



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 21 2006

WAC 03 053 54884

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:

SELF-REPRESENTED¹

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, Director
Administrative Appeals Office

¹ This office does not recognize counsel-of-record's G-28 appearance because the state bar no longer lists him as licensed to practice.

DISCUSSION: the Director, California 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 Administrative Appeals Office (AAO) on a motion to 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 Tour Operator, Commercial Air Charter Company. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a Tour Guide. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date priority date of the visa petition, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion, the petitioner submits a brief.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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 either 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. Here, the Form ETA 750 was accepted on April 8, 1999. The proffered wage as stated on the Form ETA 750 is \$2,123.17 per month, which equals \$25,479.96 per year.

With the petition, the petitioner submitted:

- An original ETA 750;
- Counsel's G-28;
- A copy of the city business license issued to [REDACTED];
- Copies of the petitioner's internal document, "State Quarterly Worksheet," for 2000 and 2002; and,
- Copies of the Form 1065 for 1999–2001.²

² "[REDACTED]" is the taxpayer on the returns, to which is attached a Form 8805, "Foreign Partner's Information Statement" for 1999, which lists the partnership as [REDACTED], and [REDACTED] of Yachiyo, Chiba, Japan, as the foreign partner

On April 17, 2003, the director issued a Notice Of Intent To Deny (NOID), requested additional evidence pertinent to the ability to pay the proffered wage.

In response, on May 15, 2003, the petitioner:

- Resubmitted³ the Form 1065 for 1999–2001;
- Submitted incomplete monthly bank statements:
 - For the Bank of America account of [REDACTED] statements for 1998–2002;
 - For the Union Bank of California account of [REDACTED] for 1998–2002; and,
- The year 2002 W-2 Wage and Tax Statement of [REDACTED] issued to employees besides the beneficiary.

On June 25, 2003, 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, accordingly, he denied the petition.

On appeal, the petitioner, making the same assertions it makes in the instant motion, asserted the director had erred.

The AAO found that the evidence established the petitioner’s ability to pay the proffered wage during 2000 but that it did not demonstrate that ability for 1999 or 2001. Accordingly, the AAO dismissed the appeal.

With the motion, the petitioner submits a brief.

The petitioner asserts that the AAO failed to follow a precedent set by its decision dated January 11, 2002, which it claims the AAO must be followed under 8 C.F.R. § 103.3(c) as part of CIS. The January 11, 2002 decision sustained an employer’s appeal, finding the employer’s bank account balances were as large as the monthly proffered wage, and thus established the employer’s ability to pay the proffered wage continuously, beginning with the priority date.

The petitioner refers the decision as a “published” decision that the AAO issued concerning the use of bank records but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. It does not appear that counsel’s unidentified decision is a published precedent. 8 C.F.R. § 103.9(a). Accordingly, the decision to which the petitioner refers is not a published precedent within the meaning of 8 C.F.R. § 103.3(c).

It is also noted that the Union Bank of California bank account appears to be the account of [REDACTED] LLC, referred to in footnote no. 2, rather than that of the petitioner. The record of proceedings does not contain documentation explaining the relationship between the petitioner and [REDACTED]. However, the latter is a limited liability company (LLC), rather than an S corporation, as the petitioner has asserted as noted. Although structured and taxed as a partnership, an LLC’s owners enjoy limited liability

³The petitioner’s cover letter describes these as the petitioner’s Form 1120S “for an S Corporation.”

similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.⁴ An investor's liability is limited to his or her initial investment. As the owners and others only are obliged to pay a certain portion of those debts should they come due, the total income and assets of the owners, including bank assets, and the assets and income of others, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

In spite of the foregoing, it is also noted that counsel's reliance on the balances in the bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Given that the income tax returns and the bank account with the higher account balances are those the LLC, however, we find that the record of proceedings does not establish that the petitioner has the ability to pay the proffered wage continuously and starting from the priority date. Therefore, the objection of the AAO has not been overcome on the motion.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The motion is granted. The AAO's decision of the director is affirmed. The AAO's decision of July 9, 2004, is affirmed. The petition is denied.

⁴ 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.