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U.S. Citizenship
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FILE: 
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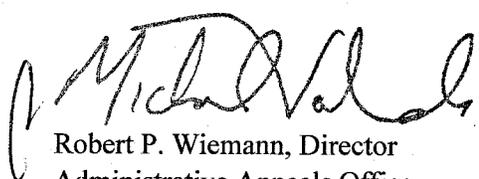
IN RE: Petitioner:
Beneficiary:

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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning and tailoring business. It seeks to employ the beneficiary permanently in the United States as a supervisor. 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 granting 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 April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$29.09 per hour, which equals \$60,507.20 per year.

On the petition, the petitioner stated that it was established in approximately 1915 and that it employs seven workers. The petition states that the petitioner's gross annual income is \$298,561 and that its net annual income is \$5,999. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Old Greenwich, Connecticut.

In support of the petition, counsel submitted the petitioner's 1999, 2000, and 2001 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports taxes based on a fiscal year running from May 1 of the nominal year to April 30 of the following year. The April 23, 2001 priority date, therefore, fell about a week prior to the end of the petitioner's 2000 fiscal year. Evidence pertinent to the petitioner's finances prior to its 2000 fiscal year, therefore, are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2000 tax return, which covers the period from May 1, 2000 to April 30, 2001, shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$13,135 during that year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The 2001 tax return, which covers the period from May 1, 2001 to April 30, 2002, shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,999 during that year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

Because 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 March 7, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted (1) the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return, (2) the beneficiary's 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns, (3) 2001 and 2002 Form 1099 Miscellaneous Income statements showing payments by the petitioner to the beneficiary, (4) a letter, dated May 28, 2003, from the petitioner's accountant, (5) amortization schedules of two loans, (6) monthly statements pertinent to two bank accounts belonging to the petitioner, and (7) a FNMA Form 1004 Uniform Residential Appraisal Report and loan statement pertinent to a residence that belongs to the petitioner's owner and the owner's spouse.

The petitioner's 2002 tax return, which covers the fiscal year from May 1, 2002 to April 30, 2003, shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$31,751 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The beneficiary's 2001 and 2002 tax returns show that she declared income of \$11,998 and \$13,119 during those years, respectively. Corresponding Schedules C-EZ submitted with those returns show that the beneficiary earned those amounts as a "Manager - Dry Cleaners." Form 1099 Miscellaneous Income statements submitted with those returns show that the petitioner paid the beneficiary \$12,960 and \$14,040 during 2001 and 2002.

The May 28, 2003 accountant's letter states the accountant's opinion that the petitioner will be able to pay the proffered wage. As evidence, the accountant cites the "ability of the corporation to generate profits" and the impending amortization, in 2003, of two loans with month payments totaling \$1,464. The two amortization schedules confirm counsel's assertion as to those monthly payments. Those amortization schedules also show that the final payment on one of those loans is scheduled for December 15, 2003 and the final payment for the other is scheduled for January 20, 2004.

In a cover letter, dated May 28, 2003, counsel argued that the petitioner's net income, its depreciation deduction, the salary it has paid the beneficiary, and the petitioner's bank balances show the continuing ability to pay the proffered wage beginning on the priority date.

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 August 15, 2003, denied the petition.

On appeal, counsel again argues that the petitioner's net profit, its depreciation and amortization deductions, and its bank balances show the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In support of that contention, counsel cites unpublished decisions of the Administrative Appeals Office. Counsel also submits a letter, dated October 2, 2003, from the petitioner's accountant in support of the position that the petitioner's depreciation deduction should be included in the calculations pertinent to the petitioner's ability to pay the proffered wage.

Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of non-precedent decisions is of no effect.

The assertion of counsel and the petitioner's accountant that the petitioner's depreciation and amortization deductions should be added back to the petitioner's income is unconvincing. Counsel and the accountant are correct that those deductions do not represent specific cash expenditures during the year claimed. They are systematic allocations of the cost of long-term assets, tangible and intangible, respectively.

The depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While those expenses do not require or represent the current use of cash, neither are they available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage.

petitioner's selection of an accounting method and a depreciation schedule accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its redistribution to other years as convenient. The amounts claimed as depreciation and amortization will not be included in the calculations pertinent to the petitioner's ability to pay the proffered wage.

Counsel and the accountant cite the pending amortization¹ of two loans as evidence of additional funds available to pay the proffered wage. The retirement of those loans may demonstrate that additional funds become available, prospectively, when the loan is paid off. The petitioner, however, is obliged to demonstrate the continuing ability to pay the proffered wage beginning on the priority date. That the loans were scheduled to be amortized around the beginning of 2003 is of no use in demonstrating the petitioner's ability to pay the proffered wage during previous years.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). 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 (Comm. 1980). 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. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). Evidence pertinent to real estate or other assets or income of the petitioner's owner is not directly relevant to the ability of the petitioner to pay the proffered wage in this case and shall not be further considered.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.² 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 reported on its tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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. In the instant case, the petitioner established that it employed and paid the beneficiary \$12,960 during 2001 and \$14,040 during 2002. The petitioner must demonstrate the ability to pay the balance of the proffered wage.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp.*

¹ "Amortization" is used in a different sense here than that in previous paragraphs. Here, amortization refers to paying off a loan, whereas in previous paragraphs it referred to attribution of the basis of intangible assets. The two concepts are not closely related.

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is insufficient. *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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$60,507.20 per year. The priority date is April 23, 2001.³

The petitioner demonstrated that it paid the beneficiary \$12,960 during the 2001 calendar year. Because the petitioner reports taxes based on a fiscal year that begins on May 1, approximately two-thirds of that amount, or \$8,640, is correctly imputed to the petitioner's 2001 fiscal year. The petitioner demonstrated that it paid the beneficiary \$14,040 during the 2002 calendar year. Because the petitioner's fiscal year begins on May 1, approximately one-third of that amount, or \$4,680, was likely earned during the petitioner's 2001 fiscal year. The sum of those two amounts is \$13,320. Having demonstrated that it paid the beneficiary approximately \$13,320 during its 2001 fiscal year, the petitioner is obliged to demonstrate the ability to pay the \$47,187.20 balance of the proffered wage.

During its 2001 fiscal year, the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,999. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

³ Because only one week of the petitioner's 2000 fiscal year was after the priority date, no analysis of the petitioner's ability to pay the proffered wage during its 2000 fiscal year will be performed.

As was previously noted, the petitioner demonstrated that it paid the beneficiary \$14,040 during the 2002 calendar year. Two-thirds of that amount, or \$9,360, is correctly imputed to the petitioner's 2002 fiscal year. The petitioner submitted no evidence of any wages it paid to the beneficiary during 2003. Having demonstrated that it paid the beneficiary \$9,360 during its 2002 fiscal year, the petitioner must show the ability to pay the \$51,147.20 balance of the proffered wage during that fiscal year.

During its 2002 fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of \$31,751. That amount is insufficient to pay the balance of the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during fiscal year 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its fiscal year 2002.

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

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.