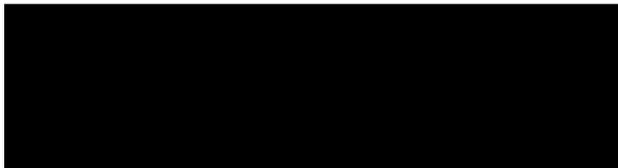


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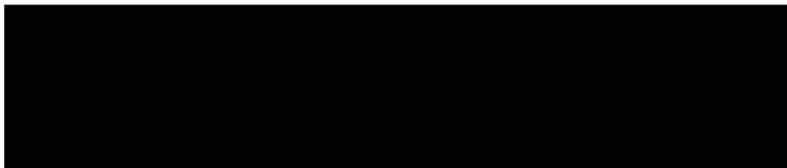
Office: TEXAS SERVICE CENTER Date: **DEC 21**

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 Director, Texas Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a jewelry store. It seeks to employ the beneficiary permanently in the United States as a jeweler. 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 the motion, the petitioner 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 granting 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, 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 2, 2001. The proffered wage as stated on the Form ETA 750 is \$9 per hour, which equals \$18,720 per year.

On the petition, the petitioner stated that it was established on June 15, 1994 and that it employs five to six workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Port Arthur, Texas.

In support of the petition, the petitioner submitted a copy of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a corporation, that it incorporated on June 15, 1994, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

That tax return also shows that during 2000 the petitioner declared ordinary income of \$40,025. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$132,091 and current liabilities of \$73,666, which yields net current assets of \$58,425.

Because the priority date is February 2, 2001, however, evidence pertinent to the petitioner's financial performance during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on April 28, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested that the evidence submitted cover the years 2001 and 2002.

In response, counsel submitted a letter, dated July 29, 2003. Counsel referred to an accountant's letter that counsel attached as evidence of the petitioner's continuing ability to pay the proffered wage.

The accountant's letter, dated July 22, 2003, states that, in the opinion of the accountant, the petitioner has the ability to pay the proffered wage. The accountant explicitly stated that she was basing that opinion on the amount of the petitioner's compensation of officers, its depreciation and amortization deductions, and the petitioner's owner's other assets, in addition to the petitioner's ordinary income.

Although that letter refers to the petitioner's compensation of officers as shown on its 2001 and 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, those returns were not then provided. Counsel did not provide copies of annual reports, federal tax returns, or audited financial statements covering 2001 and 2002 as the director specifically requested in the April 28, 2003 request for evidence. Because the record did not then contain copies of annual reports, federal tax returns, or audited financial statements pertinent to 2001 or 2002 it contained no competent evidence from which the petitioner's compensation of officers and its depreciation and amortization deductions during those years could be extracted.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 24, 2003, denied the petition.

On appeal, the petitioner argued that its owner is an individual who also owns other businesses, and that its owner's assets should be considered in the determination of its ability to pay the proffered wage. With the appeal the petitioner submitted an affidavit dated October 20, 2003 from the petitioner's owner stating that he is willing and able to pay the proffered wage. The petitioner submitted an unaudited statement of the net worth of the petitioner's owner and another person, possibly the petitioner's owner's spouse. The petitioner submitted its own compiled financial statements and compiled financial statements of another business ostensibly owned by the petitioner. In addition, the petitioner submitted tax returns of some of the other businesses the petitioner's owner ostensibly also owns.

The petitioner still did not, however, submit copies of its own annual reports, federal tax returns, or audited financial statements for 2001 and 2002, as the director requested in the April 28, 2003 request for evidence.

On March 16, 2005 the AAO issued a decision in this matter. The AAO found that the petitioner had not demonstrated the continuing ability to pay the proffered wage beginning on the priority date and dismissed the appeal.

With the instant motion counsel provided the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, a brief, and additional copies of documents previously provided.

In the motion counsel cited the accountant's May 4, 2003 letter as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel further cited the petitioner's owner's affidavit for the proposition that the petitioner's owner is willing and able to pay the proffered wage and insisted that the petitioner's owner's personal income and assets should, therefore, be considered in determining the petitioner's ability to pay the proffered wage. Further still, counsel stated that the amount of the petitioner's compensation of officers represents the company's profit, which it could, as necessary, have diverted to pay the proffered wage.

Counsel also cited a May 4, 2004 memorandum from the Associate Director for Operations of CIS. Counsel notes that the memorandum states that a petitioner has demonstrated the ability to pay the proffered wage during a given year if its year-end net current assets equaled or exceeded the proffered wage.

Counsel stated that pursuant to that memorandum a petitioner's ability to pay the proffered wage is demonstrated, ". . . when [its total] assets exceed the proffered wage." Counsel notes, ". . . the petitioner's [total] assets far exceeds [sic] the proffered wage." Counsel urges that, therefore, the petition must be approved pursuant to the direction of the May 4, 2004 memorandum. In that argument counsel equated current assets with total assets. The distinction between them is addressed below.

The 2001 and 2002 tax returns submitted will not be considered. Those tax returns were requested in the April 28, 2003 request for evidence and were not then provided. Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal or motion. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). Under the circumstances, this office need not and does not comment on the sufficiency of the evidence offered on appeal.¹

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). **The debts and obligations of the**

¹ This office notes, however, that the petitioner's 2001 and 2002 tax returns do not show that the petitioner paid compensation of officers during those years, which the accountant's July 22, 2003 letter stated that they did. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

corporation are not the debts and obligations of the owners, the stockholders, or anyone else.² 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.”

As the owners, stockholders, and others are not obliged to pay the petitioner’s debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation’s debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel has misplaced his reliance on the petitioner’s owner’s affidavit as a basis for disregarding the segregation of corporate wealth from individual wealth. That affidavit does not convince this office to include the petitioner’s owner’s income and assets in the determination of the petitioner’s ability to pay the proffered wage. That affidavit indicates that on the date it was executed the petitioner’s owner intended to use his own income and assets to pay the proffered wage if necessary, but does not overcome the statutory protection of the petitioner’s owner’s income and assets from the debts and obligations of the petitioner. It does not demonstrate that the petitioner’s owner would continue to be willing to pay the proffered wage out of his own income and assets if that arrangement becomes unprofitable, and it does not show that he would be obliged to pay the proffered wage out of his own income and assets if he became unwilling to do so. As was noted in the previous AAO decision, “. . . no reason exists to believe that the affidavit submitted on appeal effectively binds the petitioner’s owner to pay the proffered wage if the petitioner fails to do so.” The petitioner must show the ability to pay the proffered wage out of its own funds.

The petitioner’s reliance on the unaudited financial statements submitted is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel’s reliance on the amount of its compensation of officers is misplaced. The evidence submitted, including the petitioner’s owner’s affidavit, is insufficient to demonstrate that the petitioner’s owner was willing and able to forego compensation either temporarily or permanently, either in whole or in part. The assertion of the petitioner’s owner to that effect, even under oath, is insufficient. As such, the evidence does not demonstrate that the petitioner could have used any portion of its compensation of officers to pay the proffered wage.

Further, even if, in the abstract, owner’s compensation were to be considered, the evidence in the record pertinent to the petitioner’s owner compensation during the salient years was taken from the petitioner’s tax returns, which were tardily submitted, and from the unaudited financial statements. For the reasons given above, figures from those documents will not be considered.

² Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

The assertions of counsel and the accountant that the petitioner's depreciation and amortization deductions should be included in the calculation of its ability to pay the proffered wage are unconvincing. This office is aware that depreciation and amortization deductions do not require or represent a specific cash expenditure during the year taken. They are the systematic allocation of the cost of long-term assets. A depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost or other basis of assets and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient.

Further, amounts spent on long-term tangible and intangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation and amortization schedules, he does not offer any alternative allocation of those costs.³ Counsel appears to be asserting that the real cost of long-term assets should never be deducted from revenue for the purpose of calculating the funds available to the petitioner. Such a scenario is unacceptable.

Further still, even if, in the abstract, depreciation and amortization deductions were to be considered, the evidence in the record pertinent to the petitioner's depreciation and amortization deductions during the salient years was taken from the petitioner's tax returns, which were tardily submitted, and from the unaudited financial statements. For the reasons given above, figures from those documents will not be considered.

Counsel's reliance on the accountant's letter is misplaced. That letter explicitly cites the petitioner's compensation of officers, depreciation and amortization deductions, and the income and assets of the petitioner's owner's other businesses as indices of the petitioner's ability to pay the proffered wage. As was noted above, those are not factors typically considered in the determination of a corporate petitioner's

³ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

continuing ability to pay the proffered wage beginning on the priority date within the context of a petition for an alien worker.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁴ or otherwise increased its net income,⁵ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be

⁴ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁵ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$18,720 per year. The priority date is February 2, 2001.

The petitioner has submitted no timely, reliable evidence that it had the ability to pay the proffered wage during either 2001 or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied for that reason and that basis for denial has not been overcome on appeal or on motion.

The record suggests an additional issue that was not addressed in the decision of denial. On April 28, 2003 the service center requested copies of annual reports, federal tax returns, or audited financial statements pertinent to 2001 and 2002. That evidence was not then submitted.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is granted. The AAO's decision of March 16, 2005 is affirmed. The petition is denied.