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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **AUG 09 2006**
EAC 03 013 51328

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner installs and repairs aluminum rain gutters. It seeks to employ the beneficiary permanently in the United States as a sheet metal gutter and leader installer. 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 a statement.

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.

8 C.F.R. § 204.5(g)(2) states:

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 either 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 the Service.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 13, 1997. The proffered wage as stated on the Form ETA 750 is \$23.84 per hour, which equals \$49,587.20 per year.

The petition in this matter was submitted on October 7, 2002.¹ On the petition, the petitioner stated that it was established during 1996 and that it employs two workers. The petition states that the petitioner's gross annual income is \$140,000. As to its net annual income the petitioner stated "Proprietary" on the Form I-140 petition. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have

¹ The petitioner submitted two other petitions for the same beneficiary, one on December 11, 2001 and the other on November 15, 2003.

worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Rockville Center, New York.

In support of the petition, counsel submitted copies of the petitioner's bank statements, a spreadsheet showing the petitioner's monthly checking account balances from February 1997 to October 2001, and a copy of five pages of the 1997 Form 1065 U.S. Return of Partnership Income of the petitioner, [REDACTED]

[REDACTED] Those portions of that return show that the petitioner is a general partnership, and that it reports taxes pursuant to cash convention and the calendar year. During 1997 the petitioner declared ordinary income of \$28,301. The corresponding Schedule L submitted with that return shows neither current assets nor current liabilities.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on May 16, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements.

The service center also requested that the petitioner provide W-2 forms showing payments to the beneficiary during 1997 and 2002, annual reports for 1997 and 2002, and "[t]he [petitioner's] 1997 and 2002 U.S. federal corporate [sic²] income tax returns, with all schedules and attachments"³

In that request for evidence the service center stated that, because the ending balances shown on the monthly bank statements were less than the annual amount of the proffered wage they are insufficient to show the ability of the petitioner to pay the proffered wage.

In response counsel submitted (1) the same five pages of the petitioner's 1997 tax return, (2) four pages of a 2002 tax return, and (3) a letter dated June 4, 2003.

In submitting those same five pages of the petitioner's 1997 tax return counsel implies that it is the petitioner's entire return. Evidence subsequently submitted shows that the five pages submitted are not the petitioner's complete return.

In providing four pages of the petitioner's 2002 return counsel implies that those four pages constitute the entire return. Line 19 of that return states that the petitioner claimed "Other deductions" of \$43,602 and instructs the petitioner to "attach schedule" detailing those deductions. No such schedule was provided.

² Because the petitioner is a partnership rather than a corporation it has no corporate tax returns.

³ The request for evidence implies that the petitioner need only show its ability to pay the proffered wage during the year of the priority date and during the year the Form I-140 petition was submitted. This office notes that pursuant to 8 C.F.R. § 204.5(g)(2) the petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, that is, the ability to pay the proffered wage from the priority date to the present, including all of the intervening period.

The taxpayer shown on the 2002 Form 1120S, U.S. Income Tax Return for an S Corporation submitted is

That company is a corporation, rather than a partnership. The return shows that the corporation declared ordinary income of \$55,743 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$9,594 and no current liabilities, which yields net current assets of \$9,594. The space provided on that form for the taxpayer to state its date of incorporation is blank.

In his letter counsel argues that the monthly bank statements show the petitioner's ability to pay the proffered wage in that the ending balance shown on each exceeds the monthly amount of the proffered wage. Counsel also stated that the petitioner had never employed the beneficiary, and that the petitioner produced no annual reports.

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 and, on August 28, 2003, denied the petition. In that decision the director again indicated that the petitioner's bank statements could show the petitioner's continuing ability to pay the proffered wage beginning on the priority date if they showed ending balances greater than the annual amount of the proffered wage.

On appeal, counsel submitted a letter dated September 11, 2003. In that letter counsel reiterated his assertion that the bank statements submitted demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Subsequently, on February 26, 2004, the service center issued a request for evidence dated February 25, 2004.⁴ That request noted that the 1997 tax return in the record appeared to be incomplete and requested a copy of that return certified by IRS to be a complete and accurate representation of the return that the petitioner actually submitted for that year.

The service center also specifically requested (1) the petitioner's Form 941 quarterly returns for each quarter of 1997 and the first quarter of 1998, (2) the petitioner's 1997 W-3 transmittal, and (3) if it employed the beneficiary during 1997, copies of the Form W-2 Wage and Tax Statements showing the amount it paid to him during that year.

Finally, the service center requested that, if the petitioner had issued any Form 1099 Miscellaneous Income statements that it provide its 1997 Form 1096 summary and transmittal for that year.

In response, counsel submitted (1) a copy of a different version of the petitioner's 1997 Form 1065 U.S. Return of Partnership Income, (2) a copy of the 2002 Form 1120S, U.S. Income Tax Return for an and (3) a letter dated June 4, 2003 from counsel.

⁴ This request for evidence was issued pertinent to the third Form I-140 submitted by the instant petitioner for the instant beneficiary.

⁵ Because the petitioner and are under the same ownership this office has incorporated that corporation's tax return into the record of the instant proceedings.

The 1997 tax return contains a Schedule L showing that the petitioner ended that year with current assets of \$11,471 and current liabilities of \$0, which yields net current assets of \$11,471. The version previously submitted showed neither current assets nor current liabilities. Schedules M-1 and M-2 on the same page as that Schedule L were also completed, whereas they had been left blank on the return previously submitted. The return also contains two Schedules K-1, which the return previously submitted did not. The return initially submitted as the petitioner's actual and complete tax return and the certified copy provided subsequently are markedly different. Counsel's explanation of the discrepancies follows:

Please note that the "tax return" that had been sent to you had been subitted [sic] to me by the beneficiary who had obtained it from the petitioner's accountant. After filing Form 4506, copy enclosed, IRS telephonically advised that a search of the records did not find the return. Accordingly the identical return that had been sent to you, plus the missing balance sheet, has now been filed by the petitioner's accountant as can be seen by the IRS certified stamp on the return which was delivered to me yesterday by the beneficiary who had obtained it from the Petitioner's accountant.

The events and chronology urged by counsel are unclear. This office notes, however, that only one of the competing Schedules L can be the actual Schedule L from the petitioner's 1997 tax return. Counsel appears to assert that the petitioner's accountant somehow provided the wrong version of the Schedule L. Counsel's explanation does not explain, however, why the petitioner's accountant retains two different versions of the petitioner's Schedule L in its files. Whether counsel's explanation, if it were clearer, would explain why two different versions of that form were submitted is unknown. Without a clear explanation of the discrepancy the submission of two different versions of a portion of the petitioner's tax return continues to raise issues of credibility.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).

As to the request for the beneficiary's 1997 W-2 form counsel again stated that the petitioner has never employed the beneficiary. Counsel did not provide the requested W-3 transmittal, Form 941 quarterly returns, or Form 1096 summary and transmittal that the service center requested on February 25, 2004 and did not explain those omissions.

In his June 4, 2003 letter counsel appeared to argue that the petitioner is not obliged to show the continuing ability to pay the proffered wage beginning on the priority date, but only the ability to pay the proffered wage on the priority date, on the date the petition was filed, and on the date the Form I-485 is filed. Counsel also states that, as the petitioner did not employ the beneficiary, it was not obliged to show that it accumulated

⁶ Further, counsel previously submitted an incomplete 1997 tax return in response to the service center's request for a complete 1997 return. The significance of that incomplete submission is discussed further below.

sufficient funds to pay the proffered wage during the period since the priority date, but only that, during any given month, it would have been able to pay the monthly amount of the proffered wage.

Counsel further argued that his previous submission of the September 11, 2003 letter demonstrates that the bank statements submitted show the petitioner's ability to pay the proffered wage. The September 11, 2003 letter urges that the petitioner has shown the ability to pay the proffered wage because its monthly bank statements generally showed a balance equal to at least the monthly portion of the proffered wage. Counsel also argues that the service center admitted, in a decision denying a previous petition by this petitioner for this beneficiary, that the petitioner has demonstrated the ability to pay the proffered wage on the priority date and on the filing date of the petition. This office does not read that decision of denial as counsel does and, in any event, this office issues a *de novo* decision⁷ and is not bound on appeal by pronouncements of the service center.

Counsel's reliance on the bank statements in this case is misplaced.⁸ First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁹ 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 reported on its tax returns.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence with copies of annual reports, federal tax returns, or audited financial statements. Although counsel appears to assert otherwise, the language of the regulation is clear.

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,

⁷ *Dor v. INS*, 891 F.2d 997, 1002 n. 9(2d Cir. 1989).

⁸ In addition to differing with counsel, this office differs with the implication of the service center that, if the petitioner's bank statements showed ending balances greater than the annual amount of the proffered wage they would demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

⁹ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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.¹⁰

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 is insufficient. Similarly, showing that the petitioner paid total 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 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 net of 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 a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically¹¹ 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.

Further, the original petitioner in this matter is or was a general partnership. Each of the partners in a general partnership is jointly and severally responsible for the partnership's debts and obligations. Because each partner is obliged to satisfy those debts and obligations, as necessary, out of his or her own income and assets,

¹⁰ Counsel asserts, in fact, that the petitioner has never employed the beneficiary.

¹¹ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

the income and assets of each partner is correctly included in the determination of a general partnership petitioner's ability to pay the proffered wage. The personal assets and income of the petitioner's partners, therefore, are available to pay the proffered wage, and are correctly included in the determination of the petitioner's ability to pay the proffered wage. In this case, however, no evidence pertinent to the petitioner's owners' income and assets has been provided.

The proffered wage is \$49,587.20 per year. The priority date is March 13, 1997.

During 1997 the petitioner declared \$28,301 in ordinary income. That amount is insufficient to pay the proffered wage. One version of the petitioner's 1997 Schedule L states that the petitioner had net current assets of \$11,471 at the end of that year. The other version of that document shows that the petitioner reported no year-end net current assets.¹² Whichever Schedule L is taken to be genuine, if either, the petitioner is unable to show its ability to pay the proffered wage with its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 1997 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1997.

The petitioner submitted no evidence pertinent to its ability to pay the proffered wage during 1998, 1999, 2000, or 2001. Therefore the petitioner has failed to demonstrate its ability to pay the proffered wage during those years as required by 8 C.F.R. § 204.5(g)(2).

Counsel submitted the 2002 tax return of [REDACTED], a corporation. That return does not state that corporate taxpayer's date of incorporation. The petition in this matter states that the petitioner is [REDACTED] which its 1997 tax return states is, or was, a general partnership. The record contains no evidence to demonstrate that those two entities, the partnership and the corporation, are identical or that the corporation is the petitioner's true successor within the meaning of [REDACTED] 19 I&N Dec. 481 (Comm. 1981). Because the 2002 tax return has not been demonstrated to be the petitioner's own return it is not reliable evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. If it is, in fact the petitioner's tax return the change in ownership triggers the successorship issues explained further below.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, 2000, 2001, and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied on that ground.

The record contains additional issues, however, that were not addressed in the decision of denial.

On May 16, 2003 the service center requested that the petitioner provide its "1997 and 2002 . . . income tax returns, with all schedules and attachments . . ." In response the petitioner submitted five pages of its return. Subsequently the petitioner submitted another version of its return, certified by IRS. That version contains seven pages and the entries on some of those pages are different from those on the return originally provided.

¹² Because the first version of the petitioner's 1997 tax return is demonstrably inaccurate this office is not obliged to consider it. Because the second version, which is certified by IRS and presumably complete and accurate, was not submitted when it was requested this office is not obliged to consider it either. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). This office, however, exercises its discretion in considering the second version of the petitioner's 1997 tax return.

This indicates that the petitioner's submission in response to the May 16, 2003 request for evidence was not responsive.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). If the director had known that the petitioner had not provided its complete tax return as requested he could have, and possibly would have, denied the petition on this additional basis.

Further, if the petitioner has changed ownership¹³ the petitioner is obliged, pursuant to [REDACTED] *supra*, to demonstrate that the new company is the original petitioner's true successor within the meaning of the opinion in that case. The petitioner's 1997 tax return indicates that the petitioner is [REDACTED] general partnership. The 2002 tax return submitted appears to indicate that the business is now held as a subchapter S corporation. The substituted petitioner must demonstrate that it is a true successor within the meaning of [REDACTED]. It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer.

[REDACTED] further requires that the substituted petitioner show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business.

The petition should have been denied on these additional bases. Because these issues were not raised in the decision of denial, however, and the petitioner has not been accorded an opportunity to address them, this office declines to base today's decision, in whole or in part, on these grounds. If the petitioner attempts to overcome today's decision on motion, however, it should address these issues.

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.

¹³ Because the substituted petitioner would be a new company, even a change in mode of ownership, from partnership to corporation, for instance, would be sufficient to trigger the requirements of [REDACTED] even if same people were the ultimate owners of both companies.