



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 04 211 50875

Office: VERMONT SERVICE CENTER

Date: MAR 01 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

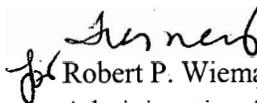
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, 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 real estate developer and manager. It seeks to employ the beneficiary permanently in the United States as a bricklayer. 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$55,000 per year.

The Form I-140 petition in this matter was submitted on July 8, 2004. On the petition, the petitioner stated that it was established during 1995 and that it employs two workers. The petition states that the petitioner's gross annual income is \$300,000 and that its net annual income is \$120,000.¹ The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Greenwich, Connecticut.

¹ Those figures are not borne out by the tax returns subsequently submitted.

On the Form ETA 750, Part B the beneficiary stated that he had worked as a mason and plumber for [REDACTED] Connecticut from August 1990 through April 24, 2001, the date he signed that form. On that form the beneficiary referred to an addendum for information pertinent to his qualifying employment experience. That addendum states, “[the beneficiary] has been a great asset to our Company for over one decade, since 1990.” That addendum is signed by one of the petitioner’s partners and by an attorney at the petitioner’s counsel’s firm.

The AAO reviews *de novo* issues raised in decisions challenged 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.

With the petition counsel submitted a letter, dated June 14, 2004, alleging that [REDACTED] of Stamford, Connecticut, has employed the beneficiary as a plumbing contractor for 12 years. This office notes that the petitioner in this matter is [REDACTED]. The relationship of those two entities, if any, is unknown to this office.

With the Form I-140 visa petition, however, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date. Therefore, on November 8, 2004 the Vermont Service Center requested pertinent evidence. Specifically, the service center requested copies of the petitioner’s 2001, 2002, and 2003 tax returns or annual reports. In response counsel submitted a letter dated January 18, 2005 from the petitioner’s accountant. Counsel also submitted a copy of the Form 1120S, U.S. Income Tax Return for an S Corporation of ABOG Enterprises, Incorporated. Counsel did not submit the petitioner’s tax returns or annual reports as the request for evidence specifically requested.

In his January 18, 2005 letter the accountant stated that (1) the petitioner is a viable concern in good financial standing, (2) the petitioner has real estate valued at \$1.8 million, (3) the petitioner’s 2003 rental income from its properties was \$114,000, (4) its total 2003 “financial year “ revenue including the revenue of a subsidiary was \$791,000, (5) its gross income projections for 2004 and 2005 are \$900,000 and \$1.2 million, respectively, (6) its projected gross income during the following five years is over \$2.5 million, (7) that it owns ABOG Enterprises, Incorporated, and (8) it has the ability to pay the proffered wage in this case.

ABOG Enterprises’ 2003 tax return shows, at Schedule K-1, that [REDACTED] owns the corporation, in its entirety. This is contrary to the accountant’s assertion that the petitioner, [REDACTED] owns it.

The director denied the petition on March 18, 2003; finding that the petitioner, the [REDACTED], had not demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

On appeal counsel submitted (1) a letter dated April 13, 2005 from a commercial lender, (2) a letter dated April 12, 2005 from the petitioner’s accountant, (3) a portion of an article about a new logo adopted by Quality Couriers, which is apparently related to [REDACTED], and (4) the petitioner’s 1997 through 2003 Form 1065 U.S. Returns of Partnership Income.

The commercial lender’s April 13, 2005 letter states that it has accorded the petitioner a \$500,000 revolving line of credit. The petitioner’s accountant’s April 12, 2005 letter is essentially a restatement of the

accountant's January 18, 2005 letter. The proposition counsel intended to support with the article about new logo is unknown to this office.

The priority date of the instant petition is April 30, 2001. Evidence pertinent to the petitioner's finances prior to that date, therefore, is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. For this reason the petitioner's 1997 through 2000 tax returns will not be considered.

The service center requested, on November 8, 2004, that the petitioner provide copies of its 2001, 2002, and 2003 tax returns or annual reports. Those returns or reports were not provided in response to that request, nor was an explanation of that omission. Now, on appeal, counsel has submitted the 2001, 2002, and 2003 tax returns.

Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). Under the circumstances, this office need not and will not consider the petitioner's 2001, 2002, and 2003 tax returns.

The assertions and conclusions of the accountant pertinent to the petitioner's past and future performance are of little probative value. The regulation at 8 C.F.R. § 204.5(g)(2) is clear that copies of annual reports, federal tax returns, or audited financial statements are the required evidence of a petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner is required to provide evidence such that CIS may judge whether the petitioner has that ability. **CIS will not assign that determination to the petitioner's accountant or substitute that accountant's judgment for its own.**

Further, this office notes that the accountant stated in his January 18, 2005 and April 12, 2005 letters that the petitioner owns real estate valued at \$1.8 million. The petitioner's 2003 tax return, however, states that the petitioner has total assets of \$751,530. The accountant stated that the petitioner received rental income of \$114,000 during 2003. The petitioner's 2003 return shows no such rental income. The accountant stated that the petitioner owns ABOG Enterprises. The tax return of [REDACTED] shows that it does not.

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).

Counsel's reliance on the petitioner's credit line is misplaced. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel's reliance on the income and assets of [REDACTED] the other company owned by the petitioner's owner, is misplaced as that other company's income and assets have not been shown to be available to the petitioner to pay additional wages. The petitioner is a limited liability company. [REDACTED] An [REDACTED] like a corporation, is a legal entity separate and distinct from its owners or stockholders. *See 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 or 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.

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. (Reg. Comm. 1967).

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, whether the beneficiary is claiming to have worked for the petitioner is unclear. In any event, however, the petitioner did not establish that it paid any amount of wages to 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).

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 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 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 \$55,000 per year. The priority date is April 30, 2001. The service center issued a request for evidence on November 8, 2004 asking for evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The service center requested that the petitioner provide either its tax returns or annual reports for 2001, 2002, and 2003. On that date the petitioner's 2001, 2002, and 2003 tax returns should have been available.

The petitioner did not timely provide the requested evidence. The petitioner did not provide copies of annual reports, federal tax returns, or audited financial statements as required by 8 C.F.R. § 204.5(g)(2) as evidence of its continuing ability to pay the proffered wage beginning on the priority date. Further, the petitioner did not provide any other reliable evidence of its continuing ability to pay the proffered wage beginning on the priority date. The petitioner failed to demonstrate its ability to pay the proffered wage during 2001, 2002, and 2003 and has failed, therefore, to show its continuing ability to pay the proffered wage beginning on the priority date. The visa petition was correctly denied on that basis, which basis has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

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

Whether the beneficiary has been working for the petitioner for the ten years prior to filing the Form ETA 750 or whether it had been working for some other entity is unclear. Whether the beneficiary worked as a plumber, a mason, or both is also unclear. Consequently, whether the beneficiary has five years of experience as a bricklayer as required by the Form ETA 750 is unclear.

Because the decision of denial did not discuss this issue and the petitioner has not been accorded the opportunity to address it, today's decision does not rely on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should explain in detail who employed the beneficiary and in what trade.

Further, although the petitioner purportedly proposes to employ the beneficiary and stated, on the Form I-140 petition, that it has two current employees, the petitioner's tax returns do not show that it has any salary or wage expense. Only the prospective employer, the entity that proposes to employ the alien and pay him wages, may petition for an alien worker. Evidence in the record appears to indicate that the petitioner in this case is not the prospective employer.

Again, because the decision of denial did not discuss this issue and the petitioner has not been accorded the opportunity to address it, today's decision does not rely on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The petitioner is required to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. 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.