



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED]
EAC 04 023 50849

Office: VERMONT SERVICE CENTER

Date: NOV 30 2006

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:

[REDACTED]

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general construction and restoration firm. It seeks to employ the beneficiary permanently in the United States as a coppersmith/sheet metal worker. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial 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 additional evidence and contends that the petitioner has demonstrated its continuing financial ability to pay the proffered wage.

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 the granting of 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 filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on March 16, 2001. The proffered wage is \$26.87 per hour, which amounts to \$48,903.40 per year based on a 35-hour workweek as set forth on Form ETA 750. On Form ETA 750B, signed by the beneficiary on June 18, 2003, the beneficiary claims to have worked for the petitioner since September 1996.

Part 5 of the visa petition, which was filed on October 27, 2003, indicates that the petitioner was established in April 1994. In support of its ability to pay the proffered salary, the petitioner also provided an incomplete copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It contained five pages but lacked any copies of the statements referenced on the tax return. It indicates that the petitioner files its taxes uses a standard calendar year. The petitioner reported gross receipts or sales of \$2,135,983, total income of \$403,811, no officer compensation, salaries and wages of \$250,000, and taxable income of -\$3,327 before the net operating loss (NOL) deduction. Schedule L of the tax return reveals that the petitioner had \$95,415 in current assets and \$77,644 in current liabilities, resulting in \$17,771 in net current assets.

Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end 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 petitioner also provided a letter, dated October 17, 2003, from its accountant, [REDACTED] CPA, who vouched for the petitioner's ability to meet an additional expense of hiring another sheet metal worker at the proposed wage.

On July 21, 2004, the director requested additional evidence, including documentation establishing the petitioner's ability to pay the proffered salary beginning on the priority date and continuing until the present. He instructed the petitioner to provide copies of its 2002 and 2003 federal income tax returns, as well as copies of the beneficiary's Wage and Tax Statements (W-2s) showing how much the petitioner paid the beneficiary if it employed him during 2001-2003.

In response, the petitioner submitted partial copies of its 2002 and 2003 federal income tax returns. Both lacked copies of the referenced statements. The tax returns contained the following information:

	2002	2003
Gross Receipts or Sales	\$1,377,487	\$1,244,865
Total Income	\$ 422,623	\$ 415,760
Compensation of Officers	none listed	\$ 250,000
Salaries and Expenses	\$ 250,000	none listed
Current Assets (Sched. L)	\$ 77,649	\$ 68,398
Current Liabilities (Sched. L)	\$ 70,611	\$ 35,683
Net current assets	\$ 7,038	\$ 32,715
Taxable income before NOL deduction	-\$ 8,170	-\$ 5,683

The petitioner also provided another letter, dated September 27, 2004, from Mr. [REDACTED]. He asserts that the petitioner's financial profile justifies its ability to pay the proffered wage in the prevailing residential construction market and emphasizes that corporations such as the petitioner distribute all profits as compensation to their owners in order to minimize tax liability, and that such compensation could have been added to the bottom line as part of the corporation's income.

On December 29, 2004, the director denied the petition, concluding that neither the petitioner's reported net income or its net current assets for each of the relevant years of 2001, 2002, and 2003, were greater than the certified wage of \$48,903.40 and did not demonstrate the petitioner's continuing ability to pay the proffered salary.

On appeal, counsel resubmits the September 27, 2004, letter from Mr. [REDACTED] and the 2002 and 2003 copies of the petitioner's tax returns previously provided to the director's request for evidence. Counsel asserts that the director failed to specifically discuss the merits of Mr. [REDACTED]'s letter as it provides expert interpretation of the submitted tax returns.

It is noted that the AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

In this case, CIS does not find the assertion that the officer compensation presented on the petitioner's tax returns should be automatically added back to the corporate petitioner's income, to be persuasive. It is observed that the \$250,000 was expensed as officer compensation in 2003 and as expensed as salaries and wages in 2001 and 2002. As shown on the copy of the 2003 tax return, the \$250,000 was divided between two officers of the corporation (\$175,000 and \$75,000). Such compensation is paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. It is further noted that the same amount was also designated as salaries and wages for two of the relevant years, and as such is considered compensation for services performed. There is also no first-hand evidence from either officer that such compensation could have been foregone during the period given.¹ The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Similarly, the financial information presented on the other corporation's tax returns cannot be included in the consideration of the petitioning corporation's individual ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, 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.

In determining a petitioner's ability to pay a certified wage, CIS will examine whether a petitioner may have employed and paid wages to a beneficiary during a given period. If a petitioner establishes by credible 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. If either the petitioner's net taxable income or net current assets can cover any shortfall resulting from a comparison of actual

¹ Undocumented suggestions that the beneficiary would be assuming a portion of this officer's compensation may be considered funds available to pay the proffered wage are misplaced. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for this officer or other documentation to identify the officer whose workload would be reduced and to verify what compensation the petitioner paid this officer from the priority date onwards. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary would assume this officer's duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, although there is evidence that the petitioner has employed the beneficiary, the petitioner did not provide any W-2s or other evidence of compensation paid such as Form 1099s (non-employee compensation) from which any calculation could be made. It is noted that the documentation submitted with the beneficiary's application for permanent residence contains copies of two checks issued in October 2003 by the petitioner to the beneficiary for \$1,500 and \$2,000, respectively.

CIS will then examine the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. Additionally, it will review a petitioner's current assets and current liabilities as reflected on Schedule L of the tax return as an alternative method of determining a petitioner's ability to pay the proffered wage. 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). 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 the Service should have considered income before expenses were paid, rather than net income.

In this case, in 2001, neither the petitioner's -\$3,327 in taxable income before the NOL deduction, nor its net current assets of \$17,771 were sufficient to cover the proposed wage offer of \$48,903.40. In 2002, its tax return reflects that neither its -\$8,170 in taxable income before the NOL deduction was enough to pay the proffered salary, nor its \$7,038 in net current assets was sufficient to meet the proposed wage offer. Similarly, in 2003, neither the taxable income of -\$5,683 before the NOL deduction, nor the \$32,715 in net current assets was sufficient to cover the shortfall between any actual wages paid as suggested by the \$3,500 in checks issued by the petitioner to the beneficiary in October 2003 and the certified wage of \$48,903.40. The record does not reflect that the corporate petitioner demonstrated its continuing ability to pay the proffered wage beginning at the priority date.

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition. 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.