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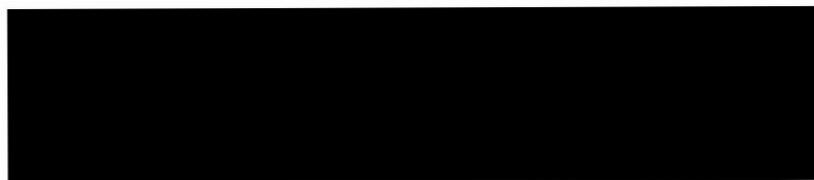
IN RE:

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaner and tailor. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 7, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 DOL. See 8 C.F.R. § 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 DOL 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 6, 2001. The proffered wage as stated on the Form ETA 750 is \$13.57 per hour (\$28,225.60 per year based on a 40 hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all

pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief, a copy of minutes from a teleconference between the Eastern Service Center and the American Immigration Lawyers Association (AILA) dated November 16, 1994 (AILA Minutes), the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for fiscal year 2003, and bank statements for the petitioner's sole shareholder's bank account from Dime Savings Bank of Williamsburgh for May 2001 through November 2002. Relevant evidence in the record includes the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns for fiscal years 2000, 2001 and 2002, the petitioner's bank statements from Dime Savings Bank of Williamsburgh for May 2001 through August 2002, a letter from the petitioner dated January 14, 2004 in support of the petition, the beneficiary's IRS Forms 1040, U.S. Individual Income Tax Returns, for 2001 and 2002, the beneficiary's IRS Forms W-2, Wage and Tax Statements, issued by the petitioner for 2001, 2002 and 2003 and the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Returns, for all quarters of 2000 and 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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, to have a gross annual income of \$143,913.00, to have a net annual income of \$9,595.00 and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year begins on May 1 and ends on April 30. On the Form ETA 750B, signed by the beneficiary on December 5, 2001, the beneficiary claimed to have worked for the petitioner as an alteration tailor from November 1999 to the date he signed the Form ETA 750B.

On appeal, counsel asserts that the director erroneously calculated the petitioner's net income for 2000 and 2001, and that the director erroneously calculated the petitioner's net current assets for 2002. Citing the AILA Minutes, counsel asserts that the petitioner's depreciation expense should have been considered in the determination of the petitioner's ability to pay the proffered wage. Counsel also asserts that the monthly average balance in the bank account of the petitioner's sole shareholder should be considered in the determination of the petitioner's ability to pay the proffered wage. Counsel further states that the petitioner's shareholder would have injected cash into the petitioner if necessary to pay the beneficiary's salary.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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 beneficiary's IRS Forms W-2 for 2001, 2002 and 2003 show compensation received from the petitioner, as shown in the table below.²

¹ 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). 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).

² The petitioner's fiscal year runs from May 1 to April 30 of each year, and the beneficiary's IRS Forms W-2

- In 2001, the Form W-2 stated compensation of \$18,000.00.
- In 2002, the Form W-2 stated compensation of \$23,400.00.
- In 2003, the Form W-2 stated compensation of \$23,400.00.

Therefore, for the years 2001, 2002 and 2003, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages each year. Since the proffered wage is \$28,225.60 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$10,225.60, \$4,825.60 and \$4,825.60 in 2001, 2002 and 2003, respectively.³

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.⁴ 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). Reliance on the petitioner's gross sales and profits is misplaced. Showing that the petitioner's gross sales and profits exceeded 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:

cover the period from January 1 to December 31 of each year. Regardless of whether the petitioner is credited with paying the beneficiary's wages during the fiscal year or calendar year, the petitioner has not paid the beneficiary the full proffered wage during any relevant period. However, for this appeal, we will credit the petitioner with having paid the beneficiary the wages listed on his 2001 Form W-2 in the petitioner's 2001 fiscal year, the wages listed on his 2002 Form W-2 in the petitioner's 2002 fiscal year, and the wages listed on his 2003 Form W-2 in the petitioner's 2003 fiscal year.

³ Although the beneficiary claimed to have worked for the petitioner as an alteration tailor from November 1999 to the date he signed the Form ETA 750B on December 5, 2001, this office notes that the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Returns, for 2000 and 2001 indicate that the petitioner paid no wages to the beneficiary in 2000 or the first quarter of 2001. Further, the petitioner's IRS Form 941 for the second quarter of 2001 indicate that the petitioner had no federal employment tax liability for April of 2001. The record contains no other evidence that the petitioner paid the beneficiary wages in fiscal year 2000, which includes the priority date of April 6, 2001.

⁴ Citing the AILA Minutes, counsel asserts on appeal that the petitioner's depreciation expense should have been considered in the determination of the petitioner's ability to pay the proffered wage. However, the AILA Minutes are not binding on the AAO. Counsel does not provide a published citation relating to the use of depreciation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on January 20, 2004 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's fiscal year 2003 federal income tax return was not yet due, but was provided by the petitioner on appeal. The petitioner's tax returns demonstrate its net income for fiscal years 2000, 2001, 2002 and 2003, as shown in the table below.

- In fiscal year 2000, the Form 1120 stated net income of \$5,394.00.⁵
- In fiscal year 2001, the Form 1120 stated net income of \$9,595.00.
- In fiscal year 2002, the Form 1120 stated net income of -\$3,693.00.
- In fiscal year 2003, the Form 1120 stated net income of \$7,272.00.

Therefore, for fiscal year 2000, the petitioner did not have sufficient net income to pay the proffered wage. For fiscal years 2001 and 2002, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage. For fiscal year 2003, the petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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. We reject, however, the petitioner's idea that its total assets should have been considered in the determination of the ability to pay the proffered wage. 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.

⁵ On appeal, counsel asserts that the director erroneously calculated the petitioner's net income for 2000 and 2001. Counsel is correct; however, the director's error does not alter the ultimate outcome of the appeal.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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. The petitioner's tax returns demonstrate its end-of-year net current assets for fiscal years 2000, 2001, 2002, as shown in the table below.

- In fiscal year 2000, the Form 1120 stated net current assets of \$5,397.00.
- In fiscal year 2001, the Form 1120 stated net current assets of \$7,999.00.
- In fiscal year 2002, the Form 1120 stated net current assets of \$10,806.00.⁷

Therefore, for fiscal year 2000, the petitioner did not have sufficient net current assets to pay the proffered wage. For fiscal year 2001, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage. For fiscal year 2002, the petitioner had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, 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 except for fiscal years 2002 and 2003.

On appeal, counsel asserts that the monthly average balance in the bank account of the petitioner's sole shareholder should be considered in the determination of the petitioner's ability to pay the proffered wage, and that the petitioner's shareholder would have injected cash into the petitioner if necessary to pay the beneficiary's salary. However, 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 cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.⁸

⁶ 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.

⁷ On appeal, counsel asserts that the director erroneously calculated the petitioner's net current assets for 2002. Counsel is correct; however, the director's error does not alter the ultimate outcome of the appeal.

⁸ The record contains the petitioner's bank statements from Dime Savings Bank of Williamsburgh for May 2001 through August 2002. Counsel asserts in a letter submitted with the petition that the petitioner had a monthly average bank balance of \$8,360.88, which exceeds the proffered wage of \$2,352.13 per month.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

Thus, counsel asserts that the petitioner's average monthly bank balance should be considered in the determination of the petitioner's ability to pay the proffered wage. However, 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. In the instant petition, none of the petitioner's bank statements show a balance greater than the annual proffered wage of \$28,225.60. Nor do the statements show monthly increases in balances by at least the amount of the monthly 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.