



U.S. Citizenship
and Immigration
Services

B-2



FILE: EAC-02-183-53235 Office: VERMONT SERVICE CENTER

Date: JUN 24 2004

IN RE: Petitioner:
Beneficiary:



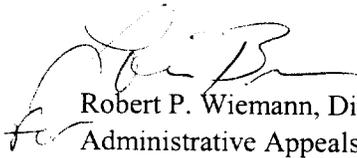
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

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, Director
Administrative Appeals Office

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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 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, the petitioner 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.

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 January 21, 1997. The proffered wage as stated on the Form ETA 750 is \$17.43 per hour, which amounts to \$36,254.40 annually.

With the petition, the petitioner submitted its Forms 1120S, U.S. Income Tax Return for an S Corporation for 1997 through 2000.

The tax returns reflect the following information for the following years:

	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>
Ordinary income	\$8,932	\$32,496	\$10,233	\$-23,268
Current Assets	\$5,925	\$17,612	\$27,324	\$4,181
Current Liabilities	\$4,050	\$8,010	\$11,371	\$14,397
Net current assets	\$1,875	\$9,602	\$15,953	\$-10,216

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 10, 2002, the director requested additional evidence pertinent to that ability. The director noted that the petitioner's tax returns reflected insufficient income or net current assets to establish its ability to pay the proffered wage. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, or in the alternative, evidence of wages paid to the beneficiary.

In response, the petitioner's former counsel stated the following:

Please note that the beneficiary was not employed by the [petitioner] in 1997. However, [the petitioner] employed [the beneficiary] in 2000 and 2001, see copies of income tax returns. [The petitioner] indeed has and had the assets to be able to afford the wage of \$36,254. The [petitioner] has assets of \$52,395 in 1997; \$59,723 in 1998; \$59,563 in 1999; in the year 2000 and 2001 the [beneficiary] was employed as per the enclosed Income Tax Returns.

The petitioner's former counsel submitted the beneficiary's Form 1040 Individual income tax return for 2001 and 2000. Nothing in these tax returns indicates the source of the beneficiary's income. The beneficiary's home address is listed as his business address although his occupation is listed as cook.

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 May 16, 2003, denied the petition.

On appeal, the petitioner states that counsel is no longer its representative for failing to follow directions and asserts an ability to pay the proffered wage through wages already paid to the beneficiary and from the petitioner's president's assets. The petitioner submits its 2001 and 2002 Forms 1120S U.S. Income Tax Return for an S Corporation reflecting ordinary income of \$5,115 and net current assets of \$-17,624 in 2001, and ordinary income of \$29,119 and net current assets of \$-11,481 in 2002. Additionally, the petitioner submits a reviewed, but not audited, balance sheet for the periods ending December 31, 1997 and December 31, 2001. The petitioner also submits Forms W-2, Wage and Tax Statement, for the beneficiary for 2002 reflecting that he was paid \$25,998 in wages by the petitioner for that year. A partial W-2 form for 2003 indicates that the beneficiary was paid \$9,800.00 in wages by the petitioner for employment performed from January through April 21, 2003. The petitioner presents an amortization schedule and the petitioner's president's Schedules E to his Form 1040 U.S. Individual Income tax return for the years 1997 through 2002. Finally, the petitioner presents a copy of a page purportedly from Zagat's restaurant survey.

The unaudited financial statements that the petitioner submits on appeal are not persuasive evidence. 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. Moreover, assuming the petitioner had submitted audited statements that reflected sufficient net income or net

current assets to establish its ability to pay the proffered wage as of 1997, the petitioner would need to reconcile any inconsistencies between such statements and the tax returns already submitted. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner's reliance on the assets of its president, Steven Van Gelder, 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). Citizenship and Immigration Services (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). The petitioner's president explains that it formed one company to purchase real estate for the petitioner and then formed another company to buy it back. This is apparently reflected on Schedule E to his individual income tax returns and amortization schedules; however, neither company is related to the petitioner and the petitioner's president's profits from this real estate venture cannot be allocated towards the petitioner's ability to pay the proffered wage for the reasons set forth above.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 did not establish that it employed and paid the beneficiary the full proffered wage in 1997 through 2002.¹ The petitioner did establish that it employed and paid the beneficiary part of the proffered wage in 2002. Thus, the petitioner must show that it can pay the full proffered wage for 1997 through 2001 and only the remainder of the proffered wage after what it demonstrated it actually paid in 2002, which is \$10,256.40.

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). The petitioner's net income for 1997 through 2001 was \$8,932, \$32,496, \$10,233, \$-23,268, and \$5,115 respectively. Those amounts are all lower than the \$36,254.40 proffered wage, and thus, the petitioner cannot demonstrate its ability to pay the proffered wage through its net income. The petitioner has established its ability to pay the proffered wage in 2002 through actual wages paid to the beneficiary and a net income that would cover the remainder. However, the petitioner must demonstrate an ongoing ability to pay the proffered wage. Thus, the petitioner must show it can pay the proffered wage for 1997 through 2001 in order for the petition to be approved.

¹ The beneficiary submitted his own individual income tax returns illustrating that he received income. However, the director correctly pointed out that no objective corroborating evidence, such as a Form W-2, or 1099 or paystubs, accompanied these returns to demonstrate the origin of the income. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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, former counsel's 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, 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.² 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 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's net current assets during 1997 through 2001, however, were only \$1,875, \$9,602, \$15,953, \$-10,216, and \$-17,624, respectively. None of these amounts are greater than the proffered wage.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1997. In 1997, the petitioner shows a net income of only \$8,932, and net current assets of only \$1,875, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998. In 1998, the petitioner shows a net income of \$32,496, and net current assets of only \$9,602, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999. In 1999, the petitioner shows a net income of only \$10,233, and net current assets of only \$15,953, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, the petitioner shows a loss of \$-23,268, and negative net current assets of \$-10,216, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of only \$5,115, and negative net current assets of \$-17,624, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has demonstrated the ability to pay the proffered wage in 2002 as set forth above.

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 petitioner has not demonstrated that any other funds were available to pay the proffered wage in 1997 through 2001.³ The petitioner has not, therefore, shown the ability to pay the proffered wage during 1997 through 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997 through 2001. 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.

³ While the restaurant's reputation appears to be generally positive, it does not translate into tangible resources with which to pay the proffered wage.