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U.S. Citizenship
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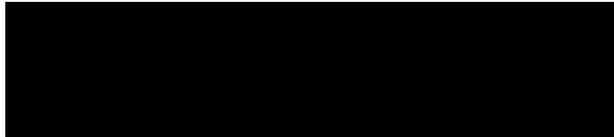
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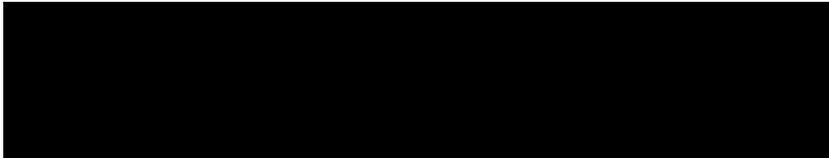
Date: AUG 11 2005

IN RE: Petitioner:
Beneficiary:



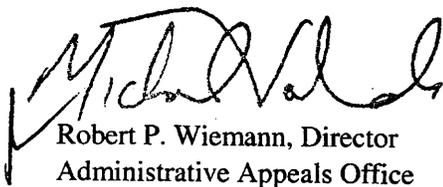
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a computer products and services company. It seeks to employ the beneficiary permanently in the United States as a budget accountant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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 granting 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 granting 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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$45,600 per year.

On the petition, the petitioner stated that it was established during 1990 and that it employs seven workers. The petition states that the petitioner's gross annual income is \$1.4 million and that its net annual income is \$711,805.¹ On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Vienna, Virginia.

¹ None of the evidence submitted in this matter corroborates these statements.

In support of the petition, counsel submitted a copy of the petitioner's compiled balance sheet for 2001. Counsel submitted no other evidence pertinent to the petitioner's ability to pay the proffered wage with the petition.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date consistent with the requirements of 8 C.F.R. § 204.5(g)(2), the Vermont Service Center, on July 29, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested that the petitioner, if it had employed the beneficiary during the pendency of the petition, provide Form W-2 Wage and Tax Statements showing the wages it had paid to the beneficiary.

In response, counsel submitted (1) an undated letter from the petitioner's accountant stating that it had the ability, as of 2001, to pay the proffered wage, (2) the petitioner's 2001 and 2002 Form 1120 U.S. Corporation Income Tax Returns, (3) copies of monthly statements pertinent to the petitioner's bank account,² (4) the petitioner's customer lists and sales journals, and (5) additional unaudited financial statements. Counsel submitted no W-2 forms, apparently indicating that the petitioner has not employed the beneficiary.

The petitioner's tax returns show that the petitioner reports taxes pursuant to the calendar year. The 2001 return shows that during that year the petitioner declared a loss of \$197,445 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner had current assets of \$415,315 and current liabilities of \$379,913, which yields net current assets of \$35,040.

The 2002 return shows that during that year the petitioner declared taxable income before net operating loss deduction and special deductions of \$11,360. At the end of that year the petitioner had current assets of \$519,487 and current liabilities of \$499,214, which yields net current assets of \$20,273.

The Acting 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 January 13, 2004, denied the petition.

On appeal, counsel cites the minutes of a November 7, 2001 teleconference between an immigration attorneys' association and the director of the Vermont Service Center for the proposition that CIS is obliged to consider various aspects of the petitioner's finances. In the discussion below this office will make clear the aspects of the petitioner's finances that may show the petitioner's ability to pay the proffered wage. This office is not, however, bound by the minutes of the teleconference.

Counsel also cites a federal district court decision, *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), for the proposition that the Acting Director failed to consider various relevant factors.

² The petitioner is identified on the Form I-140 petition, the Form ETA 750 labor certification, and its tax returns as [REDACTED] Incorporated. The bank accounts belong to [REDACTED] Worldwide, Incorporated and [REDACTED] Corporation. Because the taxpayer identification number on the bank statements matches those on the income tax returns, however, this office infers that the bank accounts belongs to the petitioner.

Counsel argues that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel also submits (1) a letter, dated February 15, 2004, from the petitioner's president, (2) another undated letter from the petitioner's accountant, and (3) additional bank statements.

The petitioner's president's letter states that he authorized payment of \$45,828.92 toward the balance of the petitioner's credit line debt on December 24, 2001, and that he would have retained those funds if necessary to pay the proffered wage. He further notes that, after that payment, the petitioner still owed \$35,707.12 on that credit line. The petitioner's president further stated that in November 2001 the U.S. Small Business Administration issued the petitioner a \$142,000 loan authorization,³ which is an additional indication of money the petitioner could have borrowed to pay the proffered wage. Finally, the president stated that he is the petitioner's sole owner, and that he has a net worth of \$742,600.⁴

The petitioner's accountant's letter states that, taking into account the petitioner's ready cash, its available credit, and its owner's assets, the petitioner has sufficient funds to pay the proffered wage.

Counsel's citation of *Full Gospel, supra*, is inapposite. The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court even in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a piano teacher. Here, counsel is asserting that CIS should treat the petitioner's owners' personal assets, its credit lines and other indices of credit as evidence of its ability to pay wages. Borrowing from a credit line creates a debt, whereas a parishioner's pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the line of credit.

Further, the petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). 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). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner shall not be further considered.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate

³ As support for that statement the petitioner's president provides a copy of the SBA Form 391 Loan Authorization and Agreement.

⁴ In support of that statement the president provides a copy of his SBA Form 413 Personal Financial Statement.

cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁵ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel's reliance on the unaudited financial statements submitted is similarly misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

As is noted above, counsel submitted copies of the petitioner's customer lists and sales journals. How those documents might support the petitioner's ability to pay the proffered wage is unclear and counsel provided no explanation. Those documents will not be considered further.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 total 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 CIS should have

⁵ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$45,600 per year. The priority date is April 19, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had net current assets of \$35,040. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$11,360. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$20,273. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.