



U.S. Citizenship
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FILE: WAC-03-267-55054 Office: CALIFORNIA SERVICE CENTER Date: AUG 16 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an architectural firm. It seeks to employ the beneficiary permanently in the United States as an accountant. 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, counsel submits a brief without additional evidence.¹

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation 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. *See* 8 CFR § 204.5(d). 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 October 10, 2001. The proffered wage as stated on the Form ETA 750 is \$29.13 per hour (\$60,590.40 per year). The Form ETA 750 states that the position requires four (4) years of college studies, Bachelor's degree or foreign equivalent in accounting and two (2) years of experience in the job offered.

¹ Counsel does not submit any additional evidence on appeal although the submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1) and the record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will evaluate the decision of the director, based on the evidence submitted prior to the director's decision.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1992,² to have a gross annual income of \$600,000, and to currently employ 7 workers. According to the tax returns in the record, the petitioner's fiscal year is based a calendar year. On the Form ETA 750B, signed by the beneficiary on September 28, 2001, the beneficiary claimed to have worked for the petitioner since December 1999.

The petition was filed on September 26, 2003 with the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2000 and 2001 pertinent to its ability to pay the proffered wage.

On July 17, 2004, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence (RFE) pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested this evidence for the years 2002 and 2003. The director also requested Form DE-6, Quarterly Wage Report for the last four quarters and the beneficiary's W-2 forms from the priority date to the present.

In response, counsel submitted the petitioner's federal tax returns for 2001 through 2003, corporate bank statements, bank statements for the owner of the petitioner, the owner's real property documentation and the beneficiary's W-2 forms.

The director denied the petition on November 12, 2004, finding that the evidence submitted with the petition and in response to the RFE has not established that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date to the present.

On appeal, counsel alleges that the director ignored evidence submitted to show the owner's real property, which can establish the petitioner's ability to pay the proffered wage. Counsel also asserts that the regulation 8 C.F.R. § 204.5(g)(2) is an unlawful ultra vires requirement.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner submitted the beneficiary's W-2 forms for 2001 through 2003. The W-2 forms show that the petitioner paid the beneficiary in the amount of \$27,040.00 in 2001, \$29,186.50 in 2002, and \$21,154.00 in 2003, which are \$33,550.40 in 2001, \$31,403.90 in 2002 and \$39,436.40 in 2003 less than the proffered wage respectively. The petitioner did not establish that it had the ability to pay the proffered wage in these years through wage paid to the beneficiary. Therefore, the petitioner is still obligated to demonstrate that it could pay the difference of \$33,550.40 in 2001, \$31,403.90 in 2002, and \$39,186.50 in 2003 between wages actually paid to the beneficiary and the proffered wage.

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 income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal

² However, the petitioner's Form 1120 tax returns indicate the date incorporated is June 11, 1996.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record of proceeding contains the petitioner's tax returns for 2000 through 2003. The priority date in the instant case is October 10, 2001, therefore, the 2000 tax return is not necessarily dispositive. The tax returns for 2001 through 2003 demonstrate the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage.

In 2001, the Form 1120 stated net income³ of \$(36,263).

In 2002, the Form 1120 stated net income of \$(44,633).

In 2003, the Form 1120 stated net income of \$2,682.

Therefore, the petitioner did not have sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage in year 2001, 2002 or 2003.

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.

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. Per the tax returns submitted with the petition, the petitioner's net current assets were \$3,388 in 2001, \$(3,251) in 2002, and \$(2,634) in 2003 respectively.

The petitioner had insufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2001, 2002 or 2003.

Therefore, 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 continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or 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. Counsel states that: "The documents the [director] unlawfully ignored include evidence that [redacted] owns real property valued at more than \$300,000.00, which would allow him to borrow at least that amount. These documents therefore establish that [the petitioner] has the ability to pay the proffered wage." Counsel's reliance on real property of the petitioner's owner to establish the petitioner's ability to pay the proffered wage is misplaced. Contrary to counsel's 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. The instant petitioner is structured as a C corporation, which is a separate and distinct legal entity from its owner, [redacted]. Counsel misunderstood this elementary rule and mixed up a sole owner and sole proprietor. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. However, the AAO would not accept a claim that the sole proprietor relies on the value of his real property to show his ability to pay because it is not likely that the petitioner will liquidate such assets in order to pay a wage even if the instant petitioner was a sole proprietorship. The director did properly not consider the evidence of the owner's real property in determining the petitioner's ability to pay the proffered wage in his denial decision.

On appeal counsel also challenges authority and legality of the regulation at 8 C.F.R. § 204.5(g)(2) alleging that regulation is an unlawful ultra vires requirement. Counsel's assertion is beyond the jurisdiction of the AAO. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. However, the AAO has no jurisdiction over a challenge to the authority and legality of a federal regulation.

⁴ 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.

Counsel's assertions on appeal cannot overcome the director's decision that the petitioner failed to demonstrate its continuing ability to pay the proffered wage of all beneficiaries 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.