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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JUN 30 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

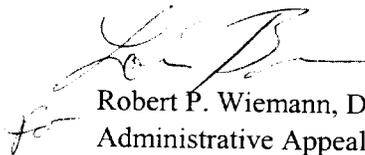
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

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

Wiemann
Administrative Appeals Office
June 30, 2004

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

The petitioner is an auto repair firm. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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 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 April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$37,274 per year.

With the petition, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It shows that the petitioner files its returns using a standard calendar year. In 2001, the petitioner declared \$5,274 in taxable income before taking the net operating loss (NOL) deduction. Schedule L of the tax return reflects that the petitioner had \$27,826 in current assets and \$1,683 in current liabilities, yielding \$26,143 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent the petitioner's cash or cash equivalent assets that would be reasonably available to pay the proffered wage during the year of filing. In 2001, neither the petitioner's net income of \$5,274, nor its net current assets of \$26,143 was sufficient to pay the beneficiary's annual wage offer of \$37,274 per year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 28, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of each employee's

Wage and Tax Statement (W-2) for 2001 and 2002 as well as copies of the petitioner's bank statements from the priority date of April 2001 to the present.

In response, the petitioner submitted copies of unaudited financial statements presenting data for the year ending December 31, 2002, copies of its Transmittal of Wage and Tax Statements (W-3s) showing the collective wages paid to its employees for 2001 and 2002, and copies of various employees' W-2s for 2001 and 2002. Nothing in the W-2s provided indicates that the petitioner employed the beneficiary. In addition, counsel submitted copies of the petitioner's checking account statements from two different accounts for the period from January 1, 2001 through December 31, 2002. As noted by the director, one of the checking account statements from November 2001 was omitted.

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. The director reviewed the ending checking account balances reflected on the petitioner's bank statements and noted that the ending balances reflected several months in which the accounts were overdrawn.

On appeal, counsel submits additional evidence relating to the petitioner's financial standing, including copies of the principal shareholders individual tax returns, a copy of a warranty deed reflecting real property owned by the petitioner, and a copy of its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. The tax return indicates that the petitioner elected to become an S corporation on January 1, 2002. It shows that the petitioner declared \$12,348 as ordinary income in 2002. Schedule L reveals that the petitioner had \$15,991 in current assets and \$2,237 in current liabilities, resulting in \$13,754 in net current assets. In 2002, the petitioner could not pay the beneficiary's proffered wage out of either its net income \$12,348 or its net current assets of \$13,754.

At the outset, it is noted that the unaudited financial statements that counsel submitted in response to the director's request for evidence are not persuasive. 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 asserts that the petitioner's 2002 total assets of \$429,598 as shown on Schedule L of its tax return should be a determinative figure, as well as maintaining that the officers' compensation and depreciation should also be considered. This assertion is not persuasive. In reviewing the petitioner's financial ability to pay a proffered wage, 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). 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.

Similarly, counsel's reliance on the petitioner's total assets is misplaced. 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, as noted above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Counsel's assertion that the bank statement balances establish the petitioner's ability to pay the proffered wage is also unpersuasive. Although the AAO concurs with the director's observations relating to the ending balances of the bank statements, it must be noted that bank statements are not among the three types of fundamental 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 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. 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 the 2001 or 2002 tax returns.

Counsel's reliance on the other individual assets of the petitioner's principal shareholders is also rejected. A corporation is a separate and distinct legal entity from its owners or stockholders. The assets of its shareholders or of other enterprises cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. 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 that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

Finally, counsel's claim that the petitioner's building and land could obtain a line of credit with which to pay the proffered wage is not convincing. A line of credit is a commitment to loan and does not represent unused funds in existence at the time of filing the petition. A petitioner must establish eligibility as of the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). It is further noted that an existing line of credit will be reflected on a petitioner's audited financial statement or tax return and will be considered as part of the evaluation of a corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or a cash equivalent asset as it potentially represents a debt that must be repaid.

Following a review of the petitioner's tax returns and other evidence contained in the record, and after consideration of the petitioner's assertions and evidence presented on appeal, the AAO cannot conclude that the petitioner has persuasively demonstrated its continuing ability to pay the proffered wage as of the priority date of the visa petition.

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.