



U.S. Citizenship
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Services

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FILE: [Redacted]
EAC-03-011-53289

Office: VERMONT SERVICE CENTER

Date: **JUN 22 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a beam carpenter. 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 April 6, 2001. The proffered wage as stated on the Form ETA 750 is \$33.68 per hour, which amounts to \$70,054.40 annually. On the Form ETA 750B, signed by the beneficiary on March 1, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on October 1, 2002. On the petition, the petitioner claimed to have been established in 1998, to currently have two employees, and to have a gross annual income of \$200,000.00+. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated September 4, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by CIS on October 8, 2003.

In a decision dated December 16, 2003, 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 petitioner's tax returns and bank statements, along with evidence in the record of compensation paid by the petitioner to the beneficiary, are sufficient to establish the petitioner's ability to pay the proffered wage. Counsel also states that the personal financial resources of the petitioner's owner are available to pay the proffered wage if needed.

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 the federal and state tax returns of the petitioner's owner for 2001. 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 1, 2001, the beneficiary did not claim to have worked for the petitioner. However, the record contains copies of the beneficiary's Form 1099-MISC for 2001 and 2002. Those forms show nonemployee compensation paid by the petitioner to the beneficiary in the amounts of \$26,550.00 for 2001 and \$26,400.00 for 2002. Since each of those figures is less than the proffered wage of \$70,054.40, those figures fail to establish the petitioner's ability to pay the proffered wage during either of those years. The amounts needed to raise the beneficiary's compensation to the proffered wage would have been \$43,504.40 in 2001 and \$43,654.40 in 2002.

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: \$23,767.00 for 2001; and \$44,889.00 for 2002. The record before the director closed on October 8, 2003 with the petitioner's submissions in response to the RFE. As of that date, the petitioner's federal tax return for 2002 was the most recent return available.

As noted above, the amounts needed to raise the beneficiary's compensation to the proffered wage would have been \$43,504.40 in 2001 and \$43,654.40 in 2002. The petitioner's net income of \$23,767.00 in 2001 was less than the amount of \$43,504.40 needed to raise the beneficiary's actual compensation to the proffered wage. Therefore the petitioner's net income in 2001 fails to establish the petitioner's ability to pay the proffered wage in 2001, which was the year of the priority date. The petitioner's net income of \$44,889.00 in 2002 was greater than the amount of \$43,654.40 needed to raise the beneficiary's actual compensation to the proffered wage in that year. Therefore the petitioner's net income in 2002 was sufficient to establish the petitioner's ability to pay the proffered wage in 2002.

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: \$7,639.00 for the beginning of 2001; \$36,125.00 for the end of 2001; and \$72,952.00 for the end of 2002. The figures for the beginning of 2001 and for the end of 2001 are less than the amount of \$43,504.40 needed to raise the beneficiary's actual compensation to the proffered wage for 2001. Therefore those figures fail to establish the petitioner's ability to pay the proffered wage in 2001. The petitioner's net current assets for the end of 2002 are greater than amount of \$43,654.40 needed to raise the beneficiary's actual compensation to the proffered wage in that year. Therefore the petitioner's net current assets for the end of 2002 would be sufficient to establish the petitioner's ability to pay the proffered wage in 2002.

The record also contains copies of bank statements. However, 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 ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, 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.

The petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002 show that one individual is the owner of 100% of the shares of the petitioner. The record contains a copy of the Form 1040 U.S. Individual Income Tax Return individual income tax return of the petitioner's owner and his wife for 2001. However, 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 shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. In the instant petitioner, however, even if the principles of *Matter of Sonogawa* are used as the basis for an analysis, the record does not establish the petitioner's ability to pay the proffered wage during the year 2001.

The petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001 shows that the petitioner's owner received a total of \$3,000.00 in the form of compensation of officers. That return shows an additional \$26,000.00 in expenses for salaries and wages. It appears that some of the salaries and wages were also paid to the petitioner's owner, because the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and his wife for 2001 shows that owner received a total of \$17,500.00 in compensation from the petitioner that year. The Form 1040 tax return shows that the owner and his wife had substantial income from sources other than the petitioner in 2001, including \$75,000.00 in income from a six-family rental building. But even if it is assumed that the owner could have chosen not to receive any compensation from the petitioner for 2001, the petitioner's financial resources in 2001 would still be insufficient to have raised the beneficiary's actual compensation to the proffered wage. The total of the petitioner's net income of \$23,767.00 plus the \$17,500.00 paid to the petitioner's owner in 2001 would be \$41,176.00, an amount less than the \$43,504.40 needed to raise the beneficiary's compensation to the proffered wage that year.

In his decision, the director correctly summarized the information on the petitioner's tax returns for 2001 and 2002, and correctly found that the petitioner's net income for 2001 and its year-end net current assets for that year were insufficient to establish the petitioner's ability to pay the full proffered wage to the beneficiary. The director's decision to deny the petition was therefore correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence newly submitted on appeal are insufficient 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 not met that burden.

ORDER: The appeal is dismissed.