

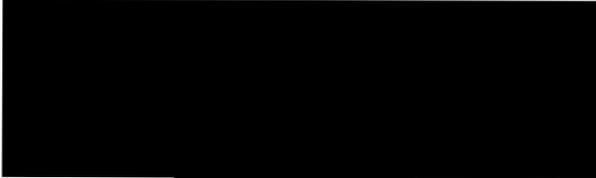
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**U.S. Citizenship
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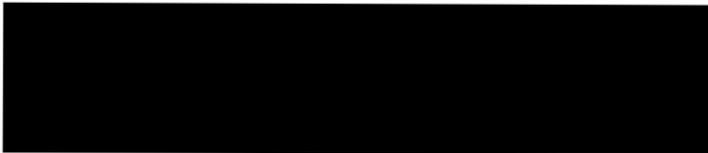
Petitioner:

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, Director
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 a moving company. It seeks to employ the beneficiary permanently in the United States as a warehouse supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits:

- A Form 1040 for 2002 and 2003 of the petitioner's joint owners;
- The W-2 Wage and Tax Statement for 2001 reporting \$162,864 in wages paid to [REDACTED], one of the petitioner's two shareholder-owners;¹ and,
- Counsel's statement in support of the appeal dated November 22, 2004.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$12.65 per hour (\$26,312 per year).

The evidence in the record of proceedings shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1982. According to the tax returns in the record, the petitioner's fiscal years last from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on April 30, 2001, the beneficiary claimed to have worked for the petitioner since January 1999.

With the petition, the petitioner submitted the following documents:

- An approved ETA 750; and,
- An internal balance sheet for January 1 to September 30, 2003.

¹ The petitioner's Form 1120 for 2001 and 2002 lists [REDACTED] as owner of 49 percent of the petitioner's common stock and [REDACTED] of 51 percent, whereas the return for 2003 lists the reverse, [REDACTED] owning 51 percent and [REDACTED] 49 percent. A majority shareholder has the authority to allocate corporate expenses for various business purposes, such as between compensation of officers and employees, and if authorized, may be considered an additional financial resource for an employer to show its ability to pay the proffered wage.

On August 4, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested:

- The petitioner's federal income tax returns for 2001–2003; or,
- The petitioner's annual audited or reviewed financial reports for 2001–2003.

In response, the petitioner submitted:

- The petitioner's Form 1120 for 2001–2003; and,
- The petitioner's internal balance sheet for January 1, 2004, to July 31, 2004.

The director denied the petition on October 21, 2004, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the petitioner's owner's personal tax returns establish the petitioner's ability to pay the proffered wage continuously from the priority date.

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 has not established that it employed and paid the beneficiary the full proffered.

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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$26,312 per year from the priority date.

In 2003, the Form 1120 stated net income² of \$17,854.

In 2002, the Form 1120 stated net income of -\$340,645.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

In 2001, the Form 1120 stated net income of -\$407,282.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the 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. We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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 corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the years in question, were -\$624,998 for 2001; -\$860,284 for 2002; and -\$697,012 for 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 asserts that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date, which is demonstrated by showing the personal income tax return and W-2 statement for the pertinent years of the petitioner's majority, or minority, owner, [REDACTED]

However, contrary to counsel's assertion, Citizenship and Immigration Services (CIS) may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. 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 shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Although we note the sizeable amount of wages paid to [REDACTED] for 2001, nothing in the record of proceedings shows conclusively

³According 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 payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

that the majority shareholders are willing or even able to forgo receipt of \$26,312 in officer's compensation in order to enable the petitioner to pay the proffered wage.

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.