PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

File: WAC 02 198 52624 Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision 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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an export-import trade show organizer. It seeks to employ the beneficiary permanently in the United States as an executive secretary. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor 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.

On appeal, counsel submits a statement and additional evidence.

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 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $19.20 per hour, which equals $39,936 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 Form [redacted] The return shows that the petitioner declares income based on a fiscal year beginning March 1 of the nominal year and ending on the last day of February on the following year. Because the priority date is April 30, 2001, information pertinent to the petitioner's finances during its 2000 fiscal year is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel submitted a letter, dated May 10, 2002 from the petitioner's owner. In that letter, the petitioner's owner stressed his ability to pay the proffered wage out of funds from [redacted] another corporate business he owns. Counsel provided the 2000 Form 1120 U.S. Corporation Income Tax Return of GWP and various other documents pertinent to its finances and taxes.

Because counsel submitted no evidence pertinent to the petitioner's own ability to pay the proffered wage, the California Service Center, on September 5, 2002, requested evidence pertinent to that ability. The Service Center requested that the petitioner demonstrate the ability to pay the proffered wage beginning on the priority date. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The Service Center observed that the petitioner is a corporation. The Service Center requested, therefore, that evidence pertinent to funds other entities or individuals might provide to pay the proffered wage be accompanied by evidence that the entities or individuals are obliged to pay the petitioner's debts and obligations.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return, which covers the fiscal year beginning March 1, 2001 and ending February 28, 2002. The petitioner's taxable income before net operating loss deduction and special deductions was $3,552 during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year, the petitioner had net current assets of $28,940 and no current liabilities, which yields net current assets of $28,940.

Counsel also submitted a letter, dated November 25, 2002. In that letter, counsel stated that the petitioner's owner supports the petitioner with funds drawn from his other holdings. Counsel submitted the Form 1120 U.S. Corporation Income Tax Return of GWP, which has an Employer Identification Number different from that of the petitioner, which indicates that they are separate corporate entities. Counsel submitted no evidence to demonstrate that either the petitioner's owner or GWP is obliged to pay the petitioner's debts and obligations.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 15, 2003, denied the petition. The director noted that, because the petitioner is a corporation, the assets of its stockholders or of other entities could not be considered in the determination of the petitioner's ability to pay the proffered wage.

On appeal, counsel submits various documents pertinent to assets of GWP and the petitioner's owner's personal assets. Counsel asserts that the petitioner's owner is willing and able, as an individual, rather than as a shareholder, to pay the proffered wage.

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 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders, nor of anyone else.[1] As the owners, stockholders, and others are not obliged to pay those 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.

---

[1] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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 the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount equal to or greater than the proffered wage during that period, the AAO will next 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's net current assets[2] as an alternative method of demonstrating the ability to pay the proffered wage.

The priority date is April 30, 2001. The proffered wage is $39,936 per year. The petitioner's 2001 fiscal year ran from March 1, 2001 through February 29, 2002. During that fiscal year, the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage, but only that portion which would have been due if it had hired the beneficiary on the priority date. On the priority date, 60 days of that 365-day fiscal year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 305 days. The proffered wage multiplied by 305/365th equals $33,371.18, which is the amount the petitioner must show the ability to pay during its 2001 fiscal year.

During its 2001 fiscal year, the petitioner declared taxable income before net operating loss deduction and special deductions of $3,552. That amount is insufficient to pay the salient portion of the proffered wage. At the end of that fiscal year, the petitioner had net current assets of $28,940. That amount is also insufficient to pay the salient portion of the proffered wage. No evidence was submitted of any other funds the petitioner had at its disposal to pay the proffered wage.

---

[2] End-of-year net current assets are the taxpayer's end-of-year current assets less the taxpayer's end-of-year current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(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 petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. 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 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.