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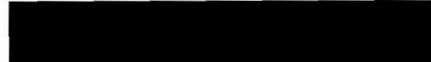
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Petitioner:

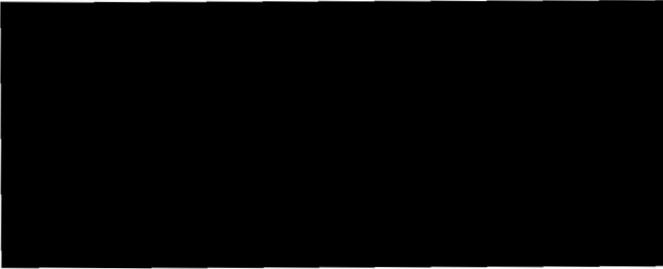


Beneficiary:



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 sustained. The petition will be approved.

The petitioner is an hotelier. It seeks to employ the beneficiary permanently in the United States as a financial specialist. 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 August 8, 2003. The proffered wage as stated on the Form ETA 750 is \$45,000 per year.

The Form I-140 petition in this matter was submitted on December 22, 2003. On the petition, the petitioner stated that it was established on April 30, 1981 and that it employs 20 workers. The petition states that the petitioner's gross annual income is \$1,242,534 and that its net annual income is a loss of \$483,512. On the

Form ETA 750, Part B, signed by the beneficiary on June 6, 2003, 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 West Bessemer, Alabama.

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.¹

In the instant case the record contains (1) copies of portions of the petitioner's 1999 and 2000 Form 1120, U.S. Corporation Income Tax Returns, (2) copies of the petitioner's 2001 and 2003 Form 1120, U.S. Corporation Income Tax Returns, (3) compiled, unaudited, financial statements, (4) Form W-2 Wage and Tax Statements the petitioner issued to [REDACTED] and (5) a letter dated May 25, 2005 from the petitioner's president. 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 record also contains a confidential financial statement pertinent to the petitioner's owner's personal assets.

The tax returns and portions of tax returns submitted show that the petitioner is a corporation, that it incorporated on April 30, 1981, and that it reports taxes pursuant to accrual convention accounting and a fiscal year running from May 1 of the nominal year to April 30 of the following year.

During its 1999 fiscal year, which ran from May 1, 1999 to April 30, 2000, the petitioner reported a loss of \$483,512 as its taxable income before net operating loss deductions and special deductions. Because the corresponding Schedule L was not provided this office is unable to compute the petitioner's end-of-year net current assets.

During its 2000 fiscal year, which ran from May 1, 2000 to April 30, 2001, the petitioner reported taxable income before net operating loss deductions and special deductions of \$387,203. Because the corresponding Schedule L was not provided this office is unable to compute the petitioner's end-of-year net current assets.

During its 2001 fiscal year, which ran from May 1, 2001 to April 30, 2002, the petitioner reported a loss of \$483,512 as its taxable income before net operating loss deductions and special deductions. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 tax return is not in the record. This office notes, however, that because the priority date of the visa petition is August 8, 2003, which falls within the petitioner's 2003 fiscal year, evidence pertinent to prior fiscal years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

¹ 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).

During its 2003 fiscal year, which ran from May 1, 2003 to April 20, 2004, the petitioner declared taxable income before net operating loss deductions and special deductions of \$42,179. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The petitioner's president's May 25, 2005 letter states that the petitioner has employed [REDACTED] as its financial analyst since 2003 at a salary of \$48,115.50 per year but that he planned to leave the petitioner's employ during 2005. The W-2 forms issued to [REDACTED] show that the petitioner paid him \$68,000.12, \$48,115.50, and \$50,000.05 during 2003, 2004, and 2005, respectively. The 2005 W-2 form apparently indicates that [REDACTED] did not leave his job during 2005, as he had allegedly planned, but worked the entire year.

The director denied the petition on January 31, 2006. In that decision the director stated that the petitioner's 2003 tax return shows net profit of \$0. In fact, that return does show Line 30 Taxable Income of \$0. That amount resulted, however, from the subtraction of \$42,179 in Line 29a Net Operating Loss Deductions from the petitioner's Line 28, Taxable income before net operating loss deductions and special deductions. Net Operating Loss Deductions are losses from previous years carried forward to reduce a current year's taxable income. **They are not the result of losses suffered during the current year. This office considers the petitioner's Line 28 taxable income before net operating loss deductions and special deductions to be more indicative of net profit than the petitioner's Line 30 Taxable Income.** The petitioner's Line 28 taxable income before net operating loss deductions and special deductions during its 2003 fiscal year was \$47,179.

On appeal, counsel asserted that the petitioner is only obliged to show the ability to pay a pro-rata portion of **the proffered wage during 2003 to reflect the** portion of the year that remained after the priority date. Counsel also argued that the wages paid to [REDACTED] should have been included in the computation of the funds available to pay additional wages, as the petitioner had announced that it would replace [REDACTED] with the beneficiary.

Counsel's reliance on the unaudited financial statements in the record is 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. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management 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. The unaudited financial statements will not be considered.

Counsel's reliance on the petitioner's president's personal income and assets is similarly misplaced. 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 corporation's owners, stockholders, officers, and others are not obliged to pay the petitioner's debts the income and assets of the owners, stockholders, officers, 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 requested that CIS prorate the proffered wage during 2003 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel noted that the petitioner's president stated that the petitioner would replace a named employee with the beneficiary and that, therefore, funds previously paid to the named employee would be available to pay the proffered wage to the beneficiary. Although the 2005 W-2 form the petitioner issued to [REDACTED] casts doubt on whether he actually left the petitioner's employ, this office will include the wages paid to [REDACTED] in the calculation of funds available to pay the proffered wage.

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 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).

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 \$45,000 per year. The priority date is August 8, 2003.

During its 2003 fiscal year, which ran from May 1, 2003 to April 20, 2004, the petitioner declared taxable income before net operating loss deductions and special deductions of \$42,179. That amount is \$2,821 short of the annual amount of the proffered wage. At the end of that fiscal year the petitioner had negative 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 fiscal year.

Although the petitioner's 2003 tax return is insufficient, in itself, to demonstrate the petitioner's ability to pay the proffered wage during that year, the record contains 2003, 2004, and 2005 W-2 forms showing that the petitioner paid [REDACTED] \$68,000.12, \$48,115.50, \$50,000.05 during those years, respectively. The petitioner asserts that [REDACTED] was performing the duties of the proffered position and that the beneficiary will replace him. The funds paid to [REDACTED] exceeded the annual amount of the proffered

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

wage during 2003, 2004, and 2005. The petitioner has therefore shown the ability to pay the proffered wage during those calendar years.

Having demonstrated its ability to pay the proffered wage during all of the salient years the petitioner has sufficiently demonstrated its continuing ability to pay the proffered wage beginning on the priority date and overcome the sole basis for denial of the visa petition.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.