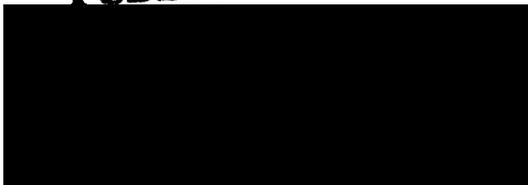




U.S. Citizenship
and Immigration
Services

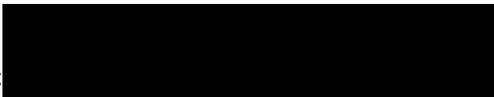
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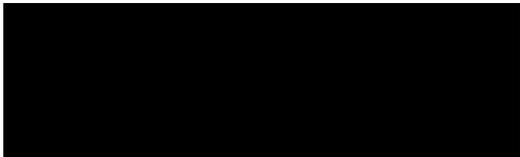
FILE: WAC 03 171 52805 Office: CALIFORNIA SERVICE CENTER Date: NOV 22 2005

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a sales and brokerage of used business and commercial aircraft corporation. It seeks to employ the beneficiary permanently in the United States as a European marketing representative, aircraft. 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 November 8, 2001. The proffered wage as stated on the Form ETA 750 is \$56,513.60 per year. The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor, a U.S. Internal Revenue Service Form tax return for 2001; and, an employment verification letter from the beneficiary's current German employer.

Because the Director determined the evidence submitted with the petition 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 Director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested that the petitioner submit copies of annual reports

and U.S. federal tax returns from November 8, 2001 to the present (explained as meaning 2002 and 2003). Quarterly wage reports for one year were also requested.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted copies of the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax return for years 2002; bank statements for 2001, 2002, 2003 and 2004; one quarterly wage report for the period ending March 31, 2004, and 2002 and 2003 as well as other documentation.

The director denied the petition on June 1, 2004, 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.

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. No evidence was submitted to show that the petitioner employed the beneficiary as a European marketing representative, aircraft.

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 returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$56,513.60 per year from the priority date of November 8, 2001:

- In 2001, the Form 1120 stated a taxable income loss of <\$175,010.00>¹.
- In 2002, the Form 1120 stated a taxable income of \$46,466.00.

Finally, 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.

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. According to a document submitted that is entitled "Salary Escrow Agreement" there is a cash deposit of \$300,000.00 to guaranty the proffered wage. There is no bank deposit

¹ 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.

receipt, or account information submitted to confirm this escrow amount. Payment made other than by the petitioner cannot be considered. The agreement was dated June 21, 2004, even dated with the appeal, and it was clearly prepared in support of the appeal. Under the circumstances, it has little probative value in this matter. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 2001 through 2002 for which the 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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 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.

Examining the Form 1120 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 1120 return stated current assets of \$10,559.00 and \$49,035.00 in current liabilities. Therefore, the petitioner had <\$38,476.00> in net current assets. Since the proffered wage was \$56,513.60 per year this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of \$41,657.00 and \$45,070.00 in current liabilities. Therefore, the petitioner had <\$3,413.00> in net current assets. Since the proffered wage was \$56,513.60 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 other ways to determine the petitioner's ability to pay the proffered wage from the priority date. On appeal, counsel asserts in pertinent part that the Director committed error as he did not properly consider "cash carried over from year to year" as well as the sole shareholder's salary as determinative of the ability to pay. Likewise, counsel asserts that the director failed to consider bank statement balance amounts.

² 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.

Counsel then contends that a "Salary Escrow Agreement" and its cash deposit should have been considered. Counsel cites no legal precedent for the contention, and, according to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. Counsel has not submitted a canceled check, evidence of a bank deposit or an escrow receipt to show that funds were in fact escrowed as stated in the agreement. Also, the source of funds is an issue. If the sole shareholder established the escrow out of his own funds, this would not be legally sufficient since it is the petitioner which is legally obligated to pay the proffered wage. Further, the ability to pay is determined at the priority date, not some years after. The fact that the escrow was established in anticipation of the appeal lessens its probative value.

Counsel includes in the above contention "cash carried over from year to year. Correlating the amounts stated in counsel's contention with the petitioner's tax return for each year, it is clear that counsel is combining petitioner's taxable income, if any, for 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. Since the net current assets are negative in each of the years examined it is unclear what cash counsel is indicating.

Counsel advocates the use of the cash balance of the business accounts to show the ability to pay the proffered wage. 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.

According to counsel brief's that is quoting petitioner's accountant, "AML [the petitioner] is a closely held corporation and is controlled by the sole shareholder ... The largest expense the company incurs is salary and commission expense [paid to the sole shareholder]" The accountant goes on to say that in the discretion of the sole shareholder this money, which is substantial, could have been used to pay the proffered wage. Contrary to counsel and petitioner's accountant 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." Moreover, once paid, this money was expended and not available as an asset to pay the wage.

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.

³ 8 C.F.R. § 204.5(g)(2).

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ORDER: The appeal is dismissed.