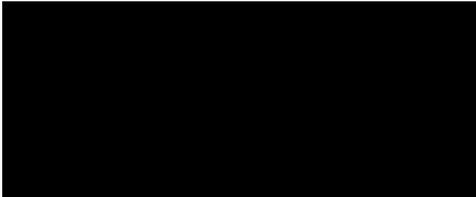




U.S. Citizenship
and Immigration
Services

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FILE:



EAC 02 168 50026

Office: VERMONT SERVICE CENTER

Date:

NOV 10 2005

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook/Italian. 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 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 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, 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 16, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 (\$39,291.20 per year). 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, a copy of petitioner's U.S. federal tax return for 2000, the beneficiary's W-2 Wage and Tax Statement for 2000; and, copies of documentation concerning the beneficiary's qualifications as well as 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, consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested on April 24, 2003, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center requested the petitioner to submit additional evidence to prove its ability to pay the proffered wage.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted a letter from an accountant, the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax return for year 2002, as well as the beneficiary's W-2 Wage and Tax Statement for 2002.

The director denied the petition on October 20, 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 petitioner has the ability to pay the proffered wage. As additional evidence, petitioner now submits copies of the following: petitioner federal tax return for 2001, the owner of the company's personal tax returns for 2001 and 2002 as well as other documents.

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. Evidence was submitted to show that the petitioner employed the beneficiary and paid him \$4,500.00 in 1999, \$15,300.00 in 2000, and, \$15,900.00 in 2001, and \$15,300.00 in 2002. Therefore, there is no evidence submitted that the beneficiary received the proffered wage of \$39,291.20.

Alternatively, 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 CIS should have considered income before expenses were paid rather than net income.

The tax return submitted¹ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$39,291.00 per year from the priority date of April 16, 2001.

- In 2001, the Form 1120S stated taxable income² of <\$3,672.00>³.
- In 2002, the Form 1120S stated taxable income of \$11,093.00.

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. In 2001 the beneficiary received wages of \$15,900.00 in 2001, and, in that year

¹ The 2000 tax return submitted was for a year before the priority date, and therefore, it has little probative value in the determination of the ability to pay the proffered wage.

² IRS Form 1120S, Line 21.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

the petitioner suffered a loss of income in the amount of <\$3,672.00>. The sum of these two figures is less than the proffered wage.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2000 through 2002 for which the petitioner's tax returns are offered for evidence.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following.

- In 2001, petitioner's Form 1120S return stated current assets of \$40,797.00 and \$209,987.00 in current liabilities. Therefore, the petitioner had <\$169,190.00> in net current assets for 2001. Since the proffered wage was \$39,291.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$35,329.00 and \$287,657.00 in current liabilities. Therefore, the petitioner had <\$252,328.00> in net current assets for 2002. Since the proffered wage was \$39,291.00 per year, this sum is less than the proffered wage.

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 net 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. According to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. Counsel recounts in his brief that the petitioner's taxable income was insufficient for the years examined to pay the proffered wage and, the wage paid to the beneficiary by petitioner was less than the proffered wage. These facts are not in dispute. Counsel submits upon appeal the personal joint federal tax returns and brokerage statements of a corporate officer of the petitioner and his spouse to show that they received wages from the company during tax years 2001 and 2002. Counsel's contends that because "... large amounts of cash had been paid by Petitioner to the ... [the corporate officer] ..." the household income of {the petitioner's} controlling officer totaled \$157,787, ... [leaves] ample funds with which to pay Beneficiary"

There is no agreement in the record of proceeding by any corporate officer to pay the proffered wage from personal funds to pay the proffered wage in the record of proceeding. This is an unsupported assertion of counsel. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503,

⁴ 8 C.F.R. § 204.5(g)(2).

506 (BIA 1980). Counsel asserts because the owner of petitioner and his spouse received “large amounts of cash” from the corporation during 2001 and 2002, the decision of *In The Matter of Shirley G. Magno, Employer, On Behalf Of Milagros C. Santos, Alien*, No. 97-INA-164, 1998 WL 23603 (January, 1998) would indicate that petitioner could have paid the proffered wage. In that case, the employer company suffered an income loss and it was unable to pay the proffered wage. According to counsel, dicta in that case would indicate that “...the individual tax returns of Employer and her spouse would have been more relevant” to demonstrate the ability to pay the proffered wage.

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

Again, the fact that cash is paid to others, and not to the beneficiary during those years demonstrates that the petitioner did not pay the proffered wage. There is no explanation given for the discrepancy between the wages the beneficiary actually received and the proffered wage. Based upon the tax returns in evidence, the amount of compensation paid to the corporate officers, \$106,000.00 in 2001, and, \$104,000.00 in 2002 remained constant, and, it is reasonable to assume would remain at these levels in the future. Counsel assertion is erroneous. Proof of ability to pay begins on the priority date, that is April 16, 2001, when petitioner’s Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner’s taxable income is examined from the priority date. It is not examined contingent upon some event in the future.

Counsel has submitted a letter from petitioner’s accountant who details the financial data of the petitioner based upon the tax returns submitted. He gave an opinion that the petitioner will experience “continued growth” and higher sales in 2003. The accountant stated that the petitioner is a viable company. There were no audited financial statements or any financial data submitted with this statement. In contravention to the accountant’s statements, the petitioner has submitted two tax returns that show a small profit in the two years examined with a negative average net current asset figure for those two years. There is no evidence to demonstrate that the petitioner’s business was in a profitable period in 2001 and 2002 sufficient to pay the proffered wage.

Counsel’s contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that by any test shows that the petitioner has not demonstrated its ability to 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.

