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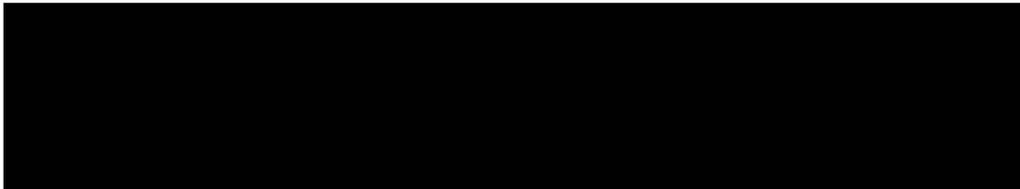
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JUN 12 2007**
SRC 05 192 51099

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a tile and reinforcing metal worker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 asserts that the petitioner has had the 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 \$19.47 per hour, which amounts to \$40,497.60 per annum. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claims to have worked for the petitioner since April 2001. A biographic form (G-325) submitted with the beneficiary's application for permanent residency indicates that this employment ended in July 2001.

On Part 5 of the visa petition, filed on June 24, 2005, the petitioner claims to have been established on May 15, 2000 and to currently employ two workers.

In support of the petitioner's continuing ability to pay the proffered wage of \$40,497.60, the record contains copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, 2003, and 2004. They reflect that the petitioner files its federal tax returns using a standard calendar year. The returns contain the following information pertinent to the petitioner's ordinary income, current assets and liabilities, and net current assets.

	2001	2002	2003	2004
Ordinary Income ¹	\$ 88,415	\$14,813	-\$17,479	\$ 9,321
Current Assets (Sched. L)	\$ 45,786	\$31,629	\$35,325	\$ 3,742
Current Liabilities (Sched. L)	\$ 30,525	\$28,240	\$56,717	\$24,825
Net current assets	\$ 15,261	\$ 3,389	-\$21,392	-\$21,083

As set forth in the table above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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 underlying record also contains a letter, dated October 10, 2005, signed by [REDACTED], the petitioner's president, in which he emphasizes that the petitioner's gross receipts have remained constant, although certain 'one-time expenses' have been taken in the most recent years.

The director denied the petition on November 8, 2005, finding that the submitted financial information failed to support the petitioner's continuing ability to pay the proffered wage.

On appeal, the petitioner provides a letter, dated December 7, 2005, from the petitioner's accountant, [REDACTED]. [REDACTED] suggests that the petitioner's ability to pay the proffered wage can be determined using factors beyond the petitioner's net income such as non-cash deductions such as depreciation, non-recurring expenses such as legal expenses for litigation services, and owner's compensation where an owner has other sources of income. [REDACTED] illustrates his assertion through an income analysis spreadsheet in which depreciation, legal expenses, and/or the owner's compensation has been added back to the petitioner's net income in 2002, 2003, and 2004.

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.

The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In this case, CIS does not find the assertion that the officer compensation presented on the petitioner's tax returns should be automatically added back to the corporate petitioner's income, to be persuasive. It is observed that the \$17,500, \$21,581 and \$29,017 was expensed as officer compensation in 2002, 2003, and 2004, respectively. Such compensation is paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. There is also no first-hand evidence from the officer that such compensation could have been foregone during the period given.³ The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, the court 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." Similarly, the financial information presented on the other corporation's tax returns cannot be included in the consideration of the petitioning corporation's individual ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, 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.

The rationale that legal expenses of \$20,000 and \$7,000 incurred during 2003 and 2004, respectively, should be added back to the petitioner's net income is not persuasive. Litigation which affects business operating expenses is a foreseeable risk that every business faces and whether it may be viewed as a non-recurring expense or not does not affect the petitioner's decreased financial ability to pay an additional payroll expense for the relevant year.

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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the

³ Undocumented suggestions that officer's compensation may be considered funds available to pay the proffered wage are misplaced. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for this officer or other documentation to identify the officer whose workload would be reduced and to verify what compensation the petitioner paid this officer from the priority date onwards. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary would assume this officer's duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, although the record indicates that the petitioner has employed the beneficiary, the petitioner failed to provide any documentation of such employment or payment of wages in response to the director's request.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). 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.

The depreciation deduction will not be included or added back to the net income as is suggested here. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. As noted

earlier, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, the petitioner's 2001 federal tax return shows that its \$88,415 in net income was sufficient to cover the certified wage of \$40,497.60 during that year. The petitioner's ability to pay the certified wage in this year has been established.

In 2002, however, neither the petitioner's \$14,813 in net income, nor its net current assets of \$3,389 was sufficient to pay the proffered wage. In 2003, both its -\$17,479 in net income and -\$21,392 in net current assets was not enough to cover the certified salary. Finally, in 2004, neither its \$9,321 in net income, nor its \$21,083 in net current assets was sufficient to pay the beneficiary's wage offer. In three out of the four relevant years, the petitioner failed to demonstrate its ability to pay the proffered wage of \$40,497.60.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning at the priority date. Based on the evidence contained in the underlying record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.