the totality of the petitioner's circumstances.

At the outset, the acting director was correct in determining that the petitioner's shareholder's assets from his other businesses cannot be considered towards the petitioner's continuing ability to pay the proffered wage. 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 who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

² Evidence that was deemed not pertinent to adjudication of this appeal is not summarized in the decision.

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

⁴ *See* note 3, *supra*.

Also at the outset, counsel's argument to pro-rate is unconvincing. We will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While Citizenship and Immigration Services (CIS) will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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. 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 any year; however, it paid partial wages of \$2,970 in 2002 and \$4,481 in 2003, and has the obligation to demonstrate that it can pay the difference between the proffered wage and wages actually paid in those years of \$30,684.40 and \$29,173.40, respectively.

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.

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.⁵ A corporation's year-end current

⁵ 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.

assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 proffered wage is \$33,654.40. Contrary to counsel's assertion, the plain language of the regulatory content of 8 C.F.R. § 204.5(g)(2) requires the petitioner to show its ability to pay the *proffered* wage, not the prevailing wage rate. The petitioner's net incomes in 1998 and 1999 are greater than the proffered wage and thus the petitioner has established its ability to pay the proffered wage out of its net income in those years. The petitioner's net income and net current assets in 1997, 2000, 2001, 2002, and 2003, however, are less than the proffered wage.

The record of proceeding contains an affidavit from [REDACTED] (Mr. [REDACTED], the petitioner's president, which was submitted in response to the acting director's decision to deny the petition on the petitioner's prior filing of the petition, so although it was undated, it would have been submitted sometime in late 2001 or early 2002.

Mr. [REDACTED] states in that affidavit, in pertinent part, the following, with respect to 1997:

Had the alien been employed by us to maintain the grounds at our home office, we would not have had to rent premises in New York City at a cost of \$34,440 [line 16, page 1] to entertain customers and provide settings for photo shoots, etc., which the alien will be providing and maintaining for us at our home office.

Had the alien been employed by us, we could have avoided the expenditure of over 1/2 of repairs and maintenance costs, line 14, page 1, or \$1800, and amounts for various items on our itemized deductions ["Other Deductions", continuation of line 26, page 1]:

approximately 1/3 or \$4,000 in "promotional expenses"
approximately 1/4 or \$21,500 of the total amount spent for "commissions and fees" for landscaping, decorating booths at conventions with plant materials, cost of renting outside facilities with appropriate landscaping, etc.

A review of the petitioner's 1997 tax return corroborates Mr. [REDACTED] numbers and the AAO has no adverse information to not accept his estimate of savings if he had employed the beneficiary and could have dispensed with large expenditures.

Mr. Purcell makes a similar analysis and assessment of the petitioner's 2000 tax returns. Although the acting director and the AAO's prior adjudicator considered Mr. [REDACTED] statements, on review, the application of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) indicates that the CIS and the AAO should consider those funds as what would have been available if the petitioner had been able to employ the beneficiary as it intended. The AAO presumes that Mr. Purcell would make similar analyses for 2001, 2002, and 2003 if he were to update the facts outlined in that affidavit since the petitioner's figures for repairs/maintenance and other deductions are similar or even greater in subsequent years than the figures cited in 1997 through 2000.

Counsel's argument on appeal concerning the petitioner's size and longevity can also not be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. at 612. The petitioner's gross income remains stable and significant in each year and its net income is close to the proffered wage or remaining wage in 2002 and 2003. The only loss reported is in 2001 and Mr. [REDACTED] explains that in an affidavit on appeal the loss was due to leasehold improvements made to its office, which would have been financed differently had the beneficiary's employment resulted in an additional payroll liability. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.