

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

SEP 13 2007

FILE:

EAC 05 169 51454

Office: VERMONT SERVICE CENTER

Date:

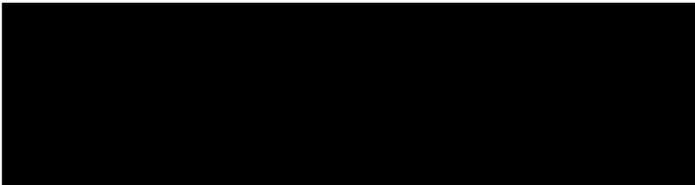
IN RE:

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 Acting 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 an automobile repair shop. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 acting 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 2, 2001. The proffered wage as stated on the Form ETA 750 is \$24.48 per hour, which equals \$50,918.40 per year.

The Form I-140 petition in this matter was submitted on May 20, 2005. On the petition, the petitioner stated that it was established during 1997 and that it employs 15 workers. The petition states that the petitioner's gross annual income is \$554,897 and that its net annual income is \$91,093.¹ On the Form ETA 750, Part B, signed by the beneficiary on March 26, 2001, the beneficiary did not claim to have worked for the petitioner.

¹ The tax returns provided show that the petitioner's net income did not approach that much during any of the salient years. The provenance of that figure is unknown to this office.

The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Franklin Square, New York.

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.²

In the instant case the record contains (1) copies of the petitioner's 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) a payroll journal page, (3) a 2005 Form W-2 Wage and Tax Statement, (4) the petitioner's NYS-45-MN, Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return for the third quarter of 2005, (5) a December 5, 2005 letter from a bank indicating that the petitioner has a \$100,000 credit line, (6) monthly statements pertinent to the petitioner's bank account, (7) a letter dated April 7, 2006 from the accountant of [REDACTED] one of the petitioner's half-owners, (8) a bank letter dated April 17, 2006, (9) bank statements of other corporations' accounts, and (10) a letter dated April 10, 2006 from [REDACTED] the petitioner's other half-owner. 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 show that it is a subchapter S corporation, that it incorporated on August 20, 1999, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2001 the petitioner declared Schedule K, Line 23 Income of \$3,385.⁴ The corresponding Schedule L shows that at the end of that year the petitioner had \$19,838 in current assets and \$3,159 in current liabilities, which yields net current assets of \$16,159. During that year the petitioner had salary and wage expense of \$0 and Schedule A, Line 3 Cost of Labor of \$0.

During 2002 the petitioner declared a loss of \$2,354 as its Schedule K, Line 23 Income. The petitioner did not list any current assets or current liabilities on the Schedule L submitted with that return, which therefore shows no net current assets. During that year the petitioner had salary and wage expense of \$0 and Schedule A, Line 3 Cost of Labor of \$0.

During 2003 the petitioner declared Schedule K, Line 23 Income of \$7,067. The corresponding Schedule L shows that at the end of that year the petitioner had \$34,480 in current assets and current liabilities of \$5,572,

² 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).

³ The petitioner's half-owner's name is spelled [REDACTED], and [REDACTED] various places in the record. This office will not attempt to reconcile that discrepancy.

⁴ Schedule K, Line 23, Income is the total of all of the various types of income and/or loss of a Subchapter S Corporation and is considered to be its net income for the purpose of determining its ability to pay the proffered wage.

which yields net current assets of \$28,908. During that year the petitioner had salary and wage expense of \$24,700 and Schedule A, Line 3 Cost of Labor of \$0.

During 2004 the petitioner declared a loss of \$1,999 as its Schedule K, Line 23 Income. The corresponding Schedule L shows that at the end of that year the petitioner had \$34,890 in current assets and current liabilities of \$6,306, which yields net current assets of \$28,584. During that year the petitioner had salary and wage expense of \$20,800 and Schedule A, Line 3 Cost of Labor of \$0.

The payroll journal page provided shows that the petitioner paid the beneficiary \$13,000 during each of the last two quarters of 2005 for a total of \$26,000 during that year. The 2005 W-2 form confirms that total. The petitioner's quarterly wage report further confirms that the petitioner paid the beneficiary \$13,000 during the third quarter of 2005. That report also shows that during that quarter the petitioner paid its only other employee \$10,400.

That other employee is identified as [REDACTED], with social security number [REDACTED]. This office notes that Schedules K-1 attached to the petitioner's tax returns show that [REDACTED] of the same social security number is half-owner of the petitioner. Notwithstanding that the petitioner claimed, on the Form I-140 visa petition, to employ 15 workers, that wage report indicates that it employed only the beneficiary and its half owner during that quarter.

Further, the petitioner paid combined salaries, wages, and costs of labor of \$0 during 2001, \$0 during 2002, \$24,700 during 2003, and \$20,800 during 2004. Those amounts also appear to be inconsistent with employing 15 workers.⁵

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).

The April 7, 2006 letter from [REDACTED] accountant names five corporations, including the petitioner, that [REDACTED] owns and states that because of their proximity to each other "it would not be unusual for one location to assist another" by providing finances or employees. This office notes that [REDACTED] owns only half of the petitioning corporation. The percentage of his ownership of the other corporations is not in evidence and is unknown to this office.

The April 17, 2006 bank letter lists bank accounts of companies of which [REDACTED] is allegedly the principal owner. Bank statements provided pertain to those accounts.

The April 10, 2006 letter from [REDACTED] reviews the other evidence submitted and asserts that it shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

⁵ In fact, during 2001 and 2002 the petitioner had no salary, wage, or labor expense, which is inconsistent with employing any workers at all.

The acting director denied the petition on March 20, 2006. On appeal, counsel cited the petitioner's bank statements and credit line as indices of its ability to pay additional wages. Counsel also noted that the petitioner has been paying the beneficiary an amount in excess of the proffered wage since July of 2005.

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 bank statements in this case is similarly 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.⁶ 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.

Evidence pertinent to other corporations owned by one of the petitioner's co-owners is irrelevant to the instant petitioner's continuing ability to pay the proffered wage beginning on the priority date. 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 [Citizenship and Immigration Services] to consider the financial resources of individuals or entities with no legal obligation to pay the wage."

The issue is not whether financial or other assistance from a separate corporation would be unusual, but whether it would be mandatory. 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, including other corporations, 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.

⁶ 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.

The wages the petitioner has paid to the beneficiary during the salient years is properly a consideration in the determination of the petitioner's ability to pay the proffered wage. The wages the petitioner has demonstrated that it paid to the beneficiary will be considered below.

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).

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 established that it paid the beneficiary \$26,000 during 2005. The petitioner must show the ability to pay the balance of the proffered wage during that year.

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 typically⁷ 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 \$50,918.40 per year. The priority date is April 2, 2001.

The petitioner declared net income of \$3,385 during 2001. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$16,159. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during 2001 with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2001.

The petitioner declared a loss during 2002. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. The petitioner's 2002 Schedule L does not show that it had any year-end net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds at its disposal during 2002 with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2002.

The petitioner declared net income of \$7,067 during 2003. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$28,908. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during 2003 with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2003.

The petitioner declared a loss during 2004. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$28,584. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during 2004 with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2004.

⁷ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner has demonstrated that it paid the beneficiary \$26,000 during 2005 and would ordinarily be obliged to show the ability to pay the remaining \$24,918.40 balance of the proffered wage. The petition in this matter, however, was submitted on May 20, 2005. On that date the petitioner's 2005 tax return was unavailable. On September 21, 2005 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 2001, 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 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.