

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

**PUBLIC COPY**

B6

FILE:

SRC 06 056 50604

Office: TEXAS SERVICE CENTER

Date:

**JUL 31 2007**

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 Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a web design and hosting firm. It seeks to employ the beneficiary permanently in the United States as a computer graphic designer. 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 record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 22, 2001. The proffered wage as stated on the Form ETA 750 is \$29,744 per year.

The Form I-140 petition in this matter was submitted on December 12, 2005.<sup>1</sup> On the petition, the petitioner stated that it was established during 1998 and that it employs two workers. The petition states that the petitioner's gross annual income is \$502,412. The space reserved for the petitioner to report its net annual

---

<sup>1</sup> The record also contains a previous Form I-140 visa petition filed by the same petitioner for the same beneficiary. That petition was filed on June 1, 2005 and denied on October 3, 2005. Today's decision, however, concerns only the Form I-140 visa petition filed on December 12, 2005.

income in was left blank. On the Form ETA 750, Part B, signed by the beneficiary on February 12, 2001, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Dallas, Texas.

The AAO reviews *de novo* issues raised on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup>

In the instant case the record contains (1) the 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation of Tae Men Property Inc, (2) the 2001, 2002, 2003, and 2004 tax returns of [REDACTED] and [REDACTED] of Dallas, Texas, (3) monthly statements pertinent to the petitioner's bank account, and (4) the petitioner's unaudited 2005 income statement. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns shows that it is a corporation, that it incorporated on February 3, 1997, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2001 the petitioner declared Schedule K, Line 23 Income of \$3,255. At the end of that year the petitioner had current assets of \$31,747 and current liabilities of \$1,951, which yields net current assets of \$29,796.

During 2002 the petitioner declared Schedule K, Line 23 Income of \$21,445. At the end of that year the petitioner had current assets of \$28,491 and current liabilities of \$5,766, which yields net current assets of \$22,725.

During 2003 the petitioner declared Schedule K, Line 23 Income of \$25,119. At the end of that year the petitioner had current assets of \$11,611 and current liabilities of \$0, which yields net current assets of \$11,611.

End-of-year numbers shown on the 2002 Schedule L should correspond with beginning-of-year figures on the 2003 Schedule L, but do not. This casts doubt on the authenticity of at least one of those returns. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

During 2004 the petitioner declared Schedule K, Line 17e Income of \$17,699. At the end of that year the petitioner had current assets of \$1,931 and current liabilities of \$0, which yields net current assets of \$1,931.

---

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The director denied the petition on March 2, 2006.

On appeal, counsel asserted that because [REDACTED] between them, own 100% of the petitioner, their income and assets must be considered in the determination of the petitioner's ability to pay the proffered wage. Counsel also cited the petitioner's Line 7 Compensation of Officers, Line 14A Depreciation Deductions, and Schedule A Line 3 Cost of Labor as indices of its ability to pay additional wages.

In previous letters dated July 22, 2005 and December 6, 2005 counsel also asserted that the petitioner's total salary and wage expense and total assets should be considered in assessing its ability to pay the proffered wage.

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.<sup>3</sup> 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.

Counsel's reliance on unaudited financial records is similarly misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

Counsel urged that the petitioner's Form 1120, Line 7, Compensation of Officers need not have been paid to its officers, but could have been retained by the petitioner to pay the proffered wage. Counsel provided no evidence, however, to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

Counsel asserts that the Cost of Labor shown on Line 3, Schedule A of its tax returns is a fund available to pay the proffered wage. The evidence does not demonstrate, however, what portion, if any, of those amounts

---

<sup>3</sup> 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 that hypothetical case.

were paid to contractors for performing the duties of the proffered position. If those payments were for the performance of other essential duties, then they were not available to pay the proffered wage. The petitioner has not demonstrated that any portion of those funds was available to pay the proffered wage and they will not be further considered.

Further, even if the petitioner had demonstrated, rather than alleged, that it paid contractors to do the work that the beneficiary would do, it did not state the hourly wage those contractors were paid. Without that information,<sup>4</sup> no calculation can be performed to demonstrate the amount of the contract labor payments that would have been obviated by hiring the beneficiary full-time.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost 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 are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *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 asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>5</sup> Counsel appears to assert 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 to pay additional wages. Such a scenario is unacceptable.

Contrary to counsel's assertion, the petitioner's total assets do not represent a fund available to pay the proffered wage. The petitioner's assets will be considered only in the context of its net current assets, as is explained further below.

---

<sup>4</sup> Another necessary figure in that calculation would be the amount of the additional costs, beyond the beneficiary's salary, that the petitioner would incur by hiring the beneficiary.

<sup>5</sup> Counsel did 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, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

Counsel's argument that the petitioner's owners' personal income and assets should be included in the computation of the funds available to it to pay additional wages is similarly unconvincing. 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). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), 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 with no legal obligation to pay the wage."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel's reliance on the amount of the petitioner's total salary and wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage, or greatly 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 expenses<sup>6</sup> or otherwise increased its net income,<sup>7</sup> 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.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

---

<sup>6</sup> 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.

<sup>7</sup> 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.

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). See also 8 C.F.R. § 204.5(g)(2).

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 minus 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 typically<sup>8</sup> 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 \$29,744 per year. The priority date is February 22, 2001.

During 2001 the petitioner declared net income of \$3,255. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$29,796. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared net income of \$21,445. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$22,725. That amount is insufficient to

---

<sup>8</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

pay the proffered wage. The petitioner submitted no other reliable evidence of its ability to pay additional wages during 2002. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared net income of \$25,119. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$11,611. That amount is insufficient to pay the proffered wage. The petitioner submitted no other reliable evidence of its ability to pay additional wages during 2003. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.<sup>9</sup>

During 2004 the petitioner declared net income of \$17,699. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$1,931. That amount is insufficient to pay the proffered wage. The petitioner submitted no other reliable evidence of its ability to pay additional wages during 2004. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on December 12, 2005. On that date the petitioner's 2005 tax return was unavailable. On January 21, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis, which has not been overcome on appeal.

The record suggests an additional issue that was not raised in the decision of denial. The Form ETA 750 states that the ability to read, write, and speak Korean is a prerequisite of the proffered position. The record contains no indication that the beneficiary is able to read, write, and speak Korean. Because the decision of denial did not address that issue, and the petitioner has not been accorded an opportunity to respond, today's decision is not based, even in part, on that issue. If the petitioner pursues this matter further, however, it should provide evidence pertinent to those requirements.

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 not met that burden.

**ORDER:** The appeal is dismissed.

---

<sup>9</sup> The director erroneously stated that the petitioner had established its ability to pay the proffered wage during 2002 and 2003. However, this error does not alter the ultimate outcome of the appeal.