

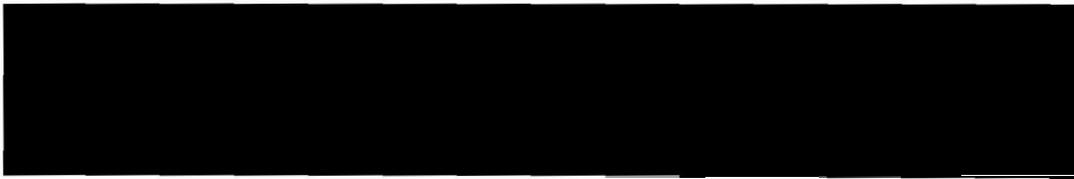
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U.S. Citizenship
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Services

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FILE: EAC 04 075 51129 Office: VERMONT SERVICE CENTER Date: JUL 06 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a discount store. It seeks to employ the beneficiary permanently in the United States as a manager. 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 appeal, counsel 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$990.80 per week, which equals \$51,521.60 per year.

On the petition, the petitioner stated that it was established on July 12, 1987. The space reserved for the petitioner to report the number of workers it employs was left blank. The petition states that the petitioner's gross annual income is \$761,027 and that its net annual income is \$218,190. On the Form ETA 750, Part B, 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 Brooklyn, New York.

In support of the petition, the petitioner submitted its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a corporation, that it incorporated on July 12, 1987, and that it reports taxes pursuant to the calendar year. In the space for the petitioner to report its accounting method, rather than checking either cash basis accounting or accrual accounting, the petitioner entered "Other." The petitioner did not specify what alternative accounting method it employs.

During 2002 the petitioner declared ordinary income of \$3,142. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$234,361 and current liabilities of \$201,795, which yields net current assets of \$32,566.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on August 10, 2004, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The service center also specifically requested that, if the petitioner had ever employed the beneficiary, it provide Form W-2 Wage and Tax Statements showing wages it paid to him.

In response, counsel submitted (1) monthly statements pertinent to the petitioner's bank account, (2) copies of two pay stubs, (3) copies of the petitioner's 2001 and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, and (4) a letter dated September 20, 2004 from the petitioner's accountant.

The 2001 return shows that the petitioner declared ordinary income of \$9,374 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$192,287 and \$156,804 in current liabilities, which yields net current assets of \$35,483.

The 2003 return shows that the petitioner declared ordinary income of \$4,226 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$287,580 and \$255,662 in current liabilities, which yields net current assets of \$31,918.

The pay stubs submitted show that the petitioner paid the beneficiary gross wages of \$995 for employment both during the week of May 14 to May 25, 2004 and during the week of August 6 to September 4, 2004. No evidence of any other wages paid was submitted.

The petitioner's accountant's September 20, 2004 letter states that the petitioner has eight employees. It further states that the petitioner has current assets of \$292,580¹ and the ability to pay the proffered wage. The accountant states that the petitioner's gross income was \$801,860 during 2001, \$761,027 during 2002, and \$954,110 during 2003. The accountant also stated that the petitioner's net income was \$9,374, \$3,142, and \$4,226 during those three years, respectively. This office notes that those figures do not support the petitioner's assertion, on the Form I-140, that the petitioner's net income is \$218,190. Reference to the petitioner's 2002 tax return shows that, on that petition, the petitioner incorrectly identified its total income as its net income.

The accountant draws attention to the petitioner's bank balances and states that it has a history of being able to borrow from its shareholder as necessary to meet operating expenses. Finally the accountant states that the petitioner has employed the beneficiary since May 8, 2004 at a weekly salary of \$995.

¹ Reference to the petitioner's tax return 2003 tax return reveals that the accountant has confused the petitioner's total assets with its current assets.

Although the service center requested W-2 forms as evidence of the petitioner's employment of the beneficiary and the wages paid to him this office notes that the accountant's letter is dated September 20, 2004 and he states that the beneficiary began working for the petitioner during May of that same year. Under these circumstances no W-2 forms would have been available.

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 November 20, 2004, denied the petition.

On appeal, counsel submitted additional bank statements and a brief. In his brief counsel argues that the petitioner's bank balances should have been included in the determination of the petitioner's ability to pay the proffered wage.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.² 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 reported on its tax returns.

Counsel's assertion that, in the past, the petitioner has been able to borrow from its stockholder to finance operations is inapposite. 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, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner shall not be further considered.

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

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

instant case, the petitioner established that it employed the beneficiary and paid him \$1,990 during 2004,³ but no wages during 2001, 2002, or 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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), *affd*, 703 F.2d 571 (7th Cir. 1983). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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 that 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 -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be 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.⁴ 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.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁵ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than

³ The accountant's assertion that the petitioner has employed the beneficiary since May 8, 2004 is insufficient to show that any additional funds were paid to the beneficiary.

⁴ For these reasons the assertion of the accountant that the petitioner has total assets, or as counsel stated, current assets of \$292,580 is inapposite.

⁵ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$51,521.60 per year. The priority date is April 27, 2001

During 2001 the petitioner declared ordinary income of \$9,374. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$35,483. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence to show that it had any additional funds at its disposal during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$3,142. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$32,566. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence to show that it had any additional funds at its disposal during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$4,226. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$31,918. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence to show that it had any additional funds at its disposal during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner has demonstrated that it paid the beneficiary wages of \$1,990 during 2004. Ordinarily the petitioner would be obliged to demonstrate the ability to pay the \$49,270 balance of the proffered wage during that year. The petition in this matter, however, was submitted on January 16, 2004. On that date the petitioner's 2004 tax return was unavailable. The request for evidence in this matter was issued on August 10, 2004. On that date the petitioner's 2004 tax return was still unavailable. The petitioner is excused, therefore, from demonstrating its ability to pay the proffered wage during 2004.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, or 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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 appeal is dismissed.