



U.S. Citizenship
and Immigration
Services

BL

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: OCT 20 2004

IN RE:

Petitioner:

[REDACTED]

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:

[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.

for Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent disclosure of warranted
invasion of personal privacy

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

The petitioner is a copying and binding service. It seeks to employ the beneficiary permanently in the United States as a budget analyst. 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 March 12, 2001. The proffered wage as stated on the Form ETA 750 is \$60,664.00 per year. 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 been established on February 18, 1993, to have a gross annual income of \$593,000, and to currently employ four workers. In support of the petition, the petitioner submitted its Form 1065, U.S. Return of Partnership Income for 2001, 2000, and 1999.¹

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 March 25, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to

¹ The returns for 1999 and 2000 are irrelevant as the priority date is 2001.

demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested quarterly wage reports, any Form W-2 issued to the beneficiary, and signed tax returns or IRS computer-generated printouts of the returns.

In response, the petitioner submitted its 2002 and 2001 Forms 1065 U.S. Return of Partnership Income. The tax returns reflect the following information for the following years:

	<u>2002</u>	<u>2001</u>
Net income ²	\$48,868	\$44,173
Current Assets	\$50,836	\$67,543
Current Liabilities	\$134,877	\$196,919
Net current liabilities	-\$84,041	-\$129,376

In addition, counsel submitted copies of the petitioner's checking account statements for the period from February 2001 through May 2001 and the petitioner's quarterly wage reports for the quarters ending March 31, 2003, December 31, 2002, September 30, 2002, and June 30, 2002, along with a typed list of employees. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

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 June 24, 2003, denied the petition. On August 7, 2003, the director rejected an untimely appeal made by the petitioner, but subsequently determined that the appeal was not too late with a handwritten note and without issuance of another decision.

On appeal, counsel states that the petitioner's bank balances, combined earnings from other businesses, and personal resources of the petitioner's owner are sufficient to prove its ability to pay the proffered wage. Counsel submits tax returns of the petitioner's owner's other businesses, Lucky Liquor Market and AA Market; the petitioner's owner's individual income tax returns with their Form W-2 wage and tax statement reflecting the owner's and his spouse's personal income; the petitioner's owner's bank statements; and additional checking statements from the petitioner's checking account.

Substituted counsel also asserts on appeal that the petitioner's depreciation and net income, as well as the petitioner's owner's other businesses, together add up to sufficient financial resources to establish its ability to pay the proffered wage. The petitioner re-submits previously submitted evidence.

Counsel'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 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. 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,

² Ordinary income as reported on Line 22.

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 will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 2001 or 2002.

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. 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.³ A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. 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 the years in question, 2001 and 2002, however, were negative.

³ 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 it paid any wages to the beneficiary during 2001 or 2002. In 2001, the petitioner shows a net income of only \$44,173 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. In 2002, the petitioner shows a net income of only \$48,868 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

Typically counsel's reliance on the assets of the petitioner's owner and his wife, as well as his other businesses, would not be considered persuasive because 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). However, in this case, the personal assets of the general partners of the petitioner, Superfast Copying and Binding, may be considered since a partnership is not shielded from liability like a corporation is. Thus, the personal assets of the petitioner's partners, who appear to be [REDACTED] as equal 50% partners, will be considered.

The record of proceeding contains federal income tax returns from other businesses, [REDACTED] and AA Market, owned and operated by [REDACTED] in partnership with two individuals different than [REDACTED]. Also contained in the record of proceeding are the personal income tax returns of [REDACTED] for 2002 and 2001 as well as [REDACTED] personal bank records covering most of the time period from January 14, 2002 through January 14, 2003.⁴ The income from Lucky Liquor Market and AA Market will not be considered because those entities are not liable for paying the petitioner's proffered wage to the beneficiary. However, [REDACTED] personal income and assets will be considered since, as noted above, a partnership's partners are personally liable for the partnership. [REDACTED] individual income tax returns on Form 1040 reflect that the petitioner's adjusted gross income for 2002 was \$81,130 and for 2001 was \$52,311, for a family of four. [REDACTED] personal checking and savings accounts reflect ending balances as low as \$3,009.04 and as high as \$54,581.13.

The petitioner's net income from its tax returns in 2002 and 2001 were \$48,868 and \$44,173, respectively. The proffered wage is \$60,664.00. If the petitioner's net income were used to cover a portion of the proffered wage, that would leave \$11,796 and \$16,491 for [REDACTED] to cover out of his personal income, respectively, for 2002 and 2001. It is conceivable that [REDACTED] could utilize his adjusted gross income of \$81,130 and \$52,311, as well as substantial bank balances, to make up that difference.

Thus, the petitioner has submitted evidence sufficient to demonstrate that it has the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has established that it has 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 met that burden.

⁴ This evidence was provided by former counsel of record and relied upon in part by current counsel of record.



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ORDER: The appeal is sustained. The petition is approved.