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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

EAC 04 119 53558

Office: VERMONT SERVICE CENTER

Date: JUL 28 2006

IN RE:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of fine desserts. It seeks to employ the beneficiary permanently in the United States as a maintenance supervisor. 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 additional evidence and contends that the petitioner has demonstrated its continuing financial ability to pay the proffered salary.

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) 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$33.98 per hour, which amounts to \$70,678.40 per year. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary claims that he has not worked for the petitioner. He also does not indicate any employment with the petitioner on a biographic questionnaire, dated February 20, 2004, submitted with his application for permanent resident status. However, in a letter, dated February 17, 2004, submitted with the instant case, and signed by [REDACTED] Executive Vice President, [REDACTED] clearly suggests in three different paragraphs that the beneficiary has been employed as a maintenance supervisor by the petitioner and concludes that letter by expressing his appreciation for the approval

of the beneficiary's adjustment of status application, "so that he can *continue to perform services* for our organization." (Emphasis added).

On Part 5 of the visa petition, filed on March 05, 2004, the petitioner claims to have been established in 1995, have a gross annual income of \$9.7 million dollars and to currently employ fifty workers. In support of its ability to pay the beneficiary's proposed wage offer of \$70,678.40 per year, the petitioner submitted copies of the petitioner's its Form 1120S, US Income Tax Return for an S Corporation for 2001 and 2002. It reflects that the petitioner files its taxes using a standard calendar year. The tax returns contain the following information:

	2001	2002
Ordinary Income ¹	-\$ 152,057	-\$ 393,190
Salaries and Wages	\$ 193,014	\$ 261,566
Cost of Labor	\$ 754,228	\$ 906,142
Current Assets	\$1,587,741	\$1,737,896
Current Liabilities	\$1,644,944	\$2,622,501
Net Current Assets	-\$ 57,203	-\$ 884,605

It is noted that besides net taxable income, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given period and as an alternative method of reviewing a petitioner's ability to pay a proffered salary. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. 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.

On April 15, 2004, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority dated of April 30, 2001, until the present. She instructed the petitioner that evidence of its ability to pay the proffered wage must include annual reports, federal tax returns, or audited financial statements. She advised the petitioner to also submit copies of the beneficiary's Wage and Tax Statements (W-2s) for 2001, 2003, and 2003, if it employed the beneficiary during that period. The director further advised the petitioner that it may provide audited or reviewed financial statements for 2001-2003 as an alternative.

In response, the petitioner, through counsel, provided reviewed financial statements for 2001 and 2002, copies of four records showing only employee names carried on the petitioner's payroll, and copies of two W-2s for the year 2000 for individuals named [REDACTED] and [REDACTED] showing that the petitioner paid [REDACTED] \$7,554.17 and [REDACTED] \$45,549.94. The petitioner also provided a letter, dated May 19, 2004, from [REDACTED]

¹ For the purpose of this review, ordinary income will be treated as net taxable income.

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

its accountant [REDACTED] as well as two letters, both dated June 7, 2004, from its president [REDACTED]

[REDACTED] letter states that the petitioner intends to hire the beneficiary to replace a previous maintenance supervisor who worked for the company at the same salary being proposed to pay the beneficiary.

In one of [REDACTED] letters, he states that in 2000, the company expanded production capability and had to pay additional one-time expenses. He also states that the four payroll records are intended to show a payroll summary for all employees for 2000-2003, as well as an actual payroll for March and April 2004.³ He further states that [REDACTED] left the petitioner's employment on September 5, 2000 and that [REDACTED] left the petitioner's employment on December 5, 2001. He claims that [REDACTED] was drawing a net salary of \$60,000 and [REDACTED] was paid a basic salary of \$63,000, but if benefits like medical, profit sharing, and car expenses were added, their respective salaries were approximately \$70,000 each. He further states that [REDACTED] were employed as maintenance supervisors. After departing the petitioner's employment, one was replaced, but that the other position is intended for the beneficiary. Currently, the petitioner uses one maintenance supervisor with three mechanics and outside contractors.

The director denied the petition on September 1, 2004. In concluding that the petitioner failed to demonstrate its continuing ability to pay the proffered wage, the director noted that the petitioner showed losses in both of the years represented by its 2001 and 2002 federal tax returns, with the loss escalating in 2002 and the current liabilities increasing over \$800,000 in one year. The director rejected the assertion that the monies paid to [REDACTED] should be applied to the consideration of the petitioner's ability to pay the proffered wage to the beneficiary because the evidence failed to show that either employee had actually left the petitioner's employment and because such salaries represent funds already expended and not readily available to pay the offered wage. Finally, the director concluded that the petitioner's substantial payroll expense do not address the concern that the company has run substantial losses and does not necessarily establish its ability to pay the certified wage.

On appeal, counsel submits additional evidence including documents indicating that [REDACTED] employment ended in September 2001 and [REDACTED] employment ended in September 2000. A 2001 W-2 indicates that the petitioner paid \$49,383.30 in wages to [REDACTED] in that year. Counsel asserts on appeal that both the salaries paid to the two employees [REDACTED] and [REDACTED] and additional costs for outside contractors to perform maintenance should be considered to apply to funds available to pay the beneficiary. Counsel also argues that real property assets could be used to pay any deficiency in payroll and that the growth of the petitioner accounts for the deficits showing in their financial information.

In support of the appeal, counsel submits another letter, dated August 2, 2004, from [REDACTED]. He explains how the petitioner's business has grown since 1995 and states that expansion was completed by the middle of 2003, thus explaining the losses shown for 2001 and 2002. He further notes that the petitioner has acquired contracts with other clients and additional real estate acquisitions. [REDACTED] then states that the real estate

³ The petitioner's response to the request for additional evidence does not contain any payroll document referring to March and April 2004.

available for consideration as potential available assets are owned by different corporations [REDACTED] but with the same shareholders and exclusively leased by the petitioner. He also states that the petitioner has successfully maintained its payroll expenses and that the beneficiary's services will cut down the expenses involved in maintenance and upkeep of the property. [REDACTED] concludes by stating that he and his partner will reduce their salaries if necessary to defray payment of the proffered wage. Various documents relating to the ownership and value of the real estate referred to in [REDACTED] letter are also provided.

It is noted that the individual real or personal assets of the petitioner's principal shareholder(s) or assets owned by other corporations will not be considered in reviewing the petitioner's financial ability to pay the proposed salary. The petitioner is the named corporate employer on the preference petition. 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). 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, in this case, the record is not clear how much, if any, of [REDACTED] individual compensation could have been foregone to supplement the petitioner's ordinary income. Without such evidence, it is not credible that [REDACTED] will forego approximately 35% of his annual compensation to pay an employee. Such a hypothesis does not overcome the financial data reflected in the underlying record. It is noted that even if all officer compensation paid to the two shareholders had been added back to the petitioner's ordinary income in 2002, there still would have been a loss of over \$45,000.

The 2001 and 2002 unaudited financial statements that were submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the regulation at 8 C.F.R. § 204.5 (g)(2) neither states nor implies that reviewed rather than audited financial statements are probative of a petitioner's continuing ability to pay a proffered wage, such statements will not be accepted in lieu of federal tax returns or audited financial statements covering the relevant period.

Counsel's assertion on appeal that monies paid to two former employees should be applied to the review of the petitioner's ability to pay the proffered wage is rejected based on the inconsistencies present in the underlying record regarding the petitioner's employment of the beneficiary. 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 a given period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If any shortfall between the proffered wage and any actual wages paid can be covered by either a petitioner's net taxable income or its net current assets, then the petitioner will be deemed to have demonstrated its ability to pay the proposed wage offer during a given period.

In this case, the record contains contradictory evidence regarding the beneficiary's own employment with the petitioner. As such, we will not recognize counsel's assertion that his proposed salary of \$70,678.40,⁴ should be considered as a replacement for the salaries of two former full-time employees, as well as monies paid to outside contractors, when the evidence contains unexplained discrepancies relating to the petitioner's employment of the beneficiary. While the payroll summaries submitted do not contain the beneficiary's name, [REDACTED] letter, submitted to the underlying record, raises a question as to how and if the petitioner has employed and compensated the beneficiary for his services. This issue was not addressed by the petitioner. If the beneficiary's employment has overlapped either of the two former employees' mentioned above, he cannot be considered as a replacement. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Moreover, in any case, we will not consider counsel's assertion that such a replacement by one employee could occur for two former full-time employees when prior evidence suggests that either [REDACTED] position was already filled.

In reviewing a petitioner's ability to pay a certified wage, CIS will also examine the net taxable 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 or payment of wages to other workers reached a certain level or individually exceeded 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.

In this case, as noted above, the petitioner recorded substantial losses of income of \$152,057 in 2001 and \$393,190 in 2002. Similarly, its net current assets in 2001 were -\$57,203 and -\$884,605 in 2002, an increase of over \$800,000. The petitioner suggests that these losses were one-time expenses, however, no persuasive evidence substantiates these claims. It is noted that in the director's April 15, 2004, request for evidence, the petitioner was asked to provide the prescribed regulatory evidence of federal tax returns, audited financial

⁴ It is noted that we generally consider the wages reflected on the W-2s as pertinent to the discussion the petitioner's ability to pay an offered salary. The regulation at 20 C.F.R. § 656.20 (c)(3) provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis."

statements or annual reports from the priority date to the present. The petitioner failed to provide this evidence for 2003. As the evidence does not overcome the figures reflected on the federal tax returns that were provided, the petitioner has failed to demonstrate that it has had a continuing ability to pay the proffered wage as of the priority date of April 30, 2001, to the present.

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: