

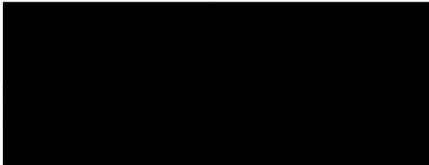
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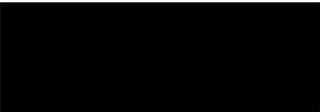
**U.S. Citizenship
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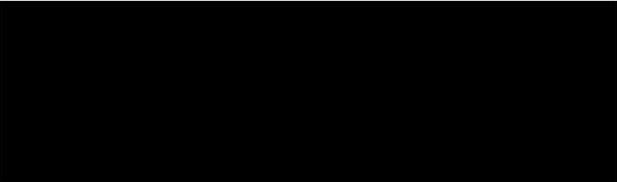
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FILE: EAC-04-064-50421 Office: VERMONT SERVICE CENTER Date: **JUL 25 2008**

IN RE: Petitioner: 
Beneficiary:

PETITION: 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 an electronic equipment repair company. It seeks to employ the beneficiary permanently in the United States as an Electronics Repair Technician. 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.

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

As set forth in the director's August 13, 2004 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is November 4, 2002. The proffered wage as stated on the Form ETA 750 is \$14.29 per hour, which amounts to \$29,723.20 annually. The ETA 750 was certified by the Department of Labor on September 30, 2003.

The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from [REDACTED] Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

The I-140 petition was submitted on January 3, 2004. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits no brief and submits no additional evidence. The petitioner also requests oral argument.

Relevant evidence in the record includes a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002, a copy of its Delaware Form 1100 Corporation Income Tax Return for 2002 and a letter dated December 18, 2003 from an official with Wilmington Trust, of Wilmington, Delaware, giving information on an account of the petitioner. The record also contains evidence pertaining to the beneficiary's experience, but that evidence is not directly relevant to the instant appeal.

On appeal, counsel states that the methods used by CIS service centers to evaluate evidence pertaining to bank accounts and other assets of petitioners are inconsistent and that the AAO should issue a clarification of the proper method of analysis. Counsel also states that the net current assets test of the ability to pay the proffered wage is not rationally related to the issue of the petitioner's ability to pay the proffered wage since that test does not include the liquidation value of a business entity, including real property. Counsel also asserts that the actions of the CIS service centers are a denial of its rights to due process under the U.S. Constitution and the laws of the United States and are "an unlawful interference by the government in Petitioner's justifiable expectations in acquiring necessary employees for its commercial success." (Form I-290B, block 3).

Counsel also requests oral argument on appeal on the grounds that an issue of importance to the instant case and to hundreds of similar cases concerns the clarification of how financial records such as bank account statements may be used to show a petitioner's ability to pay the proffered wage. Counsel asserts that CIS service centers have taken differing approaches to that issue.

CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. §103.3(b). In this instance, the issues identified by counsel can be adequately addressed in writing. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by

documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on November 6, 2003, the beneficiary did not claim to have worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002. The record before the director closed on January 3, 2004 with the submission of the I-140 petition and supporting documents. As of that date, the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 was the most recent return available. The year 2002 is the year of the priority date.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return.

The petitioner's tax return for 2002 states an amount for taxable income on line 28 as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2002	\$(20,295.00)	\$29,723.20*	\$(50,018.20)

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2002, which is the only year at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than 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. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2002	\$(2,366.00)	\$29,723.20*	\$(32,089.20)

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2002, which is the only year at issue in the instant petition.

Counsel states that the net current assets test of the ability to pay the proffered wage is not rationally related to the issue of the petitioner's ability to pay the proffered wage since that test does not include the liquidation value of a business entity, including real property. However, the AAO does not find it likely that the petitioner would liquidate its total assets in order to pay its wages. If the petitioner would have to rely on its liquidation value as evidence of its ability to pay the proffered wage that fact would indicate that the petitioner is not a going business concern and that its job offer to the petitioner is not a realistic one. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The record also contains a copy of the petitioner's Form 1100 Delaware Corporation Income Tax Return for 2002. However, that return contains no significant information beyond the information on the petitioner's federal tax return for 2002, which is discussed above.

The record also contains a letter dated December 18, 2003 from an Assistant Vice President of Wilmington Trust, of Wilmington, Delaware. The letter states in pertinent part as follows: "Please accept this letter as confirmation that [REDACTED] is a valued customer of Wilmington Trust. His personal and business accounts have a combined aggregate average balance between September 2002 and 2003 of \$5443." (Letter from Assistant Vice President, December 18, 2003).

No copies of any bank statements are attached to the December 18, 2003 letter. The reference in the letter to [REDACTED] is presumably a reference to [REDACTED] who is one of two officers of the petitioner on the Schedule E attached to the petitioner's Form 1120 tax return for 2002. The Schedule E shows that Albert Moses devoted 0.0% of his time to the business, that he owned no common or preferred stock of the corporation and that he received no compensation as an officer in 2002. The Schedule E shows the other officer as [REDACTED] and that she devoted 100.0% of her time to the business, that she owned 100.0% of the common stock and no preferred stock and that she received \$26,400.00 as officer compensation in 2002.

No evidence in the record indicates any bank balance information for the petitioner itself. The December 18, 2003 letter from the Assistant Vice President of Wilmington Trust gives a combined aggregate average balance for the personal and business accounts of [REDACTED] of \$5,443.00. But the letter does not even state that any of the business accounts of [REDACTED] are accounts of the petitioner.

It is a basic rule of law concerning corporations that a corporation is a separate and distinct legal entity from its shareholders and officers. 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 officers, its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Moreover, letters of reference from bank officials are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank balance information indicates the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. Therefore, even if the entire average balance of \$5,443.00 stated in the December 18, 2003 letter pertained entirely to the petitioner, that fact would not be sufficient to establish the petitioner's ability to pay the proffered wage, which is \$29,723.20 on an annual basis. Finally, no evidence was submitted to demonstrate that any funds in a bank account of the petitioner are additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

The record contains no other evidence relevant to the petitioner's financial situation.

Counsel states that the methods used by CIS service centers to evaluate evidence pertaining to bank accounts and other assets of petitioners are inconsistent and that the AAO should issue a clarification of the proper method of analysis. Counsel's assertions regarding the analysis of bank account evidence are complex, but they bear little relation to the evidence in the instant petition. As noted above, the record contains no copies of any bank statements. The only evidence pertaining to bank account balances is the December 18, 2003 letter discussed above, which fails to state any bank balance information pertaining to the petitioner.

Counsel also asserts that the actions of the CIS service centers are a denial of its rights to due process under the U.S. Constitution and the laws of the United States and are "an unlawful interference by the government in Petitioner's justifiable expectations in acquiring necessary employees for its commercial success." (Form I-290B, block 3). Counsel provides no citations of authority in support of his broad assertions of violations of due process. Counsel also fails to any legal basis for his claim that CIS actions are an "unlawful interference" with any legally protected expectations of the petitioner in hiring employees. (I-290B, block 3). The foregoing assertions of counsel fail to identify specifically any erroneous conclusion of law or statement of fact in the decision of the director. Therefore they merit no further consideration on appeal. *See* 8 C.F.R. § 103.3(a)(1)(v).

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director correctly stated the petitioner's net income in 2002, and correctly calculated the petitioner's year-end net current assets for that year. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in 2002. The director also correctly found that the information in the record pertaining to an aggregate bank account average balance failed to establish the petitioner's ability to pay the proffered wage. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.