



U.S. Citizenship  
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FILE: [REDACTED]  
WAC 02 261 53671

Office: CALIFORNIA SERVICE CENTER

Date: FEB 14 2005

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

The petitioner is a flight school and aircraft leasing company. It seeks to employ the beneficiary permanently in the United States as a flight instructor, categorized on the Form ETA 750, Application for Alien Employment Certification, as Instructor, Flying I. As required by statute, the Form ETA 750, which has been 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.

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 Oct. 27, 1999, which is the priority date. The proffered wage as stated on the Form ETA 750 is \$31.51 per hour, which amounts to \$65,550 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of July 1999.

On the petition, the petitioner state it was established on June 7, 1995, and has a gross annual income of \$703,187, currently employing three workers. In support of the petition, the petitioner submitted a certified Form ETA 750; a Form I-94 showing the beneficiary in nonimmigrant E-2 status until March 1, 2002; a letter verifying his experience with a former employer from his home country; copies of Federal Aviation Administration pilot and flight instructor licenses; and corporate returns for tax years 1999-2001.

Because the evidence initially submitted seemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director on March 19, 2003, requested additional evidence (RFE) to more fully demonstrate 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 Form 1120 Corporate tax returns for the petitioner for the years 1999, 2000 and 2001. The tax returns reflect the following information for the following years:

	1999	2000	2001
Net income	\$10,433	\$6,126	\$-34,198
Current Assets	\$9,575	\$8,201	\$22,527
Current Liabilities	\$1,497	\$3,013	\$3,013
Net current assets	\$8,078	\$5,188	\$4,851

In addition, counsel submitted, on appeal, copies of the petitioner's checking account statements for the period from Dec. 1, 1999, through May 30, 2003, and the petitioner's Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 1999-2002. The Forms W-2 Wage and Tax Statements reflect wages of only \$14,100 for 1999, \$28,200 for 2000, and \$27,770 for 2001.

For 2002, the beneficiary's Form-2 lists the beneficiary's annual wages as \$20,040. Counsel also submitted documents for the last quarter of 2002 purporting to show that the beneficiary earned an additional \$9,429 from a related Japanese corporation.<sup>1</sup> However, the AAO will not credit the petitioner with wages paid by another entity. Contrary to counsel's primary assertion, Citizenship and Immigration Services (CIS), formerly the Service or CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

Thus, for the years 1999 to 2002, the petitioner paid the beneficiary wages substantially less than the proffered annual wage of \$65,550.

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 20, 2003, denied the petition.

On appeal, counsel argues that the director based his decision on a simplistic analysis of current income and assets and instead should have taken the petitioner's total assets into account, including depreciated buildings and equipment. Finally, counsel submits the petitioner's owner's bank statements for the months October 1999 to March 2003.

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

<sup>1</sup> Neither counsel nor the petitioner attempted to convert the wages from Japanese to U.S. currency. From counsel's documents, however, it appears that 339,780 Japanese yen is the equivalent of \$2,800 in U.S. dollars in December 2002. From this the AAO has determined that the beneficiary's last quarter wages totaling 2,288,510 in Japan yen equal \$9,429, using a conversion factor of 0.008241.

instant case, the petitioner established that it employed and paid the above amounts to the beneficiary. Since the proffered wage is \$65,550, the petitioner must illustrate that it can pay the remainder of the proffered wage for each year, which would be an additional \$41,017 in 1999, \$31,224 in 2000, and \$71,978 in 2001. Additionally, for 2002, when the petitioner paid the beneficiary wages of \$20,040, it would need evidence of the ability to pay an additional \$45,510.

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 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.<sup>2</sup> 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, as shown above, however, were not enough to establish the petitioner's ability to pay the proffered wage. As such, the director was correct in concluding that petitioner had not met its burden to establish the ability to pay.

Finally, the petitioner maintains a sufficient balance in its corporate bank account to cover the beneficiary's proffered wages. Thus, it is argued that the petitioner could use these funds to pay the proffered wage. The

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<sup>2</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.

record contains bank statements covering the period Dec. 1, 1999, through May 30, 2003, with an average balance of roughly \$30,000 to \$70,000.

Counsel's reliance on the balances in the petitioner's bank account 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, 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.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in the years 1999 to 2003. Counsel's submission of bank records for the owner of all of the petitioner's capital stock does not escape the foregoing reasoning regarding the "corporate veil," and thus does not supply the needed evidence of the petitioner's ability to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the period from the priority date to the time of the decision. 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 and the petition is denied.