

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:

SRC 04 136 52513

Office: TEXAS SERVICE CENTER

Date: DEC 29 2006

IN RE:

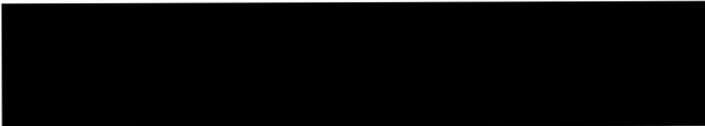
Petitioner:

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

The petitioner is an automotive repair firm. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. 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 evidence established the petitioner's 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) 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 DOL's employment system. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$600 per week, which amounts to \$31,200 annually. The ETA 750B, signed by the alien beneficiary on April 26, 2001, indicates that he has worked for the petitioner since December 2000.

On Part 5 of the visa petition, filed on April 9, 2004, it is claimed that the petitioner was established in 1985, currently employs three workers and has a gross annual income of more than \$281,000.

As evidence of its continuing financial ability to pay the certified wage of \$31,200 per year, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2003. The federal tax return shows that the petitioner reported taxable income of \$5,289 before the net operating loss (NOL). Schedule L of the tax return reflects that the petitioner had \$2,388 in current assets, which combined with \$3,671 in current liabilities, results in -\$1,283 in net current assets. The petitioner also provided a copy of the 2003 Wage and Tax Statement (W-2) issued to the beneficiary. It shows that the petitioner paid the beneficiary \$31,492.09 in wages.

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine 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 liquidity

during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year 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 January 26, 2005, the director requested additional evidence establishing the petitioner's continuing ability to pay the proffered salary and evidence establishing the connection between the petitioner and the corporate entity that filed the tax returns. In response, the petitioner provided documentation demonstrating that its name given on the preference petition represented its business name through which the corporation conducts business. The petitioner also supplied copies of its 2001 and 2002 corporate tax returns, as well as a copy of the beneficiary's W-2 for 2002. It showed that the petitioner paid the beneficiary \$29,267.72 in wages. The petitioner did not provide a W-2 for 2001. The tax returns contain the following information:

| | 2001 | 2002 |
|-------------------------------------|-----------|----------|
| Taxable income before NOL deduction | -\$22,135 | -\$1,014 |
| Current Assets (Schedule L) | \$ 9,377 | \$1,243 |
| Current Liabilities (Sched. L) | \$ 2,348 | \$3,200 |
| Net Current Assets | \$ 7,029 | -\$1,283 |

The director denied the petition on April 29, 2005, concluding that the petitioner had failed to establish its continuing ability to pay the proffered wage. Although finding that the evidence showed that the petitioner established its ability to pay the proposed salary in 2003 through the actual payment of wages, the director noted that the evidence failed to demonstrate the petitioner's ability to pay the certified wage in either 2001 or 2002.

On appeal, counsel provides copies of the beneficiary's W-2s for 2001 and 2004. They show that the petitioner paid the beneficiary \$23,725.50 in 2001 and \$32,884.91 in 2004. Counsel also provides an affidavit of the petitioner's sole shareholder, Mr. [REDACTED]. Mr. [REDACTED] states that the beneficiary's compensation package in 2001 and 2002 included the provision of tools and equipment worth \$9,395 and \$3,586, respectively. Mr. [REDACTED] also states that upon purchasing the company in 2001, he sought to pay debts, but could have re-allocated funds from the company's revenue and his personal compensation to cover the shortfalls between the proffered wage and the actual wages paid to the beneficiary in 2001 and 2002.

Counsel also provides copies of documents appearing to be the 2001 and 2002 record(s) of the petitioner's purchases from a supplier, as well as a letter from its accountant, Mr. [REDACTED]. Mr. [REDACTED] vouches for the petitioner's ability to cover the shortfalls between the certified wage and the actual wages paid to the beneficiary in 2001 and 2002 if the petitioner's owner had not decided to repay existing debts. He further states that the corporation would have shown a profit of \$36,000 in 2001 if a debt incurred by the former owner had not existed. Mr. [REDACTED] asserts that the petitioner has always met its payroll and that the owner could have reduced his salary of approximately \$32,000 to cover the difference between the proffered wage and the beneficiary's actual salary.

Adopting these assertions, counsel claims that the petitioner established its ability to pay the proffered wage of \$31,200 from the priority date of April 30, 2001 until the present. She adds that, at least for 2001, if the ability to

pay were prorated at approximately eight months (from April 30th to December 31st), the petitioner would only need to show the ability to pay the sum of \$23,400.

Counsel's assertion relating to prorating the petitioner's ability to pay the proffered wage is not persuasive in this case. While CIS will prorate the proffered wage if the record contains evidence of net income (or payment of a beneficiary's wages) specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence. Therefore, the comparison of a year's income as described on the tax return and a year of wages as set forth on the beneficiary's W-2 has been used. We will not consider 12 months of income (or twelve months of wages paid to a beneficiary) as shown on the relevant tax return or W-2 towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income (or wages paid to a beneficiary) towards paying the annual proffered wage.

The suggestion that the owner's salary, reflected on the tax returns as officers' compensation of \$34,392 in 2001 and \$28,529 in 2002 should be reallocated toward the petitioner's income or payment of the beneficiary's certified wage for that period is not convincing. Moreover, CIS will not consider the officer compensation presented on a petitioner's tax returns as funds available to pay the wage simply because it may have been paid to a sole shareholder. Such compensation is paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary.¹ The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, 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." A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, the 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.

Mr. [REDACTED] affidavit asserts that the petitioner provided non-cash compensation of tools and equipment to the beneficiary, and that this should be given consideration as to the petitioner's ability to pay the proposed wage. We do not concur. The proposed wage on an approved labor certification is expressed in U.S. currency and not a formula including the value of tools and equipment provided, but rather on a determination of the prevailing wage determined pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40. Further, the regulation at 20 C.F.R. 656.20 (c)(3) clearly provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis."

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 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

¹ It is noted further that the petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for the officer or other documentation clearly demonstrating that such allocation would be feasible. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary would assume this officer's duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

wage. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. In this case, as the director determined, the year 2004 is not at issue here because the petitioner paid the beneficiary \$31,492.09 or \$292 more than the proposed wage offer of \$31,200. In 2001, it paid the beneficiary \$23,725.50 or \$7,474.50 less than the proffered salary and in 2002 the beneficiary's wages of \$29,267.72 were \$1,932.28 less than the certified wage of \$31,200.

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 (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. The argument that funds which were already expended to pay other debts or cover other expenses is too speculative upon which to affirm a petitioner's ability to pay a specified wage. Similarly, merely because a petitioner may have met its payroll in the past is not sufficiently persuasive to rely upon its ability to cover the additional expense of another salary in the future. 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). 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 2001, neither the petitioner's taxable income of -\$22,135 before the NOL deduction, nor its net current assets of \$7,029 could cover the shortfall of \$7,474.50 between the actual wages paid to the beneficiary and the certified wage of \$31,200. Even if the additional \$445.50 could have been provided in 2001, in 2002, the difference of \$1,932.28 from the actual wages paid and the proffered wage could neither be paid from the petitioner's -\$1,014 in taxable income before the NOL deduction nor its -\$1,957 in net current assets.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage. Based upon a review of the underlying record and the evidence and arguments submitted on appeal, we conclude that the petitioner has failed to establish its continuing ability to pay the proffered wage.

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.