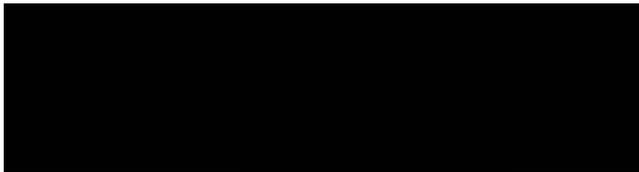


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invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B6



File: [Redacted] Office: VERMONT SERVICE CENTER Date: JUN 01 2007
EAC-05-203-53459

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:

SELF-REPRESENTED

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, Vermont Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner operates a business related to logistics and transportation. It seeks to employ the beneficiary permanently in the United States as a manager, office (“Office Assistant Manager”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s November 21, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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).

The regulation 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.

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

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 23, 2001.² The proffered wage as stated on Form ETA 750 is \$15.70 per hour,³ 35 hours per week, which is equivalent to \$28,574 per year. The labor certification was approved on May 18, 2005, and the petitioner filed the I-140 on the beneficiary's behalf on June 30, 2005. On the I-140, the petitioner listed the following information: date established: January 21, 1997; gross annual income: "please see financial statement;" net annual income: "please see financial statement;" and current number of employees: four.

On September 23, 2005, the director issued a Request for Additional Evidence ("RFE") to submit additional evidence related to the petitioner's ability to pay, including the petitioner's 2001 federal tax return. The petitioner responded. Following consideration of the petitioner's response, on November 21, 2005, the director denied the case as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will examine whether the petitioner 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. In the case at hand, on Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary did not list that he has been employed with the petitioner. The petitioner did not claim to have employed the beneficiary. Therefore, the petitioner cannot establish its ability to pay the proffered wage through prior wage payment.

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 reflected on the petitioner's federal income tax return. 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.

The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net

² We note that an attorney filed the Form ETA 750 and Form I-140 on behalf of the petitioner. The petitioner filed the appeal related to the instant petition on its own, self-represented.

³ We note that the ETA 750 contains a number of changes, including a change to the wage. The changes are initialed by the petitioner and dated, but do not contain a stamp that DOL has approved the changes. It is unclear why the DOL stamp accepting the changes is missing.

income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner's tax returns reflect a small amount of income from other sources for 2002, 2003, and 2004, so that we will take the net income figure for those years from Schedule K. In 2001, the petitioner lists only income from its business and will take the income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	-\$89,386
2003	-\$46,904
2002	-\$497,938
2001	-\$28,246

The petitioner's net income was negative for each of the above years and would not allow for payment of the beneficiary's proffered wage in any of the above years.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	-\$82,215
2003	-\$73,431
2002	-\$285,223
2001	-\$350,680

Following this analysis, the petitioner's federal tax returns shows that the petitioner similarly lacks the ability to pay the proffered wage in any of the above years based on net current assets as well.

We additionally note the following from the petitioner's tax returns:

<u>Tax year</u>	<u>Gross Receipts</u>	<u>Wages Paid</u>
2004	\$0	\$0
2003	\$3,074,325	\$0
2002	\$11	\$0
2001	\$163,974	\$11,419

By way of explaining the low net income and low gross receipts, the petitioner provided in response to the RFE that Congress in 2000 "made an amendment to Maritime Law, and we lost our core PL 480

Transportation business.”⁴ The petitioner further explains that the petitioner has sought to develop alternative businesses. The petitioner’s vice president stated that he would use his personal resources to pay the proffered wage and submitted copies of his individual federal tax return Form 1040.⁵

Regarding use of the vice president’s personal resources, the petitioner is formed as an S corporation, and the assets of shareholders cannot be considered to demonstrate the petitioner’s ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). CIS has long held that it may not “pierce the corporate veil” and look to the assets of the corporation’s owner to satisfy the corporation’s ability to pay the proffered wage. Consequently, 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.

On appeal, the petitioner provides that the company was established in 1996, and specializes in international trading and logistics. The petitioner provides that since 1996, the company has completed a transportation contract for over \$75 million.

The petitioner’s tax returns do not reflect revenues from a \$75 million contract. The petitioner provided no information regarding this contract, or when the petitioner was paid pursuant to the contract. 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)).

The petitioner further provides that “we made a serious mistake investing over \$600,000 dollar [sic] in Food business in 2001 lead [sic] us to a financial constraint . . . We are confident and that is why we keep on funding our day to day expenses from credit line including salary of [the beneficiary] and other partime [sic] contract employee.”

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner’s net income or net current assets by adding in the corporation’s credit limits, bank lines, or lines of credit. A “bank line” or “line of credit” is a bank’s unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron’s Dictionary of Finance and Investment Terms*, 45 (1998). Since the line of credit is a “commitment to loan” and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, the petitioner did not provide any documentation related to the line of credit, or amount of credit that it

⁴ The petitioner’s tax returns do not reflect that the changes to the Maritime Law, if any, resulted in a one-time impact on the business, but rather the changes appear to have caused a much more lengthy and protracted loss. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

The vice president and shareholder’s individual tax return reflects that he resides at the same address listed for the petitioner, 4 [REDACTED] so that the petitioner’s business appears to be a home based business.

theoretically has available. *See Matter of Soffici*, 22 I&N Dec. at 165.

The petitioner additionally contends that the business has hired two prominent consultants, which should serve to increase the petitioner's business. Whether the consultants successfully increase future business is irrelevant. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner must show its ability to pay from the priority date onward, and cannot speculate that it may be able to pay the wage in the future. The petitioner has not demonstrated the ability to pay from the priority date onward.

On appeal, the petitioner submitted an income statement for the year ending December 31, 2000.⁶ 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. As the income statement provided is unaudited, the statement is not persuasive evidence. The statement reflects a compilation, which reflects management's representations compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Additionally, the petitioner submitted one page from the petitioner's business bank account listing a balance for the time period ending December 31, 2000. The one page appears to reflect transactions for January to March 2001, however, the statement is not clearly marked. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Additionally, one statement alone would not demonstrate the petitioner's ability to pay from April 23, 2001 to the present, but rather would represent only the amount that the petitioner had in its account as of December 31, 2000. The statement generally reflects that large amounts of money flow into and out of the account. The statement also reflects three charges during this time period for insufficient funds. Overall, the statement reflects only a very short time period, and would not demonstrate the petitioner's ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

The petitioner did not submit any further documentation regarding its ability to pay. Accordingly, based on the foregoing, we find that the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and the petition was properly denied. 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.

⁶ We note that the priority date is April 23, 2001, so that the petitioner's 2000 income statement would not demonstrate the petitioner's ability to pay from the time of the priority date onward. We will consider the statement generally.