

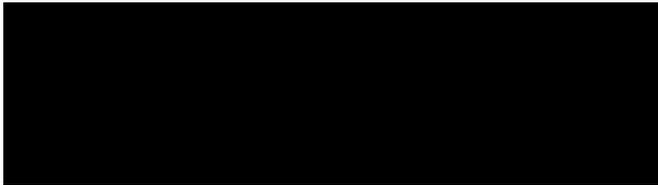
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U.S. Citizenship
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Services



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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: FEB 28 2005

WAC-02-284-55156

IN RE:

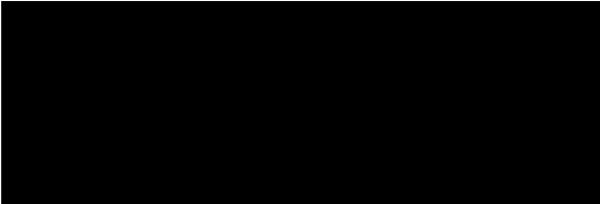
Petitioner:

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 an audio/video training media producer. It seeks to employ the beneficiary permanently in the United States as an audio video technical engineer. 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 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 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 9, 2001. The proffered wage as stated on the Form ETA 750 is \$32.82 per hour, which amounts to \$68,265.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$362,738, and to currently employ three workers. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return, for 2001.

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 April 17, 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. The director specifically requested the petitioner's 2002 corporate tax return and its quarterly wage reports for the past four quarters.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the years 2001 and 2002. The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ¹	-\$79,709	-\$107,720
Current Assets	\$337	\$176
Current Liabilities	\$188,876	\$180,985
Net current assets	-\$188,539	-\$180,809

Counsel also submitted copies of the petitioner's quarterly wage reports for first quarter in 2003, which reflect that the petitioner paid the beneficiary, the only employee listed on its quarter wage report, \$8,094.40 in that quarter. Paying the beneficiary \$8,094.40 per quarter would result in an annual wage of \$32,376. The petitioner also submitted an unaudited balance sheet depicting its financial situation as of June 20, 2003.

In addition, counsel submitted a letter citing unpublished AAO decisions and asserting that the petitioner already pays the beneficiary the proffered wage and thus in accordance with precedent, the director should approve the petition despite the petitioner's reported losses. Counsel also cites unpublished AAO decisions for the premise that the petitioner's parent entity, [REDACTED] Inc. [REDACTED]), can demonstrate its continuing ability to pay the proffered wage that should be imputed to the petitioner. A letter from a [REDACTED] representative was submitted into the record of proceeding that states it is the "100% parent and owner of [the petitioner] since 1998, to present, without change." [REDACTED] representative states that the petitioner continues to operate at a loss but has more than adequate funding and assets to pay the proffered wage. [REDACTED] submitted its tax return showing tax-exempt status as well as its quarterly wage reports.

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 September 15, 2003, denied the petition. The director stated that the beneficiary is "NOT currently employed by the petitioner" and its net income and net current assets were insufficient to pay the proffered wage.

On appeal, counsel asserts that the director erred in stating that the beneficiary is not employed by the petitioner, and states that the beneficiary did not commence employment with the petitioner until he had obtained an employment authorization document (EAD) in February 2003. Counsel also states that the director erred in failing to consider the relationship between the petitioner and Progressive and Progressive's financial status. The petitioner submits a letter from [REDACTED] CPA, President, or [REDACTED] & Associates, LLC, which states that he is familiar with the books, records, tax return and related filings of both [the petitioner] [EIN [REDACTED]], and or [REDACTED] [EIN [REDACTED]]. [REDACTED] states that the petitioner and Progressive are "single employers and commonly owned organizations" who can file their taxes together or separately under 26 IRC § 414(b). [REDACTED] also cites 20 CFR § 655.736. The petitioner also submits a copy of the beneficiary's EAD card; paycheck stubs issued from the petitioner to the beneficiary in 2003 showing that he was paid at a monthly rate of \$5,688.80 which is the annual proffered wage rate of \$68,265.60; copies of bank statements for accounts held by Progressive and the petitioner; and previously submitted evidence.

At the outset, the petitioner has not adequately documented its parent-subsidary relationship with Progressive. All it has provided is a letter from [REDACTED] and assertions of counsel. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Contrary to counsel's assertions, [REDACTED] is not an expert witness in these proceedings as no evidence has been provided concerning his credentials. Additionally, CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The AAO notes that the petitioner and Progressive have different EIN numbers and file taxes separately. If the petitioner is a 100% wholly-owned subsidiary of Progressive, then documentation should exist to establish that, such as articles of incorporation, by-laws, minutes of shareholders or corporate officers, a chart to illustrate shared ownership and control, something other than assertions and citation to the Internal Revenue Code.² 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). If the petitioner pursued additional proceedings in this matter, a clear relationship must be established and any other sponsored immigrants by any related business entities disclosed.

Thus, counsel's reliance on the assets of Progressive 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). There is insufficient evidence in the record of proceeding that Progressive has the legal obligation to pay the proffered wage in this case. Thus, no documentation pertaining to Progressive's financial status will be considered.

Additionally at the outset, the unaudited financial statements that counsel submitted in response to the director's request for evidence 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. Thus, the unaudited balance sheet representing the petitioner's financial status as of June 20, 2003 will not be considered.

Counsel's reliance on the balances in the petitioner's bank accounts 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.

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

² Mr. [REDACTED]'s and counsel's citation of 20 CFR § 655.736's definition of a parent-subsidary controlled group indicate that there is a connection through "stock ownership with a common parent corporation where at least 80 percent of the stock (by voting rights or value) of each subsidiary corporation is owned by one or more of the other corporations . . . and the common parent corporation owns at least 80 percent of the stock of at least one subsidiary." Thus, according to the provisions cited by [REDACTED] and counsel, stock ownership and voting rights must be demonstrated. The AAO notes that these provisions govern the H-1B non-immigrant visa provisions and not employment-based immigrant visa preference petitions.

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 or 2002. The petitioner did not provide quarterly wage statements or cashed paychecks to illustrate that it did in fact pay the beneficiary the wages indicated on the pay stubs it submitted into evidence on appeal³. Thus, the AAO only determines that the petitioner paid the beneficiary \$8,094.40 in 2003.

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).⁴ 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.

The petitioner reports losses in 2001 and 2002 and thus cannot demonstrate its continuing ability to pay the proffered wage out of its net income in those years.

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. 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.

³ Counsel refers to a decision issued by the AAO concerning payment of wages evidencing ability to pay the proffered wage, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Regardless of the unpublished decision to which counsel cites, however, the petitioner has not proven that it paid full wages to the beneficiary in any relevant year.

⁴ Counsel asserts that some of these precedents are inapplicable to the instant case but fails to provide a reason for such assertion.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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's net current assets during the years in question, 2001 and 2002, however, were negative. As such, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net current assets in those years.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001 and 2002, the petitioner shows a negative net income and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage 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 2001 and 2002.

Although illustrating that it paid partial wages in 2003, no other regulatory-sanctioned evidence was provided concerning the petitioner's financial situation in that year. Thus, the petitioner has failed to establish its ability to pay the proffered wage in 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, or 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Subsequent to completion of this decision, a supplemental brief was received by counsel. The AAO reviewed the arguments made in the brief and has determined that they do not impact the substantive nature of the foregoing decision.

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.

⁵ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.