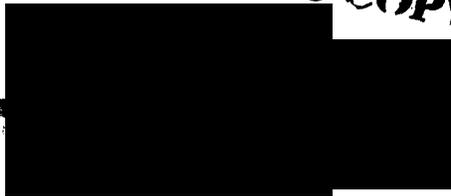




U.S. Citizenship
and Immigration
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JUN 22 2005

FILE: [REDACTED]
EAC 03 125 53332

Office: VERMONT SERVICE CENTER

Date:

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
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 technical services business. It seeks to employ the beneficiary permanently in the United States as an electrician. 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 counsel¹ 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 April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$40,476.00 per year (\$19.46 per hour). The Form ETA 750 states that the position requires two 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, copies of documentation concerning the beneficiary's qualifications, and other 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 Vermont Service Center on April 15, 2003, requested evidence pertinent to that issue.

¹ Counsel has prepared the appeal stating that he represents the beneficiary. However, in his brief, counsel states he presents the petitioner on appeal. Therefore, we will not reject the appeal, as there is a Form G-28 in the record affirming that counsel also represents the petitioner.

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:

"Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$19.42 per hour (\$40,476.80 per year) as of April 20, 2001, the date of filing and continuing to the present.

Submit the 2001 U.S. federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax returns. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business

As an alternative you may submit annual reports for 2001, which are accompanied by, audited or reviewed financial statements.

If your business reports income for tax purposes based on a fiscal year, submit the appropriate evidence that relates to the date of filing, April 20, 2001."

If the beneficiary was employed by you in 2001 and 2002, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business."

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1120S tax returns for years 2001 and 2002. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$40,476.00 per year from the priority date.

- In 2001, the Form 1120S stated taxable income² of \$7,685.00.
- In 2002, the Form 1120S stated taxable income of \$14,925.00.

The director denied the petition on November 4, 2003, 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 that the owner of the petitioner has made available his individual retirement account, the amount of the depreciation deduction, cash available to the company at the end of tax year 2001, capital stock and related earnings, and shareholder loans to ensure that the petitioner has the ability to pay the proffered wage.

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. There is no evidence that the petitioner employed the beneficiary.

² Form 1120S, Line 21.

Next, 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.

Insofar as counsel asserts that the petitioner looks to the depreciation deduction as an available source or assets of funds to pay the proffered wage, 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. Therefore, the amount the petitioner deducts for depreciation is not an asset or source of funds to pay the proffered wage.

Alternatively, 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, as is the circumstance in this case. Capital stock and related earnings are not current assets, and, they cannot be considered in the calculation. In the subject case, as set forth above, petitioner did not have taxable income to pay the proffered wage at any time between the years 2001 through 2002 for which petitioner's tax returns are offered for evidence.

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.³ 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 1120 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.

Examining the two Form 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets never exceeded its current liabilities.

- In 2002, petitioner's Form 1120S return stated current assets of \$18,511.00 and \$12,010.00 in current liabilities. Therefore, the petitioner had \$6,501.00 in current net assets for 2002. Since the proffered wage was \$40,476.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120S return stated current assets of \$56,824.00 and \$17,057.00 in current liabilities. Therefore, the petitioner had a \$39,767.00 in current net assets for 2001. Since the proffered wage was \$40,476.00 per year, this sum is less than the proffered wage.

³ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the period 2001 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 through an additive calculation. The elements to this calculation are the taxable income from the business, the amount of funds in the petitioner's owner individual retirement fund, a personal guaranty from the business' owner, the capital stock, the yearly depreciation deduction, loans from the shareholder, and, cash on hand at year's end (i.e. cash"). Counsel is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result as well as adding non-business assets and personal cash and savings.

Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Petitioner's counsel cited no legal precedent for his position. Counsel asserts that depreciation is a component to be added to the petitioner's taxable income. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent for counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

"Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that the court should revise these figures by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537."

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel also includes in the above additive calculation "Taxable Income" and "Cash." Correlating the amounts stated in counsel's additive calculation with the petitioner's tax return for each year, it is clear that counsel is combining petitioner's taxable income each year with the cash also received by the business for that year as stated on Schedule "L" as current assets. CIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. Combining taxable income and net current assets would result in the duplicative counting of the petitioner's cash.

In the additive calculation, counsel includes funds in the owner of petitioner's individual retirement fund, a personal guaranty from the business' owner,⁴ capital stock⁵, loans from the shareholder, and, cash on hand at year's end (i.e. cash")⁶.

⁴ Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530

Contrary to counsel's 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.

Counsel's additive calculation cannot be concluded to outweigh the evidence presented in the two corporate tax returns as submitted by petitioner that by any test demonstrates that petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.

(Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

⁵ Capital stock and related earnings have been discussed. We reject the petitioner's assertion 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 capital stock and 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.

⁶ Counsel is combining this item found on schedule "L" of the Form 1120S for 2001 with other allowable and non-allowable items used in the calculations of taxable income and net current assets.