



U.S. Citizenship
and Immigration
Services

B6

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



FILE:

SRC 03 240 52152

Office: TEXAS SERVICE CENTER

Date: MAR 30 2006

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 Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a jeweler. It seeks to employ the beneficiary permanently in the United States as a jewelry repairer. 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 statement.

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.

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 10, 2001. The proffered wage as stated on the Form ETA 750 is \$8 per hour, which equals \$16,640 per year.

On the petition, the petitioner stated that it was established on May 28, 1998 and that it employs seven workers. The petition states that the petitioner's gross annual income is \$304,379 and that its net annual income is -\$42,019. Although the Form ETA 750 originally petitioned for another beneficiary, the instant beneficiary was correctly substituted. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Orlando, Florida.

In support of the petition, counsel submitted (1) the petitioner's 1999, 2000 and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) a Form 7004 Application for Automatic Extension of Time, and (3) copies of monthly statements pertinent to the petitioner's bank account.

The petitioner's tax returns show that it is a corporation, that it incorporated on May 28, 1998, and that it reports taxes pursuant to the calendar year and accrual convention accounting.

The 1999 tax return shows that the petitioner declared a loss of \$11,253 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$199,055 and no current liabilities, which yields net current assets of \$199,055.

The 2000 tax return shows that the petitioner declared a loss of \$347,523 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$574,634 and current liabilities of \$253,572, which yields net current assets of \$321,062.

This office notes, however, that the priority date of the petition is April 10, 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, which is the sole issue in this case.

The 2001 return shows that the petitioner declared a loss of \$42,019 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$596,134 and \$342,221 in current liabilities, which yields net current assets of \$271,913.

The Form 7004 indicates that the petitioner requested and was automatically granted until September 15, 2003 to file its 2002 calendar year return.

On June 19, 2004 the Texas Service Center issued a request for additional information. The service center specifically requested evidence pertinent to 2003.

In response, counsel submitted (1) the petitioner's 2002 and 2003 Form 1120, U.S. Corporation Income Tax Return, (2) Form W-2 Wage and Tax Statements, (3) a personal financial statement showing the finances of the petitioner's owner and owner's spouse as of February 29, 2004, (4) a copy of a payroll report dated June 25, 2004, (5) a letter from the petitioner's owner dated August 23, 2004, (6) additional bank returns, and (7) a letter from counsel dated August 30, 2004.

The petitioner's owner's 2002 tax return shows that during that year the petitioner declared a loss of \$153,989 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$794,923 and current liabilities of \$579,740, which yields net current assets of \$215,183.

The petitioner's owner's 2003 tax return shows that during that year the petitioner declared ordinary income of \$35,030. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$1,163,117 and current liabilities of \$858,521, which yields net current assets of \$304,596.

The W-2 forms show that the petitioner paid \$28,846.25 and \$25,000 to its owner and owner's spouse during 2001, \$38,461.60 and \$31,000 to its owner and owner's spouse during 2002, and \$52,000 and \$39,000 to its owner and owner's spouse during 2003.

The payroll report shows the amount the petitioner paid to its employees during the pay period ending June 25, 2004. It also shows month-to-dated, quarter-to-date, and year-to-date totals. It does not show that the petitioner employed the beneficiary.

The petitioner's owner's letter states that the petitioner has had the continuing ability to pay the proffered wage beginning since the priority date and cites its bank statements, its depreciation deductions, its payroll expense, the amount of its officer compensation, and the financial strength of its owner as evidence of that ability. The petitioner's owner further asserted that hiring the beneficiary would result in increased revenue. The petitioner's owner also stated that the expenses associated with moving into a new, much larger, store and equipping it caused the petitioner to declare a loss during 2002. The petitioner's owner also states that the proffered position is for a full-time watchmaker.¹

In his letter counsel cites the petitioner's bank balances, the compensation it paid to its officers, its depreciation deductions, its total assets, and its loans from shareholders. Counsel also noted that the petitioner moved into a much larger store during June 2002, which resulted in greater rent expense.

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 10, 2004, denied the petition. That decision misstates the definition and formula for net current assets.²

On appeal, counsel argues that the evidence previously submitted shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.³

¹ Both the Form ETA 750 and the Form I-140 petition in this matter indicate that the proffered position is for a jewelry repairer.

² The decision incorrectly states that CIS will consider a company's net assets, rather than its net current assets. The decision further states that the formula for net assets is the difference between the petitioner's assets and its liabilities. That calculation yields a sole proprietorships' "Owner's Equity" or a corporation's "Shareholder Equity." Neither is an index of a company's ability to pay additional wages. Elsewhere the decision states that the formula for net assets is current assets minus current liabilities. That is the formula for net current assets. Elsewhere the decision equates "assets" and "current assets." Those are distinctly different statistics.

³ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of

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 reported on its tax returns.

The proposition for which the W-2 forms were submitted is unclear. Counsel may be asserting that the petitioner's owner's and owner's spouse's income and assets is available to pay the proffered wage. Other evidence pertinent to their assets was also submitted. The personal financial statement of the petitioner's owner and owner's spouse is pertinent to their income and assets, not those of the corporation.

Evidence pertinent to the loans made by stockholders is also ineffective to show a corporation's ability to pay the proffered wage. What such loans actually demonstrate is that the petitioner is in debt. Counsel, however, appears to be citing them for the proposition that the stockholders must be able, if they wished, to lend additional funds to the corporation. The evidence pertinent to the petitioner's officer compensation is similar. Counsel appears to be urging that the petitioner's officers are willing and able to forego some or all of their compensation, though no evidence of that implicit assertion was submitted.

Further, the petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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 income and assets of the petitioner's owner shall not be further considered.

Evidence pertinent to the petitioner's total wage expense is inapposite. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁴ or otherwise increased its net income,⁵ the petitioner is obliged to show the ability to pay the 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 corporate 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.

that hypothetical case.

⁴ 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.

⁵ 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.

The assertion that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel and the petitioner's owner are correct that a depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel and the petitioner's owner assert that the cost of those tangible assets should not be charged against income according to their depreciation schedule, they do not offer any alternative allocation of those costs.⁶ Counsel and the petitioner's owner appear to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

The petitioner's owner asserts that hiring the beneficiary would increase his company's revenue. The record contains no other evidence in support of that conclusion, or even an estimate of the amount by which the petitioner's revenue might increase. If that potential increase were sufficiently demonstrated, this office would include it in the computations pertinent to the petitioner's ability to pay the proffered wage. The mere assertion of the petitioner's owner, however, is insufficient.

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 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).

⁶ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

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.

End-of-year net current assets are the taxpayer's end-of-year current assets less the taxpayer's end-of-year current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. An S-corporation's year-end current assets and current liabilities are shown on Schedule L in column D. Current assets are those assets above and including "Other Current Assets." Current liabilities are those liabilities above and including "Other Current Liabilities."

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.

The proffered wage is \$16,640 per year. The priority date is April 10, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net profits during that year. At the end of that year, however, the petitioner had net current assets of \$271,913. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net profits during that year. At the end of that year, however, the petitioner had net current assets of \$215,183. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$35,030. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.⁷

The request for evidence in this matter was issued on June 19, 2004. Counsel's response is dated August 30, 2004. On those dates the petitioner's 2004 tax return was unavailable. The appeal in this matter was submitted on October 14, 2004. On that date the petitioner's 2004 tax return was still unavailable. The petitioner is excused, therefore, from producing evidence pertinent to 2004 and subsequent years.

⁷ The petitioner's net current assets would also have been sufficient to pay the proffered wage during that year.

The petitioner demonstrated its ability to pay the proffered wage during each of the salient years. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Under these circumstances this office need not address whether counsel sufficiently demonstrated his assertion that the petitioner's losses during 2002 were the result of moving to a larger store or whether that assertion, if sufficiently demonstrated, would render the petition approvable.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.