

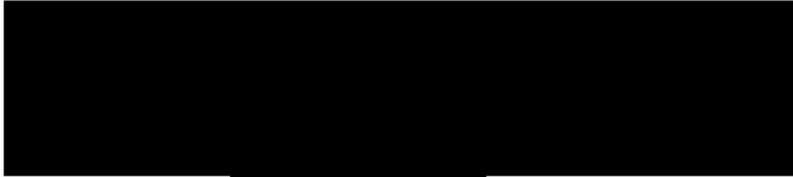
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U.S. Citizenship
and Immigration
Services

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BC



FILE:



Office: TEXAS SERVICE CENTER

Date:

FEB 05 2007

SRC 05 055 51474

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a horse farm. It seeks to employ the beneficiary permanently in the United States as a barn foreman. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that that the petitioner had established 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 day the Form ETA 750 was accepted for processing by any office within DOL's employment system. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 19, 2002. The proffered wage as stated on the Form ETA 750 is \$28,900. The ETA 750B, signed by the alien beneficiary on December 18, 2003, indicates that he has worked for the petitioner since December 2001.

On Part 5 of the visa petition, filed on December 20, 2004, it is claimed that the petitioner was established in 1981 and incorporated in 1996. It is also stated that the petitioner has a gross annual income of \$285,400 and currently employs three workers that are "paid as independent contractors."

As evidence of its continuing financial ability to pay the certified wage of \$28,900 per year, the petitioner submitted a copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002 and 2003. The tax returns contain the following information:

	2002	2003
Gross Income (Schedule F, Profit or Loss From Farming)	\$111,660	\$285,480

Total Expenses (Schedule F)	\$222,078	\$325,412
Net farm profit or (loss) (Sched. F and Page 1, line 5, Form 1120S)		
Ordinary Income ¹	-\$110,418	-\$39,932
Current Assets (Sched. L)	\$ 1,161	\$ 8,594
Current Liabilities (Sched. L)	\$ 37,600	-0-
Net Current Assets	-\$ 36,439	\$ 8,594

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.²

The petitioner, through counsel, also provided a copy of an unaudited, internally generated financial statement covering the petitioner's gross revenues for the period from January 1 to December 14, 2004. Counsel's transmittal letter indicates that the revenues were lower in 2002 because of the unavailability of one of the principal shareholders.

On January 19, 2005, the director requested additional evidence demonstrating the petitioner's continuing ability to pay the proffered wage. She advised the petitioner to submit one of either annual reports, federal tax returns or audited financial statements. She also requested that the petitioner provide copies of the beneficiary's 2002-2004, Wage and Tax Statements (W-2s) if it had employed the beneficiary during that time. The director additionally requested a copy of the petitioner's federal tax returns for 2002 and 2004.

In response, the petitioner resubmitted copies of the 2002 and 2003 tax returns, as well as a copy of the 2004 financial statement previously provided. Copies of the beneficiary's Internal Revenue Service (IRS) Form 1099, Miscellaneous Income, were also supplied. They show that the petitioner paid compensation to the beneficiary as follows:

Year	Compensation
2002	\$23,748.53
2003	\$23,852.05
2004	\$28,534.85

Counsel's transmittal letter summarizes some of the figures shown on the tax returns provided and asserts that the petitioner had the ability to pay the proffered wage. He states that the petitioner's financial statement was provided because the 2004 tax return was not yet due and therefore not available.

¹ For the purpose of this review, ordinary income will be treated as net income.

² The director misstated the petitioner's net current assets for 2002 and 2003.

The director denied the petition on April 6, 2005, concluding that the petitioner had failed to establish its continuing ability to pay the proffered wage, either through its net income, net current assets, or through its actual employment of the beneficiary. The director also declined to consider the petitioner's 2004 unaudited financial statement as persuasive evidence of its ability to pay the proffered wage during the period represented.

On appeal, counsel submits copies of the tax returns and 2004 unaudited financial statement previously supplied to the underlying record. Additionally he provides a copy of a document identified as a "livestock appraisal," dated March 15, 2005, as well as a copy of an appraisal report of real property located at the same address as the petitioner, dated February 24, 2004, and addressed to the [REDACTED]. The real property appears to be owned individually by the petitioner's two shareholders.

As to 2004, counsel asserts that where the petitioner's 2004 tax return had not been filed and was not yet due as documented by an IRS application for an extension of time to file the return provided with the appeal, then the director was obliged to accept the petitioner's unaudited financial statement as evidence of its ability to pay the proffered wage. He also argues that the amount of compensation paid to the beneficiary in 2004 also supported the petitioner's ability to pay the proposed wage offer, as well as the appraisal of the petitioner's livestock showing the value of the petitioner's horses at the time of the appraisal in 2005. Counsel claims that these horses, as capital assets, should be considered as part of the petitioner's ability to pay the proffered salary, even though he states that their value is not included on the petitioner's tax returns until it is received through sale.

Regarding the documentation submitted to the record consisting of the internally generated, unaudited, financial statement, it is noted that such financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. An internal financial document is a presentation of financial information that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). By its own terms it is based upon the representations of management. As this document is not audited as required by the 8 C.F.R. § 204.5(g)(2), it is not sufficiently probative of the petitioner's ability to pay the proffered wage during the period represented. Although the regulation allows additional evidence such as bank account records, profit/loss statements, or personnel records to be submitted by the petitioner or requested by the director in appropriate cases, it neither suggests nor implies that CIS is obliged to accept unaudited financial statements as a substitution simply because a petitioner does not have a federal tax return available.³

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. In this matter, as shown above, the \$23,748.53 in compensation paid to the beneficiary in 2002 was \$5,151.47 less than the proffered wage of \$28,900 per year. In 2003, the beneficiary's compensation of \$23,852.05 was \$5,047.95 less than the proffered salary. In 2004, however, the

³ It is noted that the internal document offered in this matter shows the petitioner's net income in 2004 as a loss of approximately \$12,000.

beneficiary's compensation of \$28,534.85 was only \$366 less than the proffered wage. In 2004, because the shortfall is so small, it is reasonable to find that the petitioner could have covered this amount.

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 (or net current assets) as 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). 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.

It is noted that in 2003, the petitioner's net current assets of \$8,594 could cover the \$5,047.95 difference between the proffered wage and the actual wages paid to the beneficiary. Thus, for 2003, the petitioner established its ability to pay the proffered wage.

The period at issue is 2002. It is noted that counsel's assurances that the inclusion of the value of the petitioner's livestock as reflected by the 2005 appraisal is not persuasive. We will not consider such evidence in isolation and as a substitution from the prescribed forms of documentation required by the 8 C.F.R. § 204.5(g)(2). Moreover, it is noted that the livestock shown to have been acquired prior to 2002 on the appraisal, and claimed by counsel to represent capital assets, is designated as either breeding or racing stock, and as such, would be used in the ordinary course of business and would not, therefore, have become funds available to pay the proffered wage.

Similarly, the real property as specified by the appraisal letter submitted to a mortgage company, will not be considered in the determination of the ability to pay the proffered wage by this petitioner. As a corporation, it must establish its own ability to pay the certified wage. It is noted that 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." 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.

That said, it is emphasized that in this case, the petitioner's obligation to demonstrate its ability to pay the proffered wage begins at the priority date of December 19, 2002 and represents its obligation for the last twelve days of that year. Counsel suggests that the petition's approval is supported by *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) due to the increase of the petitioner's profits from 2002 to 2004. It is noted that in *Matter of Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. Here, while it is recognized that the petitioner's circumstances are not specifically analogous to those in *Sonogawa*, in addition to the short period of time it was obligated to demonstrate its ability to pay the proffered wage in 2002, the petitioner has been incorporated for over ten years,

and reported an increase in gross income in 2003 that was more than twice that reported in 2002. In these circumstances, it is reasonable to conclude that the petitioner's expectation of increased profits is justified and that it has sufficiently demonstrated its ability to pay the \$28,900 annual proffered wage.

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 met that burden.

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