



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: APR 04 2006

EAC 04 056 54453

IN RE:

Petitioner:

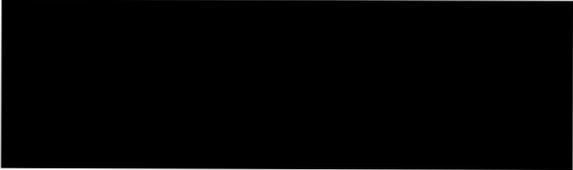
Beneficiary:



PETITION:

Immigrant Petition for Alien Worker as an Unskilled Worker 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 Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner sells used cars. It seeks to employ the beneficiary permanently in the United States as a reconditioner. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 had the continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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) 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 February 14, 2002. The proffered wage as stated on the Form ETA 750 is \$11.77 per hour, which amounts to \$24,481.60 per annum. On the Form ETA 750B, signed by the beneficiary on January 26, 2002, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on December 9, 2003, the petitioner claims to have been established in July 1996, to currently employ two workers, to have a gross annual income of \$2.7 million and to have a net annual income of \$291,352. In support of its ability to pay the beneficiary's proposed wage offer of \$24,481.60 per year,

the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It did not submit any financial information for 2002 or 2003. The 2001 corporate return reflects that the petitioner files its federal tax returns using a standard calendar year. It contains the following information pertinent to taxable income before the net operating loss (NOL) deduction and special deductions, current assets and liabilities, and net current assets.

2001	
Taxable Income before NOL	\$ 641
Deduction (Form 1040)	
Current Assets (Sched. L)	\$ 63,387
Current Liabilities (Sched. L)	\$132,842
Net current assets	-\$ 69,455

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.¹ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of its corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation'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.

The director reviewed the petitioner's financial data contained within its 2001 corporate tax return and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of February 14, 2002.

On appeal, counsel asserts that because the size of the petitioner's payroll decreased after 2001, the funds saved from unused payroll expenses show that it could cover the beneficiary's proposed wage of \$24,481.60 at the time of filing. Counsel provides copies of Wage and Tax Statements (W-2s) and payroll records of its employees from 2001 until the second quarter of 2004 in support of this contention. They show that as of the end of 2001, the petitioner paid five employees. At the end of 2002 and 2003, it employed four workers. By the second quarter of 2004, ending June 30, 2004, the petitioner also employed four workers. The quarterly state wage report also shows that it employed the beneficiary in 2004 and paid him \$932.80 as of June 30, 2004. During all periods mentioned above, at least two of the employees appear to be the principal shareholders of the corporation.

Counsel points out that the director's denial was based only upon the information in the 2001 tax return. She asserts that the overall circumstances of a corporation should be considered similar to the finding of *In the Matter*

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.

of *Ranchito Coletero* (BALCA Case No. 2002-INA-105), where the Board of Alien Labor Certification Appeals considered a sole proprietorship's financial profile.

With regard to the BALCA case, it is noted that such decisions are not binding upon CIS, although may offer guidance in some cases. The DOL's power to determine whether there are available domestic U.S. workers for a certified position does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). As this corporate employer is a separate and distinct legal entity from its individual shareholders or officers, its ability to pay a given wage is viewed as a separate and distinct obligation. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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). 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."

It is also noted that the director based her denial on the 2001 tax return because the petitioner failed to submit evidence relating to other years to the underlying record. Counsel's assertion on appeal, that funds representing unused payroll expenses was available to pay the proffered wage is not persuasive and is not supported by any federal tax returns, audited financial statements, or annual reports, as required by the regulation at 8 C.F.R. § 204.5(g)(2). Moreover, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). A reduction in payroll expenses may have any number of meanings including a reduction in revenue needed to pay the expenses.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record contains no evidence that the petitioner employed and paid wages to the beneficiary prior to 2004 where \$932.80 was paid as of the end of June 30, 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see

also Chi-Feng Chang v. Thornburgh, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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, as referenced by the director, the financial data on the petitioner's 2001 corporate tax return shows that neither the petitioner's net taxable income of \$641, nor its net current assets of \$69,455, was sufficient to pay the proffered wage of \$24,481.60. The payroll information provided on appeal does not overcome the evidence contained in its 2001 corporate tax return or the omission of any of the prescribed regulatory evidence submitted for any subsequent years consisting of either federal tax returns, audited financial statements or annual reports. The petitioner has not demonstrated its continuing ability to pay the proffered wage beginning at the priority date of February 14, 2002.

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.