



U.S. Citizenship
and Immigration
Services

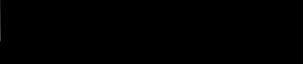
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FILE:



Office: TEXAS SERVICE CENTER

Date: JUN 29 2006

SRC 04 112 51726

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 E. 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 a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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.

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 the Service.

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 March 12, 2001. The proffered wage as stated on the Form ETA 750 is \$8 per hour (\$16,640 per year). On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, filed on March 12, 2004, the petitioner claimed to have a gross annual income of \$850,000. In support of the petition, the petitioner submitted:

- Counsel's G-28;
- Counsel's letter dated January 23, 2004, stating it employed 20 full-time employees;
 - A CPA's letter certifying it's ability to pay the proffered wage;
 - An original ETA 750; and,
 - The petitioner's Form 1065 for 2000-2002.

The record indicates the petitioner is structured as a limited liability company and files its tax returns on Form 1065. The petitioner's fiscal years lasts from January 1 to December 31.

On June 23, 2005, the director requested additional evidence pertinent to that ability. The director specifically requested W-2 (Wage and Tax Statement) for the beneficiary.

In response, counsel submitted:¹

- The petitioner’s W-3 (transmittal of W-2 statement) listing 103 W-2s issued for year 2001, 43 W-2s for the year 2003, 16 W-2s for the year 2004;
- The petitioner’s form 941 indicating 20 employees for the 2nd quarter of 2005; and,
- Copies of the beneficiary’s personal taxes for 2001–2003, indicating adjusted gross income of \$13,645, \$39,173, and \$27,819 for each year respectively; and,
- Copies of corporate documents for the beneficiary’s New Jersey corporate grocery store.

The petitioner’s tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>	<u>2003</u>
Net income ²	(\$110,986)	(\$73,410)	(\$151,683)
Gross receipts	\$1,470,771	\$871,543	\$439,438
Salaries and wages	\$289,293	\$106,125	\$95,534
Current Assets	\$14,294	\$18,529	\$9,766
Current Liabilities	\$308,378	\$378,998	\$302,279
Net current assets	(\$294,084)	(\$360,469)	(\$292,513)

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 19, 2005, denied the petition. The director cited the petitioner’s tax returns, wages noted in the petitioner’s W-3s for 2001, 2003 and 2004, as well as the evidence that the beneficiary owns his own grocery business and has other income.

On appeal, counsel submits:

- A letter from the petitioner’s CPA, dated June 21, 2005, asserting that the petitioner has the ability to pay the proffered wage;
- A letter dated March 7, 2005, from a “member,” certifying that the petitioner has the ability to pay the proffered wage;
- Copies of the petitioner’s W-3s and of 103 W-2s the petitioner issued to its employees for 2001.

On appeal, counsel asserts that, under 8 C.F.R. § 204.5(g), by the petitioner employing more than 100 workers for 2001, the director may accept this as proof of its ability to pay the proffered wage. Further, counsel asserts that because more than 180 days have elapsed since the beneficiary filed his Form I-485, the American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313 (AC21) authorizes the beneficiary to proceed to adjust status under the Form I-485.

Before considering the evidence of the petitioner’s ability to pay the proffered wage, we note that the American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313, became law on October 17, 2000. AC21, § 106(c) added a new subsection (j) to section 204 of the INA, which states:

Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence - A petition under subsection (a)(1)(D) for an individual whose application for

¹ The file also includes the petitioner’s Form 1065 for 2003 but the decision only recites those for 2000–2003.

² Ordinary income (loss) from trade or business activities as reported on Line 22.

adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

INA § 204(j) (*added by The American Competitiveness in the 21st Century Act (AC21)*, Pub.L.No. 106-313, § 106(c), 114 Stat. 1251 (2000))

AC21 also provides that where an I-140 petition and a new job offer satisfy the requirements of INA § 204(j), the underlying labor certification also remains valid. *American Competitiveness in the 21st Century Act*, Pub.L.No. 106-313, § 106(c)(2).

Counsel's assertion, that the petition remains approvable under the terms of AC21, is not supportable. The AAO does not agree that the terms of AC21 make it so that the instant immigrant petition can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an application for adjustment of status to be approved in certain specific instances despite the fact that the initial job offer is no longer valid.

The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided

- (1) The application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and
- (2) The new job offer the new employer must be for a "same or similar" job.

A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, CIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer.

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 petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001, 2002 or 2003.

In general, 8 C.F.R. 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provides further provides: "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 establish the prospective employer's ability to pay the proffered wage." (Emphasis added.)

A limited liability company is a legal entity separate and distinct from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the limited liability company are not the debts and obligations of the owners, whether those owners are individuals, corporations, or other limited liability corporations. As the owners are not obliged to pay those debts, the income and assets of the owners, and their ability, if they wished, to pay the limited liability company'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.

Given the record as a whole, we find that CIS need not exercise its discretion to accept the letter, dated June 21, 2005, from ██████████ CPA, or the letter, March 7, 2005, from ██████████ a "member" of ██████████. A CPA is not a chief financial officer of a company but rather a financial adviser from outside the company.³

As we decline to rely on either of the cited letters, we will examine the other financial documentation submitted. These documents do not support counsel's contention.

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. 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 receipts and wage expense is misplaced. 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. 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. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A partnership's year-end current assets are shown on Schedule L, lines 1 through 6.

³ We note that the petitioner issued far fewer W-2s than the 103 W-2s issued in 2001, and of the 103, most were for part-time workers.

⁴ 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 accounts

Its year-end current liabilities are shown on lines 16 through 18. If a partnership's end-of-year 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.

As shown above, for the years 2001–2003, the petitioner reported losses for each of such years, or -\$110,986 in net income for 2001, -\$73,410 for 2002, and -\$151,683 for 2003. It also reported negative net current assets for each of the three years: -\$294,084 for 2001, -\$360,469 for 2002, and -\$292,513 for 2003. The petitioner has not therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets during 2001–2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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.

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 any office within the employment system of the Department of Labor.

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.