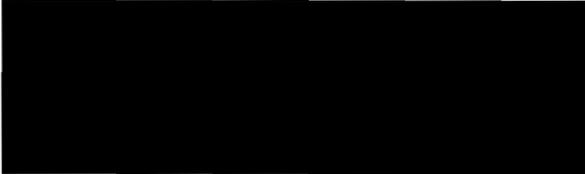


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BE

FILE: EAC 03 126 54121 Office: VERMONT SERVICE CENTER Date: **SEP 13 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, Chief
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 sustained. The petition will be approved.

The petitioner has recognized two attorneys as its counsel during the pendency of this petition. Only the attorney designated on the more recently filed Form G-28 Notice of Entry of Appearance will be recognized as the petitioner's counsel or record. All representation will be considered, but the decision in this matter will be furnished only to the petitioner and to its current counsel of record.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 submitted a brief and additional evidence.

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 12, 2001. The proffered wage as stated on the Form ETA 750 is \$400 per week, which equals \$20,800 per year.

On the petition, the petitioner did not state the date it was established, the number of workers it employs, its gross annual income, or its net annual income in the spaces provided for that information. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since March 2001.

Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Branchburg, New Jersey.

In support of the petition, the petitioner submitted the petitioner's 1998 Form 1120, U.S. Corporation Income Tax Return. That return shows that the petitioner is a corporation, that it incorporated on September 15, 1994, and that it reports taxes pursuant to cash convention accounting and the calendar year. During 1998 the petitioner declared a loss of \$20,344 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$544 and no current liabilities, which yields net current assets of \$544.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on February 18, 2004, requested, *inter alia*, additional evidence pertinent to that ability. The service center also specifically requested the petitioner's 2001, 2002, and 2003 tax returns and, if it employed the beneficiary during any of those years, copies of Form W-2 Wage and Tax Statements showing wages it paid to him during those years.

That request for evidence was sent to the petitioner at 202 North Highway 1021, Branchburg, New Jersey 08876, the address provided on the petition, and was returned, on March 1, 2004, as undeliverable.

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 August 4, 2004, denied the petition.

In a letter dated May 18, 2004 counsel stated that the address given on the petition was incorrect, which counsel attributes to a clerical error by the petitioner's previous counsel. Counsel requested a copy of the request for evidence, which was subsequently mailed to counsel.

On appeal counsel reiterated that, due to a clerical error by previous counsel, the petitioner had received no notice of the request for evidence.

In a subsequent submission to supplement the appeal counsel stated that [REDACTED] co-owner of the petitioner with his wife, is ill and wishes to retire. Counsel asserts that if the petitioner were able to hire the beneficiary Mr. [REDACTED] would immediately retire. Counsel asserts that, therefore, the wages paid to Mr. [REDACTED] should be considered to be funds available to pay the proffered wage.

Counsel further stated,

It appears that the attorney that originally filed the originally filed the I-140 petition. [sic] To begin with, the I-140 [petition] does not appear to be properly completed, especially since the petitioner's address was not correctly stated on the I-140 [petition]. Secondly, if the certified Form ETA-760 established a priority date of April 12, 2001, the company's tax return[s] that should have been presented with the I-140 petition would have been for 2001 and 2002, not 1998.

With that submission counsel provided (1) medical evidence pertinent to Mr. [REDACTED] illness, (2) 2001, 2002, 2003, and 2004 Form W-2 Wage and Tax Statements showing wages paid to Mr. [REDACTED] (3) the 2001, 2002, and 2003 Form 1065 U.S. Returns of Partnership Income of [REDACTED] (4) the petitioner's 2001, 2002, and 2003 Form 1120, U.S. Corporation Income Tax Returns,¹ (5) the petitioner's 2001, 2002, and 2003 Form 940-EZ Employer's Annual Federal Unemployment (FUTA) Tax Returns, (6) a letter dated September 24, 2004 from the petitioner's accountant, and (7) invoices showing payments by [REDACTED] to its insurance company.

The 2001, 2002, 2003, and 2004 W-2 forms show that the petitioner paid Mr. [REDACTED] \$36,400, \$44,200, \$54,600, and \$83,500 during those years, respectively.

The petitioner's 2001 return shows that it declared taxable income before net operating loss deductions and special deductions of \$16,589 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$544 and no current liabilities, which yields net current assets of \$544.

The petitioner's 2002 return shows that it declared taxable income before net operating loss deductions and special deductions of \$9,809 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$544 and no current liabilities, which yields net current assets of \$544.

The petitioner's 2003 return shows that it declared a loss of \$248 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$296 and no current liabilities, which yields net current assets of \$296.

The petitioner's Form 940-EZ returns show that the petitioner paid total wages of \$115,924, \$108,011, and \$138,050 during 2001, 2002, and 2003, respectively.

The petitioner's accountant's September 24, 2004 letter states that the petitioner, [REDACTED] provides payroll and management advisory services to [REDACTED] which in turn operates the [REDACTED]

Counsel asserts that previous evidentiary omissions should be excused because the petitioner's previous attorney ineffectively represented it. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities,

¹ The February 18, 2004 request for evidence asked that the petitioner provide its 2001, 2002, and 2003 tax returns. Those returns were not then provided. This office is not obliged, therefore, to consider those documents, which are now submitted on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). This office chooses, however, to exercise favorable discretion and consider those documents.

and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner did not comply with those requirements. The assertion of ineffective assistance will not be further considered.

██████████ a corporation, filed the petition in this matter. On appeal, counsel provided the tax returns of ██████████ thus implying that they are somehow relevant to this case. Although counsel did not detail that asserted relevance this office notes that the petitioner's owners are also the owners of ██████████. A letter from the petitioner's accountant states that ██████████ employs the petitioner's services.

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 they are not obliged to pay the debts of the corporation, and the assets of its shareholders or of other enterprises or corporations cannot, therefore, 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 owners and of ██████████ shall not be further considered. —

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. Counsel asserts, however, that the wages paid to the petitioner's co-owner, Mr. ██████████ were available to pay the proffered wage because he is eager to retire for medical reasons. Counsel adequately demonstrated that Mr. ██████████ has a serious medical condition, which supports counsel's assertion. This office finds, on the balance, that the petitioner has demonstrated that the wages paid to Mr. ██████████ during the salient years were available to pay the proffered wage. The petitioner paid Mr. ██████████ \$36,400 during 2001, \$44,200 during 2002, \$54,600 during 2003, and \$83,500 during 2004.

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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. 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. 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 that 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.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically² shown on lines 16(d) through 18(d). 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 \$20,800. The priority date is April 12, 2001.

During 2001 the petitioner declared taxable income before net operating loss deductions and special deductions of \$16,589. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$544. That amount is also insufficient to pay the proffered wage. The petitioner has demonstrated, however, that it paid Mr. ██████████ \$36,400 during 2001 for performance of the duties of the proffered position and that this amount was available to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$9,809. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$544. That amount is also insufficient to pay the proffered wage. The petitioner has demonstrated, however, that it paid Mr. ██████████ \$44,200 during 2002 for performance of the duties of the proffered position and that this amount was available to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 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 income during that year. At the end of that year the petitioner

² The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

had net current assets of \$296. That amount is also insufficient to pay the proffered wage. The petitioner has demonstrated, however, that it paid Mr. [REDACTED] \$54,600 during 2003 for performance of the duties of the proffered position and that this amount was available to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The request for evidence in this matter was issued on February 18, 2004. On that date the petitioner's 2004 tax return was unavailable. The petitioner was not obliged, therefore, to submit a copy of its 2004 return or any other evidence of its ability to pay the proffered wage during 2004. On appeal, however, counsel submitted a copy of a 2004 W-2 form showing that the petitioner paid Mr. [REDACTED] \$83,500 during 2004. As was noted above, the record demonstrates that this amount was available to pay the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2004.

The petitioner has 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. The petitioner has overcome the sole basis for the decision of denial.

A review of Mr. [REDACTED] W-2 forms, however, shows that the petitioner paid his wages. Further, the partnership returns of [REDACTED] show that it paid no salary or wages during each of the three salient years. The petitioner appears to be the entity that employs and pays the workers at [REDACTED] bakery. This office finds that the petitioner is the entity that proposes to employ the beneficiary. [REDACTED]

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.