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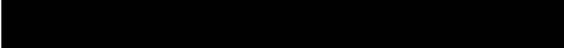


**U.S. Citizenship
and Immigration
Services**

B6



FILE: EAC 03 020 54345 Office: VERMONT SERVICE CENTER Date: **OCT 21 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 (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 baker. 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 additional evidence and asserts that the petitioner has established its continuing financial ability to pay the proffered wage.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$14.75 per hour, which amounts to \$30,680 per annum. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, the petitioner claims to have been established in 1983, have a gross annual income of \$1.3 million dollars and to currently employ twelve workers. In support of its continuing ability to pay the proffered wage, the petitioner initially submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. This income tax return reflects that the petitioner files its taxes using a fiscal year running from July 1st to June 30th of the following year. In 2001, the petitioner reported net taxable income of \$5,035 before the net operating loss (NOL) deduction. Schedule L of the tax return shows that the petitioner had \$71,692 in current

assets and \$38,580 in current liabilities, resulting in \$33,112 in net current assets. As an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ It represents a measure of a petitioner's liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1(d) through 6(d) and line(s) 16(d) through 18(d) of Schedule L of its federal tax return. If a corporation's year-end net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

On March 13, 2003, the director requested additional evidence from the petitioner pertinent to its continuing ability to pay the proffered wage. The director advised the petitioner that although its 2001 tax return showed net current assets higher than the proffered wage of \$30,680, he noted that the petitioner had five pending petitions with CIS and that the cumulative salaries of the beneficiaries of these petitions was \$144,414.40. The director informed the petitioner that a sixth petition with a 2001 priority date (EAC0126251895), had already been approved and that the documentation did not appear to demonstrate the petitioner's ability to pay more than the one salary for the petition that had already been approved. The director specifically requested that the petitioner submit a copy of its 2000 corporate tax return and also provide copies of any Wage and Tax Statements (W-2s) or Form 1099-MISC issued to the beneficiary if it had employed the beneficiary in 2001 and 2002. He also requested the petitioner to provide copies of W-2s and/or Forms 1099-MISC for all employees of its business for the years 2001 and 2002.

In response, the petitioner, through counsel, submitted a copy of the petitioner's 2000 federal tax return. It shows that the petitioner reported net income of \$4,231 before the NOL deduction. Schedule L reflects that the petitioner had \$56,969 in current assets and \$28,892 in current liabilities, resulting in \$28,077 in net current assets. The petitioner also supplied copies of its checking account statements covering January through October 2000, January 2001, and April through November 2001. Copies of the employees' 2000 and 2001 W-2s accompanied the petitioner's response, along with a copy of an unsigned letter from the petitioner's accountant, [REDACTED]. The letter states that the petitioner has plans to replace four former employees with four new employees. Counsel's transmittal letter, dated August 7, 2003, also states that the beneficiary is intended to replace one of four former employees whose names are [REDACTED] and [REDACTED].

On March 15, 2004, the director denied the petition. The director determined that the petitioner's 2000 tax return and the checking account statements did not support the approval of additional petitions. The director stated:

You indicated in your response that the beneficiary would be replacing one of four former employees and you provided 2000 and 2001 Form W-2 Wage and Tax Statements for all your employees. The Form W-2 Wage and Tax Statements show that the four former employees were paid a total of \$61,620.93 in 2000 and

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

\$51,787.80 in 2001. Based on this additional evidence, two of the five pending I-140 petitions were approved on August 27, 2003 (EAC0302051692 and EAC0302350202). The combined offered salary for the beneficiaries of the two approved petitions was \$56,867.20. The record does not support the approval of any additional petitions.

On appeal, counsel does not specifically take issue with the director's rationale for denying the petition but simply asserts that the "petitioner had the financial ability to pay the offered wage as of the date of filing to the present. Petitioner's personal tax returns for 2001, 2002 and 2003 are enclosed indicating the ability to pay the offered wage." With the appeal, counsel has submitted the individual 2001-2003 tax returns of the petitioner's principal shareholder.

Counsel's reliance upon the individual tax returns of the petitioner's principal shareholder is misplaced. The petitioning employer in this case is a corporation not an individual. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

See also, Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). The *Sitar* court considered whether the personal assets of one of the 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."

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner

establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period. In this case, the record does not suggest that the petitioner has employed the beneficiary, but that he is intended to replace a former employee.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will also 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*, 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.

It is noted that the bank statements do not, standing alone, provide sufficient evidence of the petitioner's ability to pay the offered salary of \$30,680. 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," bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

The petitioner is a corporate entity. The individual tax returns of its principal shareholder will not be considered in the review of the petitioner's ability to pay the certified wage. As the petitioner filed for multiple petitions, it must demonstrate its continuing ability to pay all the certified wages as of the time of the individual priority date(s). As noted by the director, the petitioner's financial information supported the approval of one petition, which was accomplished with the approval of EAC0126251895 that had a 2001 priority date. The director's decision also explained why only two additional pending petitions had been approved based on the information provided with the petitioner's response to the request for evidence documenting the cumulative wages paid to the petitioner's former employees and the cumulative wages of \$56,867.20 to be paid to the beneficiaries of EAC0302051692 and EAC0302350202 that were already approved.

The record in this case does not support the approval of an additional petition. The evidence failed to demonstrate that the petitioner has had the continued ability to pay the proffered wage to this beneficiary beginning at the April 27, 2001, priority date.

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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.