



U.S. Citizenship
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Services

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FILE:  Office: CALIFORNIA SERVICE CENTER Date: **JUL 05 2005**
WAC-03-016-56167

IN RE: Petitioner: 
Beneficiary: 

PETITION: 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 sustained. The petition will be approved.

The petitioner is a produce and meat market company. It seeks to employ the beneficiary permanently in the United States as a butcher. 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 20, 2001. The proffered wage as stated on the Form ETA 750 is \$11.95 per hour, which amounts to \$24,856.00 annually. On the Form ETA 750B, signed by the beneficiary on March 11, 2001, the beneficiary claimed to have worked for the petitioner beginning in June 1995 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on October 22, 2002. On the petition, the petitioner left blank the items for the date on which it was established, its current number of employees, its gross annual income, and its net annual income. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 1, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. 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 noted that the labor certificate claimed that the beneficiary had worked for the petitioner since 1995. Accordingly the director requested evidence of that employment.

In response to the RFE, the petitioner submitted additional evidence.

In a second RFE dated December 20, 2003, the director requested evidence that the beneficiary had the experience listed on the Form ETA 750. The director also requested additional evidence of the petitioner's ability to pay the proffered wage. The director specifically requested copies of the petitioner's federal tax returns for the years 2001 and 2002.

In response to the second RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the second RFE were received by CIS on January 23, 2004.

In a decision dated March 2, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the corporate officers of the petitioner are a husband and wife whose adjusted gross income was \$2,033,680.00 in 2001 and \$2,305,014.00 in 2002, and that part of their income will be used to pay the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, the evidence newly submitted on appeal consists of copies of federal individual income tax joint returns of the petitioner's owners for 2001 and 2002. A copy of one of those returns, the return for 2001, had been submitted among the documents in support of the beneficiary's I-485 application to adjust status, which was concurrently filed with the instant I-140 petition. But, in any event, none of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 11, 2001, the beneficiary claimed to have worked for the petitioner beginning in June 1995 and continuing through the date of the ETA 750B. The

file contains copies of the beneficiary's Form W-2 Wage and Tax Statements for 2000, 2001 and 2002, which were apparently submitted in support of the beneficiary's I-485 Application to Register Permanent Residence or Adjust Status. The record before the director closed on January 23, 2004 with the petitioner's submissions in response to the second RFE. As of that date the Form W-2's for the year 2003 were not yet due.

The Form W-2's of the beneficiary show that the petitioner paid the beneficiary \$17,688.31 in 2000, \$21,619.21 in 2001 and \$19,170.09 in 2002. The amount for 2000 is not directly relevant to the instant petition, since the priority date is March 20, 2001. For the years 2001 and 2002 the amounts paid to the beneficiary were less than the proffered wage of \$24,856.00. Therefore the beneficiary's Form W-2's for 2001 and 2002 fail to establish the petitioner's ability to pay the proffered wage those years. The amounts needed to raise the beneficiary's compensation to the proffered wage would have been \$3,236.79 in 2001 and \$5,685.91 in 2002.

The record contains a copy of the petitioner's Form DE 6, California quarterly wage report for the second quarter of 2003. That report shows that the petitioner paid the beneficiary compensation in the amount of \$4,656.85 that quarter. Since only one quarter of 2003 is covered by the DE 6 report, that report fails to establish the petitioner's ability to pay the proffered wage during the entire year. Moreover, even if the evidence established that the petitioner paid the petitioner at that same rate of pay for the entire year of 2003, the quarterly amount of \$4,656.85 is equivalent to an annual rate of \$18,263.40. That annual rate is less than the proffered annual wage of \$24,856.00.

The record also contains a copy of the petitioner's Form DE 6 for the third quarter of 2004. That report shows that the petitioner paid the beneficiary compensation in the amount of \$5,453.90 that quarter. As with the Form DE 6 discussed above, the report from 2004 covers only one quarter. Moreover, the quarterly rate of \$5,453.90 is equivalent to an annual rate of \$21,815.60, an amount which is also less than the proffered annual wage of \$24,856.00.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the following amounts for taxable income on line 28: \$113,879.00 for 2000; \$3,563.00 for 2001; and \$578.00 for 2002. The figure for 2000 is not directly relevant to the instant petition, since the priority date is March 20, 2001. The petitioner's taxable income of \$3,563.00 in 2001 is greater than the amount of \$3,236.79 which would have been needed to raise the beneficiary's compensation to the proffered wage in 2001. However, the petitioner's taxable income of \$578.00

in 2002 is less than the amount of \$5,685.91 which would have been needed to raise the beneficiary's compensation to the proffered wage in 2002. That figure therefore fails to establish the petitioner's ability to pay the proffered wage in the year 2002. As noted above, the record before the director closed on January 23, 2004 with the petitioner's submissions in response to the second RFE. As of that date the petitioner's tax return for 2003 was not yet due.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -\$402,901.00 for the beginning of 2000; -\$251,217.00 for the end of 2000; -\$494,853.00 for the end of 2001; and -\$428,724.00 for the end of 2002. Since each of those figures is negative, they also fail to establish the ability of the petitioner to pay the proffered wage for any of the years at issue.

The record also contains copies of bank statements for accounts of the petitioner, in the form of printouts from reports prepared by the Internet web site of California State Bank. Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the statements are for a single month, October 2002, therefore they can not establish the petitioner's ability to pay the proffered wage for each of the years at issue in the instant petition. Moreover, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

As noted above, counsel states on appeal that the corporate officers of the petitioner are a husband and wife whose adjusted gross income was \$2,033,680.00 in 2001 and \$2,305,014.00 in 2002, and that part of their income will be used to pay the proffered wage. Counsel's assertions about the officers of the petitioner are supported by tax returns in the record.

The petitioner's Form 1120 U.S. Corporation Income Tax Returns show that two officers of the corporation received compensation from the petitioner, and that those two persons own 100% of the shares of the petitioner. The record contains copies of Form 1040 U.S. Individual Income Tax Returns of those two persons for 2001 and 2002, joint returns, showing those two persons are a married couple.

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); *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.

Nonetheless, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. The sole shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. The Form 1120, Schedule E provides for itemizing the amount of compensation for each officer, along with each officer's social security number, percent of time devoted to the business, percent of corporation stock owned, and amount of compensation.

In the instant petition, the Form 1120S U.S. Income Tax Returns for an S Corporation of the petitioner show the following amounts for officer compensation to the petitioner's two owners: \$1,140,000.00 in 2001 and \$1,040,000.00 in 2002. Since those persons own 100% of the shares of the petitioner, the amounts paid to them in officer compensation may be considered as additional financial resources of the petitioner. If the amounts of officer compensation are added to the petitioner's net income for the foregoing years, the totals would be \$1,143,543.00 for 2001 and \$1,040,000.00 for 2002. The amounts needed to raise the beneficiary's compensation to the proffered wage, as noted above, are \$3,236.79 in 2001 and \$5,685.91 in 2002. If those amounts are subtracted from the figures calculated above, the amounts remaining would be \$1,140,326.79 in 2001 and \$1,034,892.09 in 2002. Those amounts would still allow for the payment of very substantial amounts of officer compensation to the petitioner's owners in each of those years.

The record indicates that the petitioner is financially stable. The tax returns in the record show that gross receipts or sales were \$16,970,503.00 in 2000, \$17,656,389.00 in 2001, and \$15,649,448.00 in 2002. The petitioner's total income figures on its tax returns were \$2,308,477.00 in 2000; \$2,011,536.00 in 2001; and \$2,134,945.00 in 2003. Those figures indicate that the petitioner has had gross receipts or sales and total income which are many multiples of the proffered wage.

The petitioner's Form DE 6 California quarterly wage report for the second quarter of 2003 shows the total number of the petitioner's employees for each month of the quarter as follows: 91 in the first month (April 2003), 86 in the second month (May 2003) and 81 in the third month (June 2003). The form DE 6 for the third quarter of 2004 shows the number of employees for each month as follows: 82 in the first month (July 2004), 76 in the second month (August 2004), and 74 in the third month (September 2004). Those figures indicate that the petitioner had a relatively stable numbers of employees during 2003 and 2004.

The foregoing evidence concerning the petitioner's net income, its officer compensation to its sole shareholders, its gross receipts or sales, its total income, and the number of its employees is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, under the principles described in *Matter of Sonogawa*, 12 I&N Dec. 612.

In his decision, the director correctly analyzed the petitioner's tax returns and correctly concluded that the petitioner's net income and its net current assets failed to establish the petitioner's ability to pay the proffered wage during the relevant period. The director did not conduct any further analysis based on the principles in *Matter of Sonogawa*. As shown above, under those principles, the petitioner's evidence is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period. At the time of the director's decision, decisions previously issued by the AAO may not have considered officer compensation to a shareholder who

holds a controlling interest in the petitioner as a factor relevant to an analysis under *Matter of Sonogawa*. But in certain circumstances, as shown above, it is appropriate to do so.

For the reasons discussed above, the assertions of counsel on appeal are sufficient to overcome the decision of the director.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.