

U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

PUBLIC COPY

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FEB 02 2004

File: [REDACTED] Office: TEXAS SERVICE CENTER

Date:

IN RE: Petitioner:
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:

[REDACTED]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

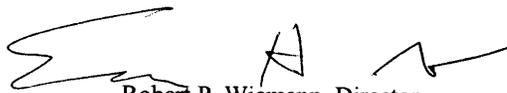
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a racing stable. It seeks to employ the beneficiary permanently in the United States as a racehorse trainer. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by 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.

On appeal, counsel submits a brief and additional evidence.

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.

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.

Eligibility in this matter hinges on the petitioner's 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on September 5, 2001. The proffered wage as stated on the Form ETA 750 is \$8.56 per hour, which equals \$17,804.80 per year.

The petition identifies the petitioner as Larry Pilotti Racing Stables. With the petition, the petitioner's previous counsel submitted a copy of the 2001 Form 1120S U.S. Income Tax Return for an S Corporation of Dream Stables, Incorporated. The return

shows that Dream Stables declared ordinary income of \$3,204 during that year. The corresponding Schedule L shows that the Dream Stables ended the year with current assets of 3,034 and current liabilities of \$220, which yields net current assets of \$2,814.

Because the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage, the Texas Service Center, on January 22, 2003, requested additional evidence pertinent to that ability. Specifically, the Service Center requested evidence that the petitioner and Dream Stables, Incorporated are the same entity. The Service Center also requested that the petitioner submit evidence of its continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a letter, dated February 26, 2003. In the letter, counsel stated that the petitioner's gross receipts are increasing year-by-year.

With that letter, counsel provided a copy of the 2000 Form 1120S U.S. Income Tax Return for an S Corporation of Dream Stables, Incorporated. The return shows that Dream Stables declared ordinary income of \$5,644 during that year. The corresponding Schedule L shows that at the end of that year, Dream Stables' current liabilities exceeded its current assets.

This office notes that the priority date is September 5, 2001. As such, the petitioner's income and assets during 2000 are not directly relevant to the determination of the petitioner's ability to pay the proffered wage beginning on the priority date. This office further notes that from 2000 to 2001, the only two years for which the petitioner had then provided tax returns, Dream Stables' gross receipts fell by approximately 9%, rather than rising each year, as counsel asserted.

In addition, counsel provided financial statements purporting to show the assets and liabilities of Dream Stables on December 31, 2001. The accountant's report that accompanies those reports clearly states that they were produced pursuant to a compilation rather than an audit.

8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are competent to demonstrate the petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. Financial statements produced pursuant to a compilation consist of the representations of management compiled into standard form by an accountant. The representations of the petitioner are very poor evidence of the petitioner's ability to pay the proffered wage. The unaudited financial statements submitted by counsel will not be considered.

As evidence that the petitioner and Dream Stables, Incorporated are the same entity, counsel provided a notarized letter, dated February 15, 2003, from Larry Pilotti, the petitioner's owner. The letter states that Dream Stables, Incorporated is the corporate entity of Larry Pilotti Racing Stables. Counsel also provided the results of a web inquiry showing that Larry Pilotti is the sole officer and director of Dream Stables, Inc. This office finds that evidence sufficient to establish that the petitioner and Dream Stables, Incorporated are the same entity.

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 April 23, 2003, denied the petition.

On appeal, counsel provides copies of the petitioner's 2002 Form 1120S U.S. Income Tax Return for an S Corporation. The return shows that the petitioner declared ordinary income of \$25,229 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$549 and current liabilities of \$155, which yields net current assets of \$394. Counsel also provided copies of the petitioner's owner's 2000, 2001, and 2002 Form 1040 U.S. Individual Income Tax Returns.

Counsel argues that the petitioner's gross receipts, total income, and net current assets during each of the three salient years demonstrate the petitioner's ability to pay the proffered wage. Counsel also cites the petitioner's owner's personal income as evidence of the petitioner's ability to pay the proffered wage.

On page two of the brief, counsel states that the petitioner's total income was \$5,644 during 2000, \$3,204 during 2001, and \$25,229 during 2002. This office notes that those are the figures for the petitioner's taxable income, not its total income, during those years.

Counsel further states, on that same page, that the petitioner's net current assets were \$24,512 during 2000, \$23,655 during 2001, and \$19,839 during 2002. Actually, those figures are the petitioner's total assets for those same years. The petitioner's net current assets, its current assets net of its current liabilities, are correctly computed above.

On page three of the brief, counsel stated that the petitioner's total income was \$113,168 during 2000, \$111,368 during 2001, and \$100,329 during 2002. Although this office is unable to detect the source of the figures cited by counsel, they are not the total income figures from the petitioner's 2000, 2001, and 2002 tax returns. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19

I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In any event, the petitioner's gross receipts and total income are not directly relevant to the petitioner's ability to pay the proffered wage. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ or otherwise increased its net income², the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

The personal income of the petitioner's owner is also irrelevant to the determination of the petitioner's ability to pay the proffered wage. A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Counsel also submits a letter, dated June 12, 2003, from an employee in the petitioner's accounting office. The writer states that the petitioner has the ability to pay the proffered wage. The writer states that the petitioner's owner could reduce the amount of his own compensation as necessary to pay the proffered wage.

The writer is unable to state, however, that the petitioner's owner would agree to reduce his own compensation, or that he would be obliged to reduce it, in order to pay the proffered wage. Again, the personal income of the petitioner's owner will not be considered in the determination of the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration

¹ The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

² The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

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 both CIS and 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 the INS, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS, now 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*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date is September 5, 2001. The proffered wage is \$17,804.80 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 247 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 118 days. The proffered wage multiplied by 118/365th equals \$5,756.07, which is the amount the petitioner must show the ability to pay during 2001.

During 2001, the petitioner declared ordinary income of \$3,204. The petitioner ended the year net current assets of \$2,814. Those amounts total \$6,018, an amount sufficient to pay the salient portion of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. During 2002, the petitioner declared ordinary income of \$25,229, an amount greater than the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner has demonstrated the ability to pay the appropriate portion of the proffered wage during 2001 and the entire proffered wage during 2002. No evidence was requested or provided for any other years.

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 met that burden.

ORDER: The appeal is sustained.