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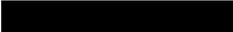
U.S. Citizenship
and Immigration
Services

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FILE:



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Office: VERMONT SERVICE CENTER

Date:

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IN RE:

Petitioner:



Beneficiary:

ON BEHALF OF PETITIONER:

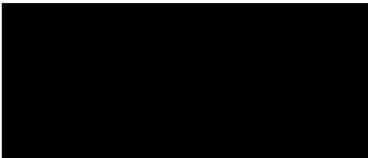
SELF-REPRESENTED

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

Cc:



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 software development and computer-consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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, the petitioner¹ submits additional evidence and asserts that the petitioner has the financial ability to pay the proposed wage offer.

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 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 March 21, 2001. The proffered wage as stated on the Form ETA 750 is \$57,429 per year. On the Form ETA 750B, signed by the beneficiary on April 22, 2003, the beneficiary does not claim to have worked for the petitioner.²

On Part 5 the petition, the petitioner claims to have been established in 1996, to have a gross annual income of approximately 1.7 million, a net annual income of \$100,000, and to currently employ over seventeen workers. In support of its continuing ability to pay the proffered salary, the petitioner initially provided a copy of its April 2001 business checking account statement and a copy of its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. It shows that the petitioner files its taxes using a standard calendar year. On the 2001 return, the

¹ The petitioner filed the appeal. The record contains a notice of entry of appearance from counsel (Form G-28) filed in April 2003. As no withdrawal of counsel's representation is contained in the record, a copy of this decision will be provided to counsel.

² The record indicates that the beneficiary is offered as a substitution for the original beneficiary named in the ETA 750.

petitioner declared ordinary income of \$10,155. Schedule L of the tax return shows that the petitioner had \$158,561 in current assets and \$145,694 in current liabilities, resulting in \$12,867 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as an alternative method of reviewing its ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporate petitioner's year-end current assets are generally shown on line(s) 1(d) through 6(d) of Schedule L of the federal tax return. The current liabilities are shown on line(s) 16(d) through 18(d) of Schedule L. If a corporate petitioner's year-end 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.

On June 26, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the certified wage of \$57,429, beginning as of the priority date of March 21, 2001 and continuing until the present. The director advised the petitioner that the evidence shall be in the form of federal tax returns, audited financial statements, or annual reports. The director further requested that the petitioner provide a copy of its 2002 federal tax return, copies of any Wage and Tax Statement (W-2) for 2001 and 2002 that it issued if it employed the beneficiary during that period, or copies of annual reports for 2001 and 2002.

In response, the petitioner offered a copy of its 2002 corporate tax return. It reflects that the petitioner reported ordinary income of \$6,696. Schedule L shows that the petitioner had \$1,062,570 in current assets and \$1,106,389 in current liabilities, yielding -\$43,819 in net current assets. The petitioner also resubmitted a partial copy of its 2001 tax return and April 2001 checking account statement. In addition, it provided a copy of its March 2001 checking account statement, as well as reviewed financial statements for 2001 and 2002.⁴ These statements reflect the petitioner's net income as -\$2,841 in 2001 and net current assets as \$12,870. In 2002, the net income is stated as -\$31,403 and the net current assets are -\$37,030.

In a transmittal letter, dated September 18, 2003, counsel states that the petitioner does not employ the alien but previously employed [REDACTED] who was the original alien named in the labor certification, from July 1999 to May 2001. An attached W-2 indicates that the petitioner paid \$79,504.73 to Mr. [REDACTED] in 2000. Counsel asserts that this money would be available to pay the current alien beneficiary's wage offer.

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.

⁴ According to the terms of the accountants' report, a review consists of inquiries of the company's personnel and analytical procedures applied to the data and is substantially less in scope than an audit. A compilation is limited to information that is the representation of management and is not audited or reviewed. Because neither is audited as required by the regulation, CIS will not consider unaudited financial statements submitted as a substitution for one of the three prescribed forms of evidence consisting of either audited financial statements, annual reports, or federal tax returns. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage, and, on November 5, 2003, denied the petition. The director noted that the petitioner's tax returns failed to demonstrate that either its net income or its net current assets could cover the proffered salary in either 2001 or 2002. The director further noted that neither of these tax returns' net incomes reflected that an additional \$79,504 was available to the petitioner after the departure of Mr. [REDACTED] in May 2001. Finally, the director also found that neither the petitioner's reviewed financial statements, nor its bank statements were sufficient to demonstrate the petitioner's continuing financial ability to pay the proffered wage.

On appeal, the petitioner submits two letters from the petitioner's president and sole shareholder, [REDACTED] respectively dated in November and December 2003. He emphasizes that the company is profitable and has always paid its employees, who he describes as individuals hired when the company receives purchase orders in order to fulfill the petitioner's obligations.⁵ Mr. [REDACTED] also states that \$92,000 in profits was "distributed as additional salary to Officer and Pension/Profit sharing (\$42,000)." He mentions that he sold another business and the proceeds represent a potential reinvestment into the petitioning business. Mr. [REDACTED] further itemizes the four lines of credit that the petitioner has established with Citibank and Fleet amounting to \$200,000, as well as his personal affidavit of support on behalf of the petitioner "since [REDACTED] is the President and sole shareholder."

Accompanying Mr. [REDACTED] letter is a letter from the petitioner's accountant, [REDACTED]. Mr. [REDACTED] echoes Mr. [REDACTED] sentiments and explains that since the employees provide the services, then additional employees mean additional revenue. He claims that in reality, in 2002, the petitioner had no loss or bad debts but was merely utilizing a tool to minimize tax liability. Mr. [REDACTED] further states that in 2003, Mr. [REDACTED] made approximately \$44,000 on a personal investment of \$90,000 from the 2003 sale of an automobile shop, which represents a potential investment into the petitioning business.

Along with these letters from Mr. [REDACTED] and Mr. [REDACTED] the documents submitted on appeal include unaudited, compiled financial statements presenting the petitioner's financial profile for the first nine months of 2003; a bill of sale and contract for the sale of an automobile shop held by another corporate entity "L & Y Transmission Systems, Inc.," in which Mr. [REDACTED] is identified as the president; a letter from "Laura S. Long" of Cottman Transmission Systems, LLC to Mr. [REDACTED] referring to a termination of a license agreement; a copy of two credit agreements with Citibank referring to the petitioner's two \$50,000 lines of credit through "Business Ready Credit" and "Business Checking Plus Account;" a 1999 Summit Bank letter referring to a cash reserve line of \$25,000 held by the petitioner in two accounts; a 2002 Fleet Small Business Services letter to the petitioner setting forth the terms of a line of credit for \$75,000; an immigration "affidavit of support," (Form I-134) signed by Mr. [REDACTED] and a copy of a personal portfolio account statement held individually by Mr. [REDACTED] from the AXA Advisors, LLC.

It is noted that additional materials were received by the AAO in January 2004, consisting of duplicates of the documents previously submitted, as well as the addition of some copies of pages to the petitioner's documentation

⁵ We note that the petitioner's tax returns reflect modest salaries and wages paid (line 8) of \$20,875 in 2001 and \$34,150 in 2002, but significant labor costs claimed (Sched. A, line 3) of well over 1 million dollars in each year. It is not really clear if these individuals' services claimed as labor costs represent the petitioner's actual employees with the corresponding federal and social security withholdings or are simply being compensated as independent contractors.

relating to its arrangements with Citibank and Summit Bank, and another copy of Mr. [REDACTED] affidavit of support with evidence that it was notarized on January 2, 2004.

First, it is noted that the financial statements submitted to the record have not been audited, although the initial submission relating to 2001 and 2002 were reviewed. The financial statements relevant to 2002 submitted on appeal are compilations. According to the terms of the accountants' report, a review consists of inquiries of the company's personnel and analytical procedures applied to the data and is substantially less in scope than an audit. A compilation is limited to information that is the representation of management and is not audited or reviewed. CIS will not consider unaudited financial statements submitted as a substitution for one of the three prescribed forms of evidence consisting of either audited financial statements, annual reports, or federal tax returns. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited.

The assertion that Mr. [REDACTED] individual assets such as his portfolio account, or the proceeds from the sale of another business unrelated to the petitioner are an available source to be considered as part of the petitioner's ability to pay the proffered wage is not persuasive in this case. The petitioner is a corporation. 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). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a closely held corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court 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."

Following this reasoning, the affidavit of support Mr. [REDACTED] offered does not constitute persuasive evidence of the corporate petitioner's ability to pay the proffered wage. There is no provision in employment-based immigrant visa statutes, regulations, or precedent that permits an affidavit of support to be utilized in lieu of proving ability to pay through prescribed financial documentation described in the regulation at 8 C.F.R. § 204.5(g)(2). In any event, a guarantee is a future pledge of payment and does nothing to alter the immediate eligibility of the instant visa petition with a priority date commencing as of March 21, 2001. See *Sitar v. Ashcroft, supra*. Similarly, the implication that the petitioner's additional profit, which was already expended as officer compensation and added to a pension or profit sharing fund does not represent a persuasive assertion that it should be subsequently reclassified as funds available to pay the proffered wage. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have 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. In the instant case, the record shows that the petitioner has not employed the beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will also examine the net taxable 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*, 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 the Service should have considered income before expenses were paid rather than net income.

In this case, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in a line of credit. Although the petitioner's line of credit represents a viable example of the petitioner's borrowing power, any existent loans taken from the line of credit will be reflected in the balance sheet provided in the tax return or an audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit as a potential debt will not be treated as cash or as a cash asset. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, *supra*.

As set forth above, in 2001, neither the petitioner's net income of \$10,155, nor its net current assets of \$12,867 represented sufficient funds to pay the proffered salary of \$57,429. Similarly, the certified wage offer could not be covered in 2002 by either the petitioner's net income of \$6,696 or its net current assets of -\$43,819.

In view of the foregoing and following a review of the evidence contained in the record and offered on appeal, the petitioner has failed to persuasively establish its continuing financial ability to pay the proffered wage as of the priority date of April 19, 2001 and continuing until the present.

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.