



U.S. Citizenship
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APR 27 2005



FILE:



Office: VERMONT SERVICE CENTER

Date:

EAC 03 005 50832

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 food store. 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 more documentary evidence and on the Form I-290B notice of appeal, asserts error in the director's failure to give due consideration to submitted financial statements. Because counsel has not submitted "a brief and/or evidence" within 30 days as indicated on the Form I-290B, this office will decide the appeal upon the record to date.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 9, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked full time in the proffered position for the petitioner as of March 2001.

On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$401,156, and to currently employ two workers. In support of the petition, the petitioner submitted the following:

- An approved ETA 750, application for labor certification;
- A July 12, 2002 letter from a former employer of the beneficiary;

- The petitioner's federal employer's quarterly federal tax return for the quarter ending December 31, 2000; and,
- The petitioner's 2000 Form-1120 income tax return.

On December 31, 2002, the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and issued a request for evidence (RFE) pertinent to that ability, asking for:

- The petitioner's federal income tax return for fiscal 2001 covering the priority date of April 9, 2001; or,
- The petitioner's annual reports for 2001 "accompanied by audited or reviewed financial statements;" and
- Form W-2 Wage and Tax Statements issued to the beneficiary if the petitioner employed him in 2001;

In response, the petitioner submitted:

- An unaudited balance sheet and income statement for the year ending June 30, 2001; and,
- A February 14, 2003 letter from the petitioner's tax accountant in support of the petition.

The tax return reflects the following information:

Fiscal 2001 (ending June 30, 2001)

Net income	\$18,154
Current Assets	\$14,510
Current Liabilities	\$10,397
Net current liabilities	\$4,113

In addition, counsel submitted copies of the petitioner's quarterly wage report for the quarter ending December 31, 2000.¹

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 August 4, 2003, denied the petition.

Counsel asserts that the director failed to give due credence to the submitted financial statements as CPA-reviewed financial statements, which the RFE had indicated was an acceptable alternative to audited financial statements. On appeal counsel also submitted a copy of the American Institute of Certified Public Accountants' "Professional Standards, AR Section 100, Compilation and Review of Financial Statements." Counsel asserts that the director mistakenly referred to the submitted financial statements as a "compilation." Counsel asserts that the financial documents submitted constitute CPA-reviewed financial statements and thus are not a compilation. Accordingly, counsel asserts that because of the director's erroneous classification of

¹ The quarterly wage report, however, does not show that the petitioner paid any wages to the beneficiary during the quarter covered by the report.

the documents as a compilation, he failed to give the documents the evidentiary weight he should have as CPA-reviewed financial statements.

Counsel's assertions are not persuasive. The financial figures referenced by the CPA tax accountant in his February 14, 2003 letter are not to be found in the submitted balance sheet and income statement. Rather, they appear in the petitioner's Form 1120 income tax return as well as some other financial statement for calendar year 2001 not in the record. In short, nowhere does the petitioner's CPA tax accountant's letter state that he has reviewed or audited the financial statements accompanying the letter.

The unaudited financial statements that counsel submitted are, therefore, 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. Moreover, the regulation does not draw a distinction between compiled and reviewed statements. Unaudited statements are the unsupported representations of management, and unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The February 14, 2003 letter by itself is also not persuasive. While the petitioner may have been "precluded" from issuing a Form W-2 Wage and Tax Statement to the beneficiary, this did not prevent it from issuing a Form 1099, providing evidence of wage payments to the beneficiary. Further, counsel's assertion that the petitioner could have expended \$26,000 for wages rather than as compensation to the business' sole officer, ignores the reality that officer compensation was instead \$21,500 – which is \$17,791 less than the proffered wage – that that this \$21,500 has been already expended was thus unavailable for additional employee salaries. Further, 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 that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

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.

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, the argument of the petitioner's tax accountant and of counsel, 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(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 year in question – i.e., ending June 30, 2001 – however, were only \$4,113. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

The petitioner has not demonstrated that it paid any wages to the beneficiary during its fiscal year ending June 30, 2001, when the petitioner shows a net income of only \$18,154, and net current assets of only \$4,113. The petitioner has not, therefore, demonstrated the ability to pay the proffered out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently. 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.

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.