



U.S. Citizenship
and Immigration
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FILE:



Office: VERMONT SERVICE CENTER

Date: MAR 29 2006

EAC 04 131 51242

IN RE:

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 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a night manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 18, 2001. The proffered wage as stated on the Form ETA 750 is \$673.36 per hour, which equals \$35,014.72 per year.

On the petition, the petitioner stated that it was established during 1991 and that it employs 11 workers. The petition states that the petitioner's gross annual income is \$42,6337.00 [sic] and that its net annual income is \$19,385. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since November 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Bristol, Connecticut.

In support of the petition, counsel submitted the 2000 tax return of [REDACTED] and an undated letter.

The 2000 tax return shows that [REDACTED] incorporated on August 1, 1998 and that it reports taxes based on the calendar year and cash convention accounting. During 2000 [REDACTED] declared a loss of \$45,985. The corresponding Schedule L shows that at the end of that year [REDACTED] had current assets of \$14,959 and no current liabilities, which yields net current assets of \$14,959. Because the priority date of the instant petition is April 18, 2001 evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The undated letter is from [REDACTED] and states that [REDACTED] does business as [REDACTED]. That letter also states that the loss sustained by [REDACTED] during 2000 was due to construction work on the road in front of the restaurant during that year. Finally, [REDACTED] that during 2001 the petitioner earned a profit of \$19,385.

[REDACTED] relationship to the petitioner was not stated in that letter. [REDACTED]'s 2000 tax return, however, lists him as the preparer of that return. No evidence was then provided in support of [REDACTED] assertions that the petitioner and [REDACTED] are the same company,¹ that the petitioner's loss during 2000 was due to construction impeding access to the restaurant, or that the petitioner earned a profit during 2001.

The petition in this matter was submitted on March 29, 2004. On that date the petitioner's 2001 and 2002 returns should have been available and its 2003 return may have been available as well. Counsel did not, however, provide any of those returns with the petition. Counsel also failed to provide any evidence of the wages allegedly paid to the beneficiary.

The acting 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 8, 2004, denied the petition.

In the decision of denial the acting director noted that the petitioner claimed, on the petition, to employ 11 workers. The acting director observed that the Wage and Salary expense of \$86,044 shown at Line 13 of the petitioner's 2000 tax return does not seem adequate to compensate 11 workers.

On appeal, counsel submits (1) partly legible copies of the 2001 and 2003 Form 1120, U.S. Corporation Income Tax Returns of [REDACTED], (2) partly legible copies of several pages of [REDACTED] 2002 tax return, and (3) a brief.

[REDACTED] 2001 return shows that it declared taxable income before net operating loss deductions and special deductions of \$19,385 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$11,390 and no current liabilities, which yields net current assets of \$11,390.

The pages provided from [REDACTED]'s 2002 return are not entirely legible, but appear to show that during that year the petitioner declared a loss of \$36,480 as its taxable income before net operating loss deductions and special deductions. The Schedule L from that return, although again not entirely legible, appears to show

¹ The same mailing address is used by both, though that is insufficient to establish that they are the same entity.

that at the end of that year the petitioner had net current assets of \$13,497 and no current liabilities, which yields net current assets of \$13,497.

§ 2003 return shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$10,146 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$19,050 and no current liabilities, which yields net current assets of \$19,050.

On appeal counsel states that a previous petition was approved based on the same 2000 return submitted in this case. The previous petition to which counsel refers is not before this office. This office notes, however, that if the priority date of the previous petition was prior to 2001, then the 2000 petition was directly relevant to that case, although it is not directly relevant to the instant case, as was explained above.

Counsel also stated, "The corporate tax year ends June 30, 2001." All of the returns submitted indicate that the petitioner reports taxes pursuant to the calendar year.

As to the perceived discrepancy between the number of workers the petitioner allegedly employs and the salary and wage expense of ██████████, counsel asserts that many of the petitioner's employees are part-time, that wait staff positions are entitled to very low minimum wages, and that restaurant staff typically has a high turnover. Counsel states that, therefore, no discrepancy exists between the number of workers the petitioner employs and the amount of its wage and salary expense.

This office is convinced by counsel's explanation of the apparent discrepancy cited by the acting director. The remaining issue is whether the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

Counsel states,

The enclosed tax return for the year 2001 show [sic] the employer's receipts were \$426,437 compared to \$334,994 the year before which is a sizeable increase. The employer could have allocated resources differently with regard to the prevailing wage.

Counsel is apparently asserting that the increase in the petitioner's gross receipts demonstrates its continuing ability to pay the proffered wage beginning on the priority date and that the petitioner could have spent funds differently if it had been obliged to pay the proffered wage.

A petitioner's gross receipts, however, or an increase in its gross receipts, are not an index of its ability to pay additional wages. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income,³ the petitioner is obliged to show the ability to pay the

² The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

³ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 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.

Counsel's unsupported assertion or implication that the petitioner could have reallocated assets as necessary to pay the proffered wage is unconvincing. Again, assertions of counsel are not evidence and are insufficient to sustain the burden of proof. See *INS v. Phinpathya, supra*, and *Matter of Ramirez-Sanchez, supra*. Absent competent evidence to the contrary, amounts spent on other business expenses during a given year will not be considered to have been available to pay the proffered wage.

Counsel asserts that the petitioner is paying the beneficiary \$10 per hour and must show the ability to pay \$17.72 per hour. Counsel reasons that, therefore, the petitioner is obliged to show only the ability to pay the difference between the two, which counsel calculates to be approximately \$15,000 per year. Counsel states that the tax returns show sizeable increases and therefore demonstrate the petitioner's ability to pay that additional amount.

However, the petitioner has submitted no evidence to demonstrate the amount it paid to the beneficiary during any of the salient years. The only indication of wages paid to the beneficiary is counsel's statement. The assertions of counsel, however, are not evidence and are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

Counsel states, "Furthermore, "LLC" ventures are able to borrow or lend their own money to fund the corporation." Although counsel's meaning is unclear, he may be stating that the owner or owners of an LLC may, if they wish, contribute to the company to pay its debts and obligations.

That the petitioner's owners may, if they wish, contribute capital to the petitioner is not germane. The petitioner is a limited liability company (LLC). Its owners enjoy the same limited liability as the owners of a corporation. It is a legal entity separate and distinct from its owners. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the company are not the debts and obligations of the owners or anyone else.⁴

Because an LLC is a separate and distinct legal entity from its owners and shareholders, and the owners and others are not obliged to pay its debts, the income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, are irrelevant to this matter. 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 assets

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.

of the petitioner's shareholders or of other enterprises cannot be considered in determining the petitioner's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The petitioner must show the ability to pay the proffered wage out of its own funds. The income and assets of the petitioner's owner shall not be further considered.

Finally, counsel states that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) "takes a far more liberal view of the ability to pay the proffered wage [than the decision of denial.] Counsel observes that the case has not been overturned, but offers no argument to demonstrate that the decision in that case should influence the decision in this matter.

Matter of Sonogawa, supra, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonogawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the petitioner is a new business, and has never posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2000, 2001, and 2003⁵ were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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 instant case, the petitioner did not establish that it employed and paid the beneficiary.

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*

⁵ The submitted portion of the petitioner's 2002 tax return was insufficient to determine whether the petitioner declared a profit or a loss during that year or the size of that profit or loss.

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).

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 the 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. 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.

The proffered wage is \$35,014.72 per year. The priority date is April 18, 2001. Although counsel submitted only an undated letter from a tax preparer to show that [REDACTED] and the petitioner are the same entity, this office notes that the address given on [REDACTED] returns is the same as that of the petitioner. On the balance, this office finds [REDACTED] tax returns to be those of the petitioner.

During 2001 the petitioner declared taxable income before net operating loss deductions and special deductions of \$19,385. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$11,390. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it 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.

The portion of the petitioner's 2002 tax return submitted shows that the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had net current assets of \$13,497. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it 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 taxable income before net operating loss deductions and special deductions of \$10,146. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$13,497. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it 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 failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 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.