

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 03 2007
SRC 03 112 54526

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a horse show company and horse farm. It seeks to employ the beneficiary permanently in the United States as a horse trainer manager and stable manager.. 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. The director also concluded that the petitioner had failed to demonstrate that the

On appeal, counsel submits additional evidence and asserts that the director was obliged to request additional evidence of the petitioner's 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$19.79 per hour, which amounts to \$40,976 annually. The ETA 750B, signed by the alien beneficiary on April 24, 2001, does not indicate that the alien has worked for the petitioner.

On Part 5 of the visa petition, filed on April 25, 2004, it is claimed that the petitioner was established in October 1993, has a gross annual income of \$1,904,208.29 and currently employs two workers.

As evidence of its continuing financial ability to pay the certified wage of \$40,976 per year, the petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 as well as a copy of its 2001 state short-form franchise tax return. The federal tax return shows that the petitioner reported ordinary income of -\$1,952.28. Schedule L of the tax return reflects that the petitioner had \$38,046.09 in current liabilities, which combined with \$47,827 in current liabilities, results in -\$9,780.91 in net current assets.

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.¹ 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.

The director denied the petition on December 7, 2004, concluding that the petitioner had failed to establish its continuing ability to pay the proffered wage. Finding that the record contained sufficient initial evidence to determine eligibility, the director noted that the petitioner's federal income tax return reflected that its current liabilities exceeded its current assets and that its ordinary income was insufficient to pay the proffered wage of \$40,976 at the time of filing.

On appeal, counsel notes that the petition was filed prior to a CIS interoffice memo, *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memorandum"), which the director cited in rendering his decision based on the evidence contained in the record. Counsel asserts that the director erred in not issuing a request for additional evidence, which precluded the petitioner from submitting additional documentation to supplement the record.

In this case, counsel's argument is not persuasive. It is noted that the Yates memo does not create any right or benefit or constitute a legally binding precedent, but merely is offered as guidance.¹ The regulation at 8 C.F.R. § 103.2(b) (8), clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, "if there is evidence of ineligibility in the record." The regulation at 8 C.F.R. § 204.5(g) (2) provides that evidence of an ability to pay a certified wage must include either federal tax returns, audited financial statements, or annual reports. As the federal tax return submitted with the petition failed to establish the petitioner's ability to pay the proffered wage at the time of filing, the director could reasonably conclude that the evidence was sufficient to render a final decision of ineligibility based on the petitioner's failure to establish its continuing ability to pay the proffered wage beginning at the priority date. Moreover, 8 C.F.R. § 204.5(g)(2) also allows in appropriate cases, that additional evidence such as bank account records, profit/loss statements, or personnel records may be submitted by the petitioner or requested by the director. Here, the director's decision was not made until seven months after the filing of the petition. If the petitioner had wanted additional evidence to be considered, there was sufficient time to offer it. Further, the petitioner had the opportunity to submit any additional evidence it had of its ability to pay the wage on appeal.

Counsel submits on appeal, a copy of an article written by an immigration attorney in which the principles outlined in the Yates Memo are criticized. Counsel specifically asserts that the petitioner's corporate structure as an "S" Corporation with a sole shareholder, was not taken into consideration by the director because the goal of such a corporate tax return is to minimize tax liability to the sole shareholder and that, for example, the officers' compensation of \$44,752 could have been added to the ordinary income to pay the proffered wage.

Counsel's suggestion that the amount of officers' compensation should be reallocated to the petitioner's ordinary income does not constitute evidence and is not convincing. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, CIS will not consider the officer

¹See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

compensation presented on a petitioner's tax returns as funds available to pay the wage simply because it may have been paid to a sole shareholder. 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.² 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 another 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 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.

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.

² It is noted further that any undocumented assertions or 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)).

In this matter, neither the petitioner's ordinary income of -\$1,952.28, nor its net current assets of -\$9,780.91 could cover the proposed wage offer in 2001. The AAO concurs with the director's determination that the petitioner has not demonstrated its continuing ability to pay the \$40,976, annual proffered wage, beginning at the visa priority date of April 30, 2001.

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.