

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B6

FILE: EAC 03 024 50721 Office: VERMONT SERVICE CENTER Date: NOV 03 2005

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:
[Redacted]

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 bakery/restaurant. It seeks to employ the beneficiary permanently in the United States as a Philippine food cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a statement and additional evidence.

Section 203(b)(3)(A)(i) of 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, 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 27, 2001. The proffered salary as stated on the labor certification is \$503.60 per week or \$26,187.20 per year.

With the petition, the petitioner, through counsel, submitted a copy of its Form 1120, U.S. Corporation Income Tax Return, for the fiscal year July 1, 2001 through June 30, 2002. The tax return reflected a taxable income before net operating loss deduction and special deductions of \$5,035 and net current assets of \$33,112. The director determined that the evidence was insufficient and, on May 13, 2003, the director requested additional evidence of the petitioner's ability to pay the proffered wage from April 27, 2001 and continuing to the present. The director specifically requested copies of any Forms W-2 or Forms 1099-MISC, Miscellaneous Income, that were submitted to the beneficiary in 2001 and 2002. The director also specifically requested a copy of the petitioner's 2000 federal income tax return with all schedules and attachments. The director further notified the petitioner that CIS was in receipt of five additional pending petitions with salaries totaling \$144,414.40, and that the petitioner must show its ability to pay all of the wages, not just the current beneficiary's.

In response, counsel provided a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, copies of bank statements for most of 2000 and 2001, a letter from its CPA, Samuel Wiesel, stating that the four new employees would be replacing four former employees, and copies of Forms W-2 for 2000 and 2001. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of \$4,231 and net current assets of \$28,077. The Forms W-2 does not show that the petitioner employed the beneficiary in 2000 and 2001. The bank statements had balances ranging from a low of \$4,027.45 to a high of \$35,290.49. The four former employees received salaries totaling \$61,620.93 in 2000 and \$51,787.80 in 2001.

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. On March 15, 2004, the director denied the petition, noting that based on the additional evidence, two of the five pending petitions were approved with salaries totaling \$56,867.20.

On appeal, counsel submits copies of the petitioner's 2001 through 2003 Forms 1040, U.S. Individual Income Tax Returns. The income tax returns reflect adjusted gross incomes of \$116,391, \$111,808, and \$151,253, respectively. Counsel states, "Petitioner had the financial ability to pay the offered wage as of the date of filing to present. Petitioner's personal tax returns for 2001, 2002, and 2003 are enclosed indicating the ability to pay the offered wage."

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2000 and 2001.

As an alternative 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, 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 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 CIS 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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, CIS will review the petitioner's assets. The petitioner's total assets include 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. Rather, 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 out of those net current assets. The petitioner's net current assets during 2000 and 2001 were \$28,077, and \$33,112, respectively. The petitioner could have paid the proffered wage in 2000 and 2001 from its net current assets if it were the only additional wage petitioned for. In the instant case, however, the petitioner had five additional petitions pending.

Counsel has provided bank statements as proof of the petitioner's ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. 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 reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel submits copies of the petitioner's personal income tax returns for 2001 through 2003. However, contrary to counsel's primary assertion, 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

¹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The petitioner claims that the beneficiary will replace one of four former employees. Those four employees earned \$61,620.93 in 2000 and \$51,787.80 in 2001. Therefore, on August 27, 2003, the director approved two additional petitions whose combined salaries equaled \$56,867.20. However, in general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of the four former employees involved the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them.

The petitioner's 2000 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$4,231 and net current assets of \$28,077. The petitioner could have paid the proffered wage from its net current assets in 2000 if it were the only wage petitioned for. In the instant case, there are an additional three petitions currently pending.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$5,035 and net current assets of \$33,112. Again, the petitioner could have paid the proffered wage from its net current assets in 2001 if it were the only wage petitioned for. When multiple petitions are pending, the petitioner must establish its ability to pay all the wages.

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.