

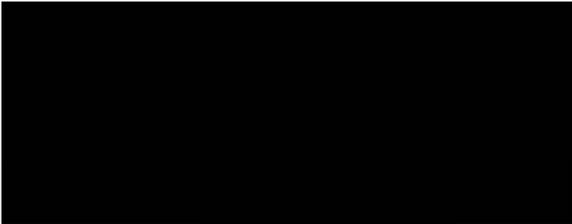
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U.S. Citizenship
and Immigration
Services

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FILE:

SRC 06 036 51370

Office: TEXAS SERVICE CENTER

Date: OCT 03 2006

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides software development services. It seeks to employ the beneficiary permanently in the United States as a “programmer – analyst” pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the 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 and denied the petition accordingly.

On appeal, the petitioner submits a brief and additional evidence. While the director failed to address the petitioner’s response to the director’s request for evidence, we concur with the director’s finding that the petitioner has not demonstrated its ability to pay the proffered wage as of the priority date of the petition.

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 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 9, 2000. The proffered wage as stated on the Form ETA 750 is \$65,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1990, a gross annual income of \$444,351, a net income of “around 0” and five employees including subcontractors. In support of the petition, the petitioner submitted its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for 2001 through 2004.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, on December 14, 2005, the director requested additional evidence pertinent to that ability.

In response, the petitioner submitted a letter from [REDACTED] a certified public accountant, its 2000 tax return and those of another corporation, [REDACTED] a subchapter S corporation. The petitioner also submitted its October 25, 2000 payroll statements and bank statements for both the petitioner and [REDACTED] for 2000 through 2005. Finally, the petitioner submitted consulting contracts between the petitioner and its clients.

The petitioner asserts that [REDACTED] owns both companies and withdraws all income for tax purposes. Mr. [REDACTED] asserts: "Cash reserves as shown on the business bank statements give [a] much better understanding of ability to pay the proffered wage" than the information on the tax returns. In addition, Mr. [REDACTED] explains that the tax returns are not an accurate portrayal of the petitioner's finances because the petitioner uses the cash basis of accounting, which does not reflect the accounts receivable reflected in accrual based balance sheets. More specifically, Mr. [REDACTED] states:

Due to legal and strategic advantages, the business of [the petitioner] is done using two corporations, [the petitioner], a C corporation and [REDACTED] an S corporation. Most of the contracts are signed between clients and [the petitioner] while some of the contracts are signed between clients and [REDACTED] Consulting, and then subcontracted by [REDACTED] to [the petitioner]. All the employees are employed by [the petitioner].

Finally, Mr. [REDACTED] asserts that the beneficiary will generate income for the petitioner and that the business had regular employees on payroll and was "inherently capable of paying the proffered wages to the Beneficiary."

The petitioner's tax returns reflect the following information for the following years:

	2000	2001	2002	2003	2004
Officer Compensation	\$0	\$0	\$0	\$0	\$0
Outside Services	*	\$416,900	\$140,000	\$163,000	\$60
Net income	\$406	\$9,337	\$168	\$233	(\$270)
Current Assets	*	\$30,787	\$4,936	\$5,323	\$24,513
Current Liabilities	*	\$25,009	(\$55)	\$0	\$19,188
Net current assets	*	\$5,778	\$4,991	\$5,323	\$5,325

* Not apparent from the return as the petitioner did not include all schedules and statements.

As is apparent from the above, Mr. [REDACTED] did not remove all income for himself. Line 12 of the Form 1120 and Schedule E reflect no income withdrawn from the petitioner in officer compensation. While large amounts were paid every year other than 2004 in "Outside Services" listed under "Other Deductions," the record is absent evidence that these amounts were paid to Mr. [REDACTED]. Even

more significantly, Schedule K references an attached statement regarding the sole owner of the petitioner. The statement in every year reflects that the petitioner is solely owned by [REDACTED] not Mr. [REDACTED]

The payroll reflects that the petitioner paid the original beneficiary \$31,590.24 as of October 23, 2000, ending around when the petition was filed. While the bank statements reflect more than the monthly proffered wage every month, they do not reflect consistently increasing balances; rather the balances fluctuate up and down.

The tax returns for [REDACTED] reflect the following net income for the specified years:

2004	2003	2002	2001	2000
\$162,886	\$109,952	\$29,470	\$416,103	\$861,345

The Schedules K-1 reflect that [REDACTED] is the sole owner of [REDACTED]

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 March 21, 2006, denied the petition. The director only considered the petitioner's net income in reaching this conclusion.

On appeal, the petitioner reiterates the assertions made in response to the request for additional evidence.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner 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 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 did not establish that it employed and paid the beneficiary or the original beneficiary the full proffered wage after the priority date.

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). Showing that the petitioner's gross receipts 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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, we reject the assertion that we should examine only the petitioner's cash reserves. The petitioner's 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 has not demonstrated that it paid any wages to the beneficiary or the original beneficiary after the priority date. In all relevant years, the petitioner shows a net income and net current assets well below the proffered wage. The petitioner, therefore, has not demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner's reliance on the balances in the petitioner's bank accounts 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 sufficiently 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. The petitioner's choice of cash rather than accrual as an accounting method is insufficient. Changing from the cash method to the accrual method may change the year-to-year distribution of the petitioner's current assets, but the petitioner has not demonstrated that

¹ 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.

changing from cash to accrual method would make available tens of thousands of dollars that would otherwise never have appeared on the tax return at all.

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 were considered above in determining the petitioner's net current assets.

The petitioner's reliance on the assets and income of [REDACTED] is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Moreover, as stated above, Mr. [REDACTED] is not the owner of the petitioner and [REDACTED] as claimed. Rather, a limited liability company owns the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. The petitioner cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Regardless, although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of the Immigration and Naturalization Service (now CIS) for failure to specify a formula used in determining the proffered wage. Further, in this instance, insufficient detail or documentation has been provided to explain how the beneficiary's employment as a programmer - analyst will significantly increase profits for the petitioner. The contracts submitted are not for the petitioner's services. Thus, the petitioner's speculation cannot be concluded to outweigh the evidence presented in the corporate tax returns.

For the above reasons, the petitioner has not demonstrated that any other funds were available to pay the proffered wage beyond its net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during the relevant period.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the 2000 or subsequently. Therefore, the petitioner has not established that it had the 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.