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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: APR 13 2005

WAC-03-046-53801

IN RE:

Petitioner:

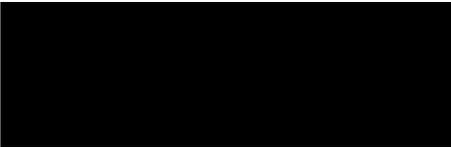


Beneficiary:

PETITION:

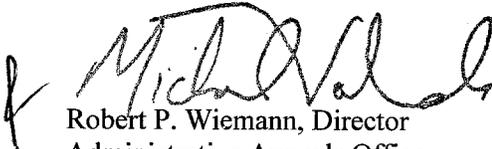
Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a trainer of thoroughbred racehorses. It seeks to employ the beneficiary permanently in the United States as a horse exerciser. 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 statement.

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 December 1, 1997. The proffered wage as stated on the Form ETA 750 is \$14.40 per hour, which amounts to \$28,828.80 annually based on a 38.5 hour work week. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner but indicated that he as a free-lance exercise rider for southern California race tracks.

On the petition, the petitioner left items blank concerning its date of establishment, gross annual income, and amount of current workers. In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date.

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 18, 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 demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted Forms 1065, U.S. Returns of Partnership Income, for Grayson Service Company, using the same address as the petitioner but noting its primary business activity as oilfield service, for the years 1997, 1998, 1999, and 2000, and accompanying letters from counsel and the petitioner's accountants

stated that the petitioner's 2001 and 2002 returns were unavailable as the petitioner's fiscal year begins in October and had sought extensions to file its returns for those years.

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

	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>
Net income ¹	-\$52,014	-\$242,982	-\$393,997	\$361,322
Current Assets	\$74,697	\$207,470	\$119,563	\$124,313
Current Liabilities	\$426,751	\$459,870	\$671,405	\$326,671
Net current assets	-\$352,054	-\$252,400	-\$551,842	-\$202,358

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 19, 2003, the director issued a notice of intent to deny pertinent to that ability. The director noted that the petitioner's net income was sufficient to establish the petitioner's ability to pay the proffered wage in 2000, but that the petitioner's negative net income and negative net current assets for 1997 through 1999 did not. The director also stated that evidence was missing for 2001 onwards as well as information omitted on forms.

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

The returns for 1997 through 1999 do show net current assets: for 1999- \$1,273[,],492.00; 1998-\$1,454[,],182.00 and for 1997-\$1,633[,],548. These assets are listed on the first sheet of each return. Also, this employer has other companies and assets. He owns oil leases, he just sold a business for \$5.2 million and there is also Grayson Services, Inc.

The petitioner submitted unaudited financial statements for Grayson Services Company.

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 November 20, 2003, denied the petition, stating that the petitioner failed to overcome the issues identified in its notice of intent to deny and that the net current assets were calculated accurately.

On appeal, counsel asserts the following:

The [p]etitioner is [sic] the above-referenced case has more than substantiated the "ability to pay" to beneficiary. The [p]etitioner owes [sic] a series of companies, which Grayson Services is just one of them. The [p]etitioner's net current assets were not calculated correctly by [Citizenship and Immigration Services (CIS)] and did show that the [p]etitioner had more than sufficient assets to pay the beneficiary. Also, current tax documents beyond October 2001 were submitted that established that the [p]etitioner was still in business and paying wages. The decision by [CIS] should be overturned and the case remanded.

¹ Ordinary income (loss) from trade or business activities as reported on Line 22.

Although counsel indicates that a brief and/or additional evidence would be sent to the AAO within thirty (30) days of filing the appeal, no additional correspondence or documentation has been received for this matter to date. The appeal was filed on December 23, 2003.

The unaudited financial statements that counsel submitted in response to the director's notice of intent to deny 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.

Counsel's reliance on the assets of other companies owned by the petitioner's owner 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). 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 AAO is not clear concerning the petitioner's identity and relationship to Grayson Service Company. No employer identification number (EIN) was presented on the petition to correlate to the EIN on the tax returns submitted in response to the request for evidence. Counsel states that Grayson Service Company is another business owned by the same owner of the petitioner. However, the record of proceeding does not contain any financial or organizational documentation concerning the petitioner and its relationship to Grayson Service Company. If the petitioner is structured as a partnership, then it would be possible to consider the petitioner's owner's liquefiable and unencumbered personal assets towards paying the proffered wage.

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, 1998, 1999, 2000, 2001, or 2002. The beneficiary's Form G-325, Biographic Information sheet, submitted with his application to adjust status to lawful permanent resident, indicates that he has been working for the petitioner since 1994. The record of proceeding, however, does not contain any evidence of wages paid to the beneficiary in any relevant year.

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. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage². 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 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 has not demonstrated that it paid any wages to the beneficiary during 1997. The petitioner has failed to produce its own financial returns or evidence that it is related to Grayson Services Company. The AAO will not analyze the petitioner's continuing ability to pay the proffered wage based upon the figures presented in tax returns for Grayson Services Company. The petitioner has not demonstrated that any other funds were available to pay the proffered wage in any relevant year.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, 2000, 2001, or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Additionally, the portion of the director's decision that determined that the petitioner had established its ability to pay the proffered wage in 2000 is withdrawn, as that net income related to Grayson Services Company, and not the petitioner.

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.

² Counsel's cited figures correlate to total assets, not total net current assets.

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.