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**U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **JUN 05 2006**
EAC 03 266 52573

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a gift, card, C/S, lotto, magazine corporation. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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. The director denied the petition accordingly.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$24.12 per hour (\$50,169.60 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 2001 and 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documents.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on June 22, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of U.S. federal tax returns and/or audited/reviewed financial statements for 2003.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted an explanatory letter and copies of the following documents: the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for year 2001, 2002 and 2003; approximately 26 pages of business checking statements that state periodic ending balances; a statement dated September 13, 2004,¹ that the president and sole shareholder of the petitioner personally guarantees the payment of the proffered wage and also expresses an opinion that the employment of the beneficiary will bring "immediate production value to my business ...;" and, the sole shareholder's personal tax return for 2003 with attached schedules.

The director denied the petition on November 10, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the addition of the petitioner's net income, compensation to owner, and "cash reserve" for each year, 2001, 2002 and 2003, together evidence the ability to pay the proffered wage. Also counsel contends that a credit line from a bank also evidences the ability to pay the proffered wage.

Counsel has resubmitted the following documents to accompany the appeal statement: the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for year 2001, 2002 and 2003, and, submitted a letter from the petitioner's bank dated September 13, 2004.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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

¹ Counsel asserts in a letter dated September 16, 2004, that the sole shareholder of petitioner pledges to "infuse capital" into [the] company if need arises now or in the future and references petitioner's letter of September 13, 2004. The letter referenced does not contain that pledge.

petitioner's ability to pay the proffered wage. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. 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 v. Thornburgh*, *Supra* at 537. *See also Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$50,169.60 per year from the priority date of April 18, 2001:

- In 2001, the Form 1120S stated taxable income of \$33,402.00.
- In 2002, the Form 1120S stated taxable income of \$34,952.00.
- In 2003, the Form 1120S stated taxable income of \$50,990.00.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2002 for which the petitioner's tax returns are offered for evidence.

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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's 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.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2001, petitioner's Form 1120S return stated current assets of \$49,713.00 and \$23,522.00 in current liabilities. Therefore, the petitioner had \$26,191.00 in net current assets. Since the proffered wage is \$50,169.60 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$64,304.00 and \$24,303.00 in current liabilities. Therefore, the petitioner had \$40,001.00 in net current assets. Since the proffered wage is \$50,169.60 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120S return stated current assets of \$55,650.00 and \$15,447.00 in current liabilities. Therefore, the petitioner had \$40,203.00 in net current assets. Since the proffered wage is \$50,169.60 per year, this sum is less than the proffered wage.

For the period 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

On appeal, counsel asserts that the addition of the petitioner's net income, compensation to owner, and "cash reserve" for each year, 2001, 2002 and 2003, together evidence the ability to pay the proffered wage. Counsel includes among that contention cash stated on Schedule "L" of the tax returns submitted. Correlating the cash amounts stated in counsel's contention with the petitioner's tax return for each year, it is clear that counsel is suggesting combining petitioner's taxable income each year with the cash also received by the business for that year as stated on Schedule "L" as current assets. CIS will consider separately the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date contrary to counsel's assertions. To do otherwise so would be duplicative of petitioner's taxable income. As stated by counsel, the net income figure is generated in part by the petitioner's receivables, but some part of such revenues are actually realized in cash. . Also, on Schedule "L" it is the net current asset figure that is important as calculated above. Again, counsel is disregarding the use of Schedule "L", that it is a balance sheet that shows both current assets and current liabilities. Therefore, the cash and other current assets are reduced as is calculated above to reach the net current asset figure.

Regarding the owner's compensation as stated on the tax returns submitted, counsel contends owner's compensation is a legitimate component of counsel's additive combination to overcome both the taxable income deficits for tax years 2001 and 2002 and the deficit between net current assets and the proffered wage for years 2001, 2002 and 2003. We disagree. Since it has been paid, the officer's compensation is an expense. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. Further, since the officer has made no commitment or offer to reduce their compensation by anything in evidence, counsel is merely speculating upon what could have happened in the past (but did not) and what may or may not happen in the future. Based upon what is known, the petitioner has not employed the beneficiary. It is not a reasonable contention that the petitioner's owner and sole shareholder, who have indicated on the petitioner's tax returns that he

³ 8 C.F.R. § 204.5(g)(2).

spends 100% of his time devoted to the business, would have forgone essentially all compensation in order to pay the wages of a subordinate. Without such evidence, the AAO cannot find counsel's claim persuasive.

The petitioner has personally guaranteed the payment of the proffered wage by his letter dated September 13, 2004. 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, 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."

Additionally, petitioner's counsel submitted bank statements. The petitioner's bank statements submitted were dated from April 2001 to October 2002. The petitioner's bank statements demonstrate ending balances of a high of \$6726.23 to a low of \$33.54. The average ending balance based upon those statements submitted was approximately \$2,000.00. While these monthly balances are for the most part not large, counsel's reliance on the balances in the petitioner's bank account is still misplaced. 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 documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statements show the amount in an account on a given date, and cannot show a sustainable ability to pay the proffered wage. 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.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. Counsel's assertion is erroneous. Proof of ability to pay begins on the priority date, that is April 18, 2001, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a retail store manager will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

As an additional, or alternative method to demonstrate its ability to pay, petitioner submits that it could establish lines of credit from a bank. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's suggestion that its income could be augmented with a line of credit will not be considered for two reasons. First, since a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset.

However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date in tax years 2001 and 2002.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.