



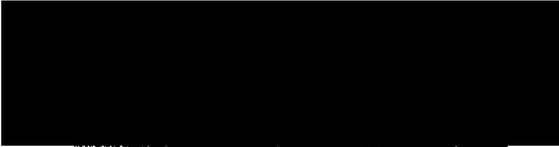
U.S. Citizenship  
and Immigration  
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B6

APP



FILE: [REDACTED]  
EAC 04 085 51595

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

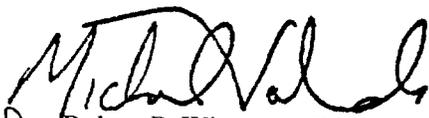
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 Acting Center Director (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 and steakhouse. 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, counsel submits additional evidence and contends that the petitioner has established its continuing ability to pay the certified wage.

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 22, 2001. The proffered wage as stated on the Form ETA 750 is 18.23 per hour, which amounts to \$37,918.40 annually. On the Form ETA 750B, signed by the beneficiary on March 19, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, filed January 29, 2004, the petitioner claims to have been established in 1968 and to currently employ ten workers. The petitioner initially submitted no evidence of its continuing ability to pay the beneficiary's proposed wage offer of \$37,918.40 per year.

On March 11, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2001 and 2002 federal tax returns.

In response, the petitioner, through counsel, submitted a copy of a Form 1120S, U.S. Income Tax Return for an S Corporation for 2000. Page 1 of the return shows that it represents the financial data for a fiscal year running

from July 1, 2000 to June 30, 2001. Schedule K-1 reflects that "Deidre Rabago" was the sole shareholder of the corporation. The petitioner also provided a copy of a Form 1065, U.S. Return of Partnership Income tax return for 2002. This return indicates that it represents the tax return for the petitioner as a domestic limited liability company and presents financial data covering a fiscal year beginning May 1, 2002 and ending December 31, 2002. Schedule K-1 reflects that [REDACTED] owns 75% of the business and [REDACTED] owns 25%. These tax returns contain the following information:

Year	2000	2002
Net income	-\$40,407	-\$70,502
Current Assets	\$ 8,374	\$52,944
Current Liabilities	\$25,193	\$63,209
Net current assets	-\$16,819	-\$10,265

The response to the director's request for evidence also contained an individual 2004 "financial statement," signed by [REDACTED] and reflecting that it was completed in connection with a credit application to Mitsubishi Motors Credit of America, Inc. The petitioner's response to the director's request did not include a copy of a 2001 federal tax return or other financial information covering the period between June 30, 2001 and May 1, 2002. Counsel's transmittal letter, dated June 2, 2004, states that the petitioner was formerly owned by Ms. [REDACTED] but due to business problems, including the September 11th World Trade Center attacks, the business was sold to [REDACTED]. Counsel asserts that the petitioning business' gross receipts have increased and contends that [REDACTED] personal resources should be considered in examining the petitioner's ability to pay the proffered wage.

Focusing primarily on the 2000 federal tax return, the director noted that the petitioner had declared a loss as net income and that its current liabilities exceeded its current assets. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage and denied the petition.

On appeal, counsel resubmits a copy of [REDACTED] May 2004 financial statement and an affidavit, dated August 2004, whereby [REDACTED] declares his intention to invest additional funds in the petitioning business to insure its viability. Counsel reasserts his argument that this evidence should be included in the evaluation of the petitioner's ability to pay the proffered wage. Counsel cites a case decided by the Board of Alien Labor Certification Appeals (BALCA) in support of this proposition.

Counsel's reliance on a BALCA case is not persuasive in this matter. The AAO notes that cases arising under the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether a visa petition is eligible for approval. CIS is empowered to make a de novo determination of whether the alien beneficiary is entitled to third preference status based on a review of the petitioner's ability to offer a permanent full-time position. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9<sup>th</sup> Cir. 1984).

Further, counsel's reliance on the assets of [REDACTED] is also not convincing. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Similarly, members and managers of limited liability companies are generally expressly exempt from personal responsibility for a company's obligations. *See McKinney's Limited Liability Company Law* § 609(a).

It is further noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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 may have 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 record does not indicate that the petitioner employed the beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will also 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 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. Similarly, in this case, the increase in gross receipts from 2000 to 2002, as shown by the two tax returns, cannot be considered in isolation as the net income also correspondingly decreased and failed to show sufficient funds to pay the proffered wage.

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. 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.<sup>1</sup> A petitioner's year-end current assets and current liabilities may be found on Schedule L of a corporate tax return or a partnership income tax return. If a petitioner's year-end net current

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

In this case, the petitioner's 2000 tax return fails to demonstrate that either its reported net income of -\$40,407 or its net current assets of -\$16,819 was sufficient to pay the certified wage. Similarly, the 2002 tax return reflects that neither the net income of -\$70,502, nor the net current assets of -\$10,265 was enough to cover the proffered salary.

As mentioned above, the record also failed to include any financial documentation covering the period between June 30, 2001 and May 1, 2002. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning at the priority date. As such an omission cannot be overlooked, the petitioner failed to show that it has had a continuing financial ability to pay the proffered wage. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Similarly, counsel's assertion as to the impact of the September 11th tragedy on the petitioning business is not specifically corroborated by the documentation in the record and cannot be considered as evidence in this regard. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based upon a review of the evidence and argument submitted to the underlying record and on appeal, the AAO concludes that the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director and as suggested by the evidence present, as well as omitted from the record, the case also fails to sufficiently corroborate that the current petitioner, a limited liability company owned by Mr. [REDACTED] not established until May 2002, as shown by its 2002 tax return, successfully qualifies as a successor-in-interest to the original petitioning business, held as an S-corporation by [REDACTED] which filed the labor certification. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. As discussed above, the evidence failed to demonstrate that either of the entities has demonstrated an ability to pay the proffered wage. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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.