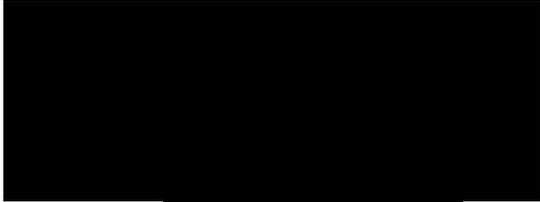


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U.S. Citizenship
and Immigration
Services

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B.

FILE:

EAC-04-210-50543

Office: VERMONT SERVICE CENTER

Date:

MAY 12 2008

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition¹ was initially approved by the Director, Vermont Service Center. Upon a further review, the director consequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition will remain revoked.

The petitioner is a masonry contractor. It seeks to employ the beneficiary permanently in the United States as a stone carver. 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 submitted sufficient evidence in rebuttal to the NOIR and had not overcome the grounds for revocation that the petitioner had not established its continuing ability to pay the proffered wage. The director revoked the approval of the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On appeal, counsel asserts that the personal income of the sole shareholder of the petitioner should be used to establish the petitioner's ability to pay the proffered wage and the shareholder's individual income tax returns submitted show that he had sufficient funds to pay the beneficiary the proffered wage during the relevant years.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

As set forth in the director's June 27, 2006 NOR, the primary issue in this case is whether or not the director had good and sufficient cause to revoke the approval of the petition based on the director's finding that the petitioner failed to establish its continuing ability to pay the proffered wage with its own net income or net current assets and continuing until the beneficiary obtains lawful permanent residence.

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 nature, for which qualified workers are not available in the United States.

¹ The instant petition was re-filed by the petitioner on the behalf of the beneficiary based on the same approved labor certification. The previous petition (EAC-03-087-52812) was filed on January 22, 2003 and denied by the Acting Director (Director) of Vermont Service Center on April 27, 2004 because the petitioner did not establish that it had the ability to pay the proffered wage at the time of filing. No further action was taken for that petition.

The regulation 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 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. *See* 8 C.F.R. § 204.5(d). 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 16, 1999. The proffered wage as stated on the Form ETA 750 is \$30.69 per hour (\$63,835.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B signed by the beneficiary on March 22, 1999, the beneficiary did not claim to have worked for the petitioner.² On the petition, the petitioner claimed to have been established in 1968, however, it did not provide information about its gross annual income, net annual income, and current number of employees on the form. In response to the director's request for evidence dated June 8, 2005, the petitioner claimed to currently employ 6 workers (2 full-time and 4 part-time).

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³ On appeal, counsel submits a brief and an affidavit of [REDACTED] and resubmits a letter dated February 27, 2006 from [REDACTED]. Other relevant evidence in the record includes the

² However, the petitioner claimed that the beneficiary has been working for the petitioner on a part-time basis since 1999, and the beneficiary indicated on the Form G-325 signed by the beneficiary on October 3, 2005 that he has been self-employed at various jobs since September 1993.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1) and the record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal, *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

beneficiary's W-2 forms for 1999 through 2004, the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1999 through 2004, Form 1040 U.S. Individual Income Tax Return filed by [REDACTED] and [REDACTED] jointly for 1999 through 2004, and a letter dated June 8, 2004 from [REDACTED] indicating that the beneficiary will replace him and his son. The record does not contain any further documentation pertinent to the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary's W-2 forms for 1999 through 2004. These W-2 forms show that the petitioner paid the beneficiary \$17,608 in 1999, \$19,096 in 2000, \$17,893.82 in 2001, \$18,554.68 in 2002, \$18,953.65 in 2003 and \$18,852.62 in 2004. The petitioner failed to establish its ability to pay the full proffered wage through wages paid to the beneficiary for these years, however, the petitioner demonstrated that it paid the beneficiary the partial proffered wage during the relevant years. Therefore, the petitioner is obligated to demonstrate that it could pay the difference of \$46,227.20 in 1999, \$44,739.20 in 2000, \$45,941.38 in 2001, \$45,280.52 in 2002, \$44,881.55 in 2003 and \$44,992.58 in 2004 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

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 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). Reliance on the petitioner's gross income and gross profit is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 corporate income tax returns, rather than the petitioner's gross income. Counsel's reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng Chang* at 537

The petitioner submitted its Form 1120S U.S. Income Tax Return for an S Corporation for 1999 through 2004 as evidence of the petitioner's ability to pay the proffered wage. According to the tax returns in the record, the petitioner is structured as an S corporation, and its fiscal year is based on a calendar year. The priority date in the instant case is April 16, 1999, therefore, the tax return for 1999 is the tax return for the year of the priority date. The record before the director closed on March 13, 2006 with the receipt by the director of the petitioner's submissions in response to the NOIR. As of that date the petitioner's federal income tax return for 2005 was not yet available. Therefore, the petitioner's 2004 tax return is the most recent available tax return in the instant case. The tax returns for 1999 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the differences between wages actually paid to the beneficiary and the proffered wage from 1999, the year of the priority date, to 2004:

- In 1999, the Form 1120S stated a net income⁴ of \$(29,622).
- In 2000, the Form 1120S stated a net income of \$(19,633).
- In 2001, the Form 1120S stated a net income of \$(99,156).
- In 2002, the Form 1120S stated a net income of \$4,815.
- In 2003, the Form 1120S stated a net income of \$(86,361).
- In 2004, the Form 1120S stated a net income of \$(154,586).

Therefore, for the years 1999 through 2004, the petitioner did not have sufficient net income to pay the difference of \$46,227.20 in 1999, \$44,739.20 in 2000, \$45,941.38 in 2001, \$45,280.52 in 2002, \$44,881.55 in 2003 and \$44,992.58 in 2004 between wages actually paid to the beneficiary and the proffered wage respectively, and thus failed to establish its ability to pay the proffered wage with its net income in these years.

⁴ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

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.⁵ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 1999 were \$(9,098).
- The petitioner's net current assets during 2000 were \$15,136.
- The petitioner's net current assets during 2001 were \$7,713.
- The petitioner's net current assets during 2002 were \$32,472.
- The petitioner's net current assets during 2003 were \$11,273.
- The petitioner's net current assets during 2004 were \$20,219.

Therefore, for the years 1999 through 2004, the petitioner did not have sufficient net current assets to pay the difference of \$46,227.20 in 1999, \$44,739.20 in 2000, \$45,941.38 in 2001, \$45,280.52 in 2002, \$44,881.55 in 2003 and \$44,992.58 in 2004 between wages actually paid to the beneficiary and the proffered wage respectively, and thus, it failed to establish its ability to pay the proffered wage with its net current assets in these years.

Therefore, 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 continuing ability to pay the beneficiary the proffered wage as of the priority date in 2001 to 2005 through an examination of wages paid to the beneficiary, its net income or net current assets.

On appeal, counsel asserts that the submitted Forms 1040 U.S. Individual Income Tax Returns filed by [REDACTED] and [REDACTED] jointly for 1999 through 2004 can establish the petitioner's ability to pay the proffered wage because the petitioner is an S corporation and [REDACTED] is the sole shareholder of the petitioner. The evidence in the record shows that the petitioner was incorporated on April 10, 1968

⁵According 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.

and elected as an S corporation on May 1, 1968; and petitioner owning 100% of the corporation's stock.

is the sole shareholder of the

Contrary to counsel's assertion, although S corporations pass their profits and losses through to their shareholders, an S corporation, including one with a sole shareholder, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the shareholders or anyone else. Because a corporation including an S 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 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." An S corporation with a sole shareholder is not a sole proprietorship. Counsel's assertion that the petitioner in the instant case should be treated as a sole proprietorship is misplaced. The petitioner must establish its continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence through the examination of wages actually paid by the petitioner to the beneficiary, its net income or its net current assets. **Consequently, the personal income, assets or other funds of the sole shareholder, [REDACTED]** in the instant case cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. On appeal, counsel argues that the cases cited by the director are not applicable to the instant case because those cases dealt with a C regular corporation. Counsel's assertion is misplaced. As discussed above, like a C corporation, an S corporation is a legal entity separate and distinct from its owners and therefore, the assets of its shareholders cannot be considered in determining the petitioning S corporation's ability to pay the proffered wage.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return for an S Corporation. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. On appeal, counsel submits an affidavit of [REDACTED] dated June 6, 2006 indicating that he is willing to divert his personal income from the business to pay the beneficiary in the event that the petitioner does not have enough income to pay the proffered wage. However, the record does not contain any evidence showing that [REDACTED] is a shareholder of the petitioner or has ever been paid any amount as officer compensation from the petitioner.

The record also contains an affidavit of [REDACTED] dated February 27, 2006. In this affidavit, [REDACTED] states under penalties of perjury that as the sole shareholder and the president of the petitioning corporation, he will divert his personal income from the business to pay the beneficiary the offered wage in the event that the petitioner does not have enough income to pay the beneficiary in this case the offered wage of \$63,835 annually. According to the petitioner's tax return for 2003, the

petitioner paid [REDACTED] officer compensation of \$13,000 that year only,⁶ and the record does not contain any evidence showing that the petitioner paid any amount of officer's compensation during all other relevant years. Even if it is proven that the petitioner paid its sole shareholder officer's compensation of \$13,000 in 2003, the petitioner still could not establish its ability to pay the proffered wage because the officer's compensation of \$13,000 was not sufficient to pay either the difference of \$33,608.55 between wages actually paid plus the petitioner's net current assets and the proffered wage or the difference of \$44,881.55 between wages actually paid plus the petitioner's net income and the proffered wage. Therefore, counsel's assertion based on officer's compensation of [REDACTED] and [REDACTED] cannot overcome the director's ground of denial.

Counsel submitted with the initial filing a notarized letter dated June 8, 2004 from [REDACTED] indicating that the beneficiary will take over all the manual labor his son and himself have done for years. The record shows that the petitioner paid [REDACTED] \$13,000 and [REDACTED] \$26,000 annually during the relevant years 1999 through 2004. [REDACTED] is a part-time owner and manager and is preparing to transfer all his managerial duties to his son, [REDACTED], and [REDACTED] allegedly works as a manager as well as stone carver. Therefore, the beneficiary cannot replace or take over all duties from two managerial personnel, and thus, cannot use all the compensation of [REDACTED] and [REDACTED] to pay the proffered wage. [REDACTED]'s June 8, 2004 letter did not indicate how much of the compensation he and his son earned from the petitioner was for performing the duties as stone carver and how the beneficiary will replace the two of them while he is currently working on a part-time basis. In addition, as discussed above, the petitioner needs \$46,227.20 in 1999, \$44,739.20 in 2000, \$45,941.38 in 2001, \$40,465.52 in 2002, \$44,881.55 in 2003 and \$44,992.58 in 2004 respectively to pay the proffered wage after the examinations of wages paid and the petitioner's net income. Even if the beneficiary had replaced both [REDACTED] and [REDACTED] in addition to his current part-time job and the petitioner had used all the salaries paid to both of them to pay the beneficiary, the petitioner could not establish its ability to pay the proffered wage for 1999 through 2004 with wages actually paid to the beneficiary and its net current assets. In the event that the petitioner uses wages actually paid to the beneficiary and its net current assets as an alternate method to establish its ability to pay the proffered wage, the petitioner still needs \$46,227.20 in 1999, \$29,603.20 in 2000, \$38,228.38 in 2001, \$12,808.52 in 2002, \$33,608.55 in 2003 and \$24,773.58 in 2004 respectively to pay the proffered wage after the examinations of wages paid and the petitioner's net current assets. If the beneficiary had replaced both [REDACTED] and [REDACTED] in addition to his current part-time job and the petitioner had used all the salaries paid to both of them to pay the beneficiary, the petitioner still could not establish its ability to pay the proffered wage for 1999 and 2001 with wages actually paid to the beneficiary and its net current assets. Therefore, in any event the petitioner would fail to establish its continuing ability to pay the proffered wage from 1999, the year of the priority date, until the present even if the petitioner had used all the salaries paid to both [REDACTED] and [REDACTED] to pay the beneficiary.

⁶ The petitioner's tax returns show that the petitioner paid [REDACTED] annual salary of \$13,000 during the years 1999 through 2004 except for 2003. The petitioner reported that amount as compensation of officers on line 7 of Form 1120S in 2003 only. Therefore, it is not clear whether the petitioner really paid [REDACTED] officer compensation in 2003 or misreported that amount on line 7 of its 2003 tax return!

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The AAO concurs with the director's decision and determines that the director had good and sufficient cause to revoke the petition's approval based on the insufficient evidence in factual assertions presented by the petitioner concerning its continuing ability to pay the proffered wage.

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. The director's June 27, 2006 NOR is affirmed. The approval of the petition remains revoked.