



U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 163 53773 Office: VERMONT SERVICE CENTER Date: JUL 21 2004

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, Director
Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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 a letter and additional evidence, asserting that the director incorrectly evaluated the petitioner's financial ability to pay the proffered wage.

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) 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$12.57 per hour, which amounts to \$26,145.60 annually. The visa petition indicates that the petitioner was established in 1991 and has 23 employees.

With the petition, the petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2000. It reflects that the petitioner uses a standard calendar year to file its taxes. The tax return indicates that the petitioner declared \$4,393 as ordinary income that year. Schedule L of the tax return shows that the petitioner had \$15,225 in current assets and \$14,611 in current liabilities, resulting in \$614 in net current assets. In addition to net income, CIS will consider a petitioner's net current assets as an alternate method of demonstrating its ability to pay a proffered wage. Net current assets are the difference between current assets and current liabilities and are reflected on Schedule L of a corporate income tax return. Net current assets represent the amount of liquidity that a petitioner has as of the date of filing. It reflects the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet.

Along with its corporate tax return, the petitioner submitted a copy of a Form 1099-MISC, Miscellaneous Income showing that the petitioner paid the beneficiary \$13,200 in 2000. The petitioner also provided a copy of an accounting firm's compiled financial report representing the petitioner's financial position as of the end of 1999 and 2000.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 12, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide its 2001 federal tax return, copies of any Wage and Tax Statements issued to the beneficiary if the petitioner employed the beneficiary, and copies of any additional financial documentation establishing its continuing ability to pay the beneficiary's proposed wage offer.

In response, the petitioner submitted another copy of the accountants' compiled financial statements for 1999 and 2000, a copy of a Form 1099-MISC for 2001 showing that the petitioner paid the beneficiary \$13,250, and a copy of the petitioner's 2001 corporate income tax return. The tax return reveals that the petitioner reported \$6,898 in ordinary income. Schedule L of the tax return shows that the petitioner had \$19,072 in current assets and \$9,780 in current liabilities, resulting in \$9,292 in net current assets.

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 14, 2003, denied the petition.

On appeal, counsel asserts that the director did not consider all factors relating to the petitioner's financial ability to pay the proffered annual wage of \$26,145.60. Counsel claims that proper weight was not given to the compiled financial statements submitted by the petitioner's accounting firm.

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence of a petitioner's ability to pay a proffered wage. Contrary to counsel's assertion on appeal, according to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel also claims that because the petitioner has been able to pay its employees and has a 2001 gross income of \$620,775, it has established its ability to pay the proffered salary.

In determining a petitioner's ability to pay an alien beneficiary's proposed wage offer as set forth on the approved labor certification, CIS will 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). Counsel's reliance on the petitioner's 2001 gross income and wages paid to other employees is misplaced. 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 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, now CIS, should have considered income before expenses were paid rather than net income.

Counsel submits on appeal, a letter dated April 18, 2003, from one of the petitioner's three principal shareholders, accompanied by an unsigned copy of a loan designated as an "open-end mortgage." The amount of the loan is \$50,000 and the named borrowers are two of the petitioner's three individual shareholders. The loan is secured by real property unrelated to the petitioner's location. The shareholder's letter asserts that the petitioner could not have survived for 10 years if it could not pay its employees. The letter simultaneously states that the shareholder borrowed the \$50,000 as indicated in the attached loan documents in order "to keep things going with the restaurant." Finally, the letter indicates that monies distributed to this shareholder as officer compensation could be used to pay the beneficiary and the shareholder could reduce her hours at the restaurant.

The letter's reliance on the shareholder's ability to individually secure a loan in order to keep the business operating is not persuasive in demonstrating the petitioner's continuing financial ability to pay the proffered wage. The petitioner is organized as a corporation. 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, (D. Mass. Sept. 18, 2003). Second, if the amount is reflected as the petitioner's loan, it will be disclosed in the balance sheet provided in the tax return or in an audited financial statement and will be fully considered in the evaluation of the corporation's net current assets.

The evidence also fails to show that the beneficiary would be replacing an owner/shareholder as the position and duties of the owner/shareholder do not involve the same duties as those set forth on the Form ETA 750. Moreover, as noted above, monies already expended, as shown on the corporate tax returns, are not available to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the ability to pay the proffered salary be demonstrated *beginning* as of the priority date and continuing until the beneficiary obtains lawful permanent resident status.

To the extent that the petitioner paid the beneficiary, credit will be given to those amounts in determining the petitioner's ability to pay the proffered wage. In this case, the evidence also suggests that the petitioner paid the beneficiary \$13,200 in 2000 and \$13,250 in 2001. The difference between the proffered wage of \$26,145.60 and the \$13,200 that the beneficiary received in 2000, is \$12,945.60. This amount could not be paid out of either the petitioner's net income of \$4,393 or its net current assets of \$614. Similarly, in 2001, the difference of \$12,895.60, between the amount paid to the beneficiary and the proffered wage, could not be covered by either the petitioner's net income of \$6,898 or its net current assets of \$9,292.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner submit either federal tax returns, audited financial statements, or annual reports in support of its ability to pay the proffered wage. It is the petitioner's

burden to demonstrate this ability as of the visa priority date and continuing until the beneficiary obtains lawful permanent resident status. In this case, following a review of the federal tax returns and other financial information contained in the record, the AAO cannot conclude that the petitioner has failed to persuasively establish its continuing ability to pay the proffered wage as of the visa 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.