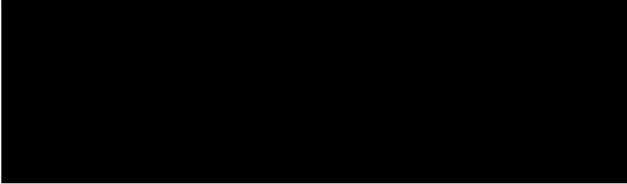


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FILE: WAC 03 108 54406 Office: CALIFORNIA SERVICE CENTER

Date: JUN 13 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 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 dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental ceramist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 3, 2000. The proffered wage as stated on the Form ETA 750 is \$18.59 per hour (\$38,667.20. per year). The Form ETA 750 states that the position requires four years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, copies of petitioner's financial documentation.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center on May 12, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

“Ability to Pay: Provide evidence of the petitioner’s ability to pay the beneficiary’s wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of the ability shall be either in the form of copies of annual reports, ... federal tax returns, or audited financial statements.”

“Beneficiary’s W-2 Form Service records indicates that the beneficiary has been working for the company from July 1998 to present. Submit a copy of the beneficiary’s W-2 Form for years 2000 through 2002.”

“ Quarterly Wage Report: Submit copies of Tri-Tech Dental Laboratory, Inc.’s California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees.”

In response to the Request for Evidence of the petitioner’s ability to pay the proffered wage beginning on the priority date, counsel submitted a letter from the petitioner dated July 30, 2003, the petitioner’s Internal Revenue Service (IRS) Form 1120S tax returns for years 2000, 2001, and 2002, Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California for the quarters ending March 31, 2002, June 30, 2002, September 30, 2002, and, December 31, 2002.

The tax returns demonstrated the following financial information concerning the petitioner’s inability to pay the proffered wage of \$38,667.20. per year from the priority date.

- In 2000, the Form 1120S stated taxable income<sup>1</sup> of \$7,154.00.
- In 2001, the Form 1120S stated taxable income of <\$4,984.00><sup>2</sup>.
- In 2002, the Form 1120S stated taxable income of \$38,573.00.

Therefore, between those years 2000 through 2002, the petitioner did not have sufficient taxable income to pay the proffered wage.

The director denied the petition on February 10, 2004 finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date

On appeal, counsel asserts:

“Reconsideration is requested upon a showing of more than sufficient income by the sole owner of the company, her pledge of her income, and W-2 Forms showing prior payroll to this worker....”

In determining the petitioner’s ability to pay the proffered wage during a given period, U.S. 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 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. For the first time on appeal, the petitioner has submitted the beneficiary’s W-2 Wage and Tax Statement for 2000, 2001 2002 stating wages in the amount paid by

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<sup>1</sup> IRS Form 1120S, Line 21.

<sup>2</sup> The symbol <a number> indicates a negative number

petitioner of \$24,048.00, \$25,362.00 and \$9,321.75<sup>3</sup> respectively.<sup>4</sup> Therefore, for the years for which W-2 Wage and Tax statements have been provided, the petitioner did not pay the beneficiary the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have 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 v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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, equal or are greater than the proffered wage, then the petitioner can demonstrate that it has the ability to pay the proffered wage. In tax year 2002, the petitioner paid wages of \$9,321.75, and, it stated taxable income of \$38,573.00. Therefore, in year 2002, petitioner had the ability to pay the 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<sup>5</sup>, CIS will review the petitioner's assets. Petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage.

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>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's 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.

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<sup>3</sup> The petitioner has submitted a second W-2 for tax year 2002 stating wages paid to the beneficiary by another employer in the amount of \$12,408.00.

<sup>4</sup> The petitioner has also submitted the beneficiary's wife's W-2 statements for 2000, 2001 and 2002 from another employer.

<sup>5</sup> In tax years 2000 and 2001 taxable income added to wages paid the beneficiary did not equal the proffered wage, but petitioner could have paid the proffered wage in year 2002..

<sup>6</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Examining the 2000, 2001 and 2002 Form 1120S U.S. Income Tax Return submitted by petitioner, Schedule L found in that return indicates current assets never exceeded current liabilities.

- In 2002, petitioner's Form 1120S return stated current assets of <\$864.00> and \$27,493.00 in current liabilities. Since the proffered wage was \$38,667.20 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120S return stated current assets of \$123.00 and \$18,420.00 in current liabilities. Since the proffered wage was \$38,667.20 per year, this sum is less than the proffered wage.
- In 2000, petitioner's Form 1120S return stated current assets of \$176.00 and \$13,640.00 in current liabilities.

Therefore, for the period 2000 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date by her pledge of her income. 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),

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.