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U.S. Citizenship  
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FILE: LIN 03 181 50867 Office: NEBRASKA SERVICE CENTER Date: FEB 03 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a construction business. It seeks to employ the beneficiary as a roofing supervisor. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a brief and prior evidence.

In pertinent part, Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on April 25, 2001. The proffered salary as stated on the labor certification is \$32.30 per hour or \$67,184 per year.

With the petition, the petitioner, through counsel, submitted copies of the petitioner's 2001 and 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, and copies of the petitioner's bank statements for the period March 31, 2001 through December 31, 2001. The petitioner's 2001 tax return reflected an ordinary income of \$18,108 and net current assets of \$2,353. The 2003 tax return reflected an ordinary income of \$77,448 and net current assets of \$2,974. The petitioner's bank statements reflected balances ranging from a low of \$3,598.12 to a high of \$30,458.88. The director considered this documentation insufficient and on January 21, 2004, he requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of April 25, 2001 and continuing to the present. The director specifically requested the petitioner's Form 941, Employer's Quarterly Federal Tax Return, and evidence of the petitioner's current employees.

In response, counsel submitted copies of the petitioner's bank statements for the periods from January 31, 2003 through November 30, 2003, copies of the petitioner's bank statements from [REDACTED] for the period from December 31, 2001 through October 31, 2002, copies of the petitioner's bank statements from [REDACTED] for the period from June 30, 2002 through December 31, 2002, copies of the owner's personal bank statements for the periods January 24, 2003 through December 26, 2003 and from December 26, 2001 through December 26, 2002, copies of the owner's multiple investment notes, three dated December 31, 2003 and one dated December 31, 2002, and copies of the owner's certificates of deposit for the periods from January 1, 2002 through December 31, 2002 and from January 1, 2003 through December 31, 2003. The petitioner's bank statements reflected balances ranging from a low of \$0 to a high of \$13,712.84. The owner's bank statements reflected balances ranging from a low of \$7,622.26 to a high of \$40,967.13. The owner's three investment notes, dated December 31, 2003, reflected balances of \$30,526.83, \$21,078.82, and \$19,849.56, respectively. The owner's investment note, dated December 31, 2002, reflected a balance of \$17,543.84. The owner's certificate of deposits for the periods January 1, 2002 through December 31, 2002 and January 1, 2003 through December 31, 2003 reflected balances of \$28,998.98 and \$31,232.31, respectively.

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 May 27, 2004, denied the petition.

On appeal, counsel submits previously submitted documentation and a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. The 2002 tax return reflects an ordinary income of \$6,435 and net current assets of \$2,713. Counsel states:

Attached is the Petitioner's 2002 business income tax return to prove his financial ability to pay the Beneficiary's salary. In 2002, the Petitioner had \$185,639 in sales and \$71,782 in total income. Also, the Petitioner had \$17,543.84 in total investment value with [REDACTED] and a balance of \$28,998.98 with [REDACTED] bank as of 12/31/02. In addition, as of 12/26/02 the Petitioner had a total of \$21,660.00 as [sic] in his CIB bank account and \$4,962.22 in his [REDACTED] as of 12/31/02. Within this sum are funds with which the Petitioner is able to pay the offered wage of \$67,184.00.

Also, attached is the Petitioner's 2003 business income tax return. In 2003, the Petitioner had \$208,210 in sales and \$129,231 in total income, and \$77,448 in net income. Also, the Petitioner had \$30,526.83 in total investment value with [REDACTED] Services and a balance of \$31,232.31 with [REDACTED] as of 12/31/03. In addition, as of 12/28/03 the Petitioner had a total of \$7,622.26 in his CIB bank account and \$6,481.75 in his [REDACTED] as of 11/30/03. Within this sum are funds with which the Petitioner is able to pay the offered wage of \$67,184.00.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2001 through 2003 at a salary equal to or greater than the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.<sup>1</sup> A corporation's year-end current 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 petitioner's net current assets during 2001 through 2003 were \$2,353, \$2,713, and \$2,974, respectively. The petitioner could not have paid the proffered wage in 2001 through 2003 from its net current assets.

Counsel contends that the petitioner's bank balances, investment income, and certificates of deposit establish the petitioner's ability to pay the proffered wage. However, counsel's reliance on the 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

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

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 is considered when determining the petitioner's net current assets.

Furthermore, the investment income and certificates of deposit belong to the petitioner's owner. CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

The 2001 tax return reflects an ordinary income of \$18,108 and net current assets of \$2,353. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2001.

The 2002 tax return reflects an ordinary income of \$6,435 and net current assets of \$2,713. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2002.

The 2003 tax return reflects an ordinary income of \$77,448 and net current assets of \$2,974. The petitioner could have paid the proffered wage from its ordinary income in 2003.

In summary, the petitioner has established its ability to pay the proffered wage in 2003, but not in 2001 and 2002. Therefore, the petitioner has not demonstrated its 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.