

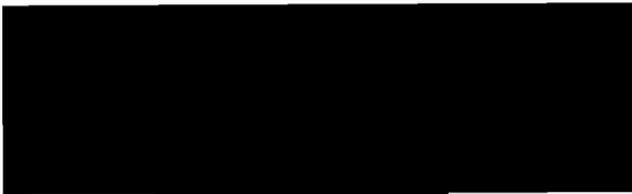
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: OCT 10 2008

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IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer applications firm. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. 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 brief and additional evidence. For the reasons discussed below, we uphold the director's decision, concluding that the director properly rejected evidence from an entity that is a separate legal entity from the petitioner and has no legal obligation to pay the proffered wage. While we uphold the director's ultimate decision, our evaluation differs from the director's for tax years 2003 and 2005.¹

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 either 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. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was filed by DSS Software Technologies and accepted for processing on June 3, 2002. Subsequently, the petitioner requested that DOL amend the Form ETA 750 to reflect the petitioner as the employer pursuant to an Asset Purchase Agreement between DSS Software Technologies and the petitioner. DOL ultimately issued the certification to the petitioner. The proffered wage as stated on the Form ETA 750 is \$36.34 per hour, which amounts to \$75,587.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for DSS Software Technologies as of September 2000.

On the petition, the petitioner claimed to have an establishment date in 2005, a gross annual income of \$4,200,000, a net income of \$628,000 and 35 employees. In support of the petition, the petitioner

¹ Whereas the director found an ability to pay the proffered wage in 2005 and not in 2003, we find the reverse.

submitted Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements issued by DSS Software Technologies to the beneficiary in 2002 through 2004² and audited financial statements for the petitioner covering the last ten months of 2005. The petitioner also submitted the 2003 and 2004 Annual Reports for Diversinet, which indicate that Diversinet purchased 100 percent of the common shares of DSS Software Technologies on January 2, 2003 and executed “an asset sale agreement whereby it sold the majority of its current assets, capital assets, current liabilities, consultant and customer accounts for \$250,000” in February 2005. The Asset Purchase Agreement between the petitioner and DSS Software Technologies is dated February 28, 2005 and lists a purchase price of \$250,000. Finally, the petitioner submitted a 2003 IRS issued Tax Return Listing for DSS Software Technologies and the 2002 IRS Form 1120S Income Tax Return for an S Corporation filed by DSS Software Technologies.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, on August 4, 2006, the director requested additional evidence pertinent to that ability. Specifically, while the director accepted that the petitioner had demonstrated the ability of the predecessor company, DSS Software Technologies, to pay the proffered wage in 2002, the director concluded that the annual reports for Diversinet did not distinguish DSS Software Technologies’ finances such that a determination may be reached regarding the subsidiary’s ability to pay the proffered wage.

In response, the petitioner reiterates that DSS Software Technologies was a wholly-owned subsidiary of Diversinet in 2003 and 2004 and that Diversinet’s net current assets cover the proffered wage in those years. The petitioner also relies on the finances of Diversinet, DSS Software Technologies and the petitioner to establish the petitioner’s ability to pay the proffered wage in 2005. The petitioner submits 2004 and 2005 IRS Form 1120 tax returns for DSS Software Technologies, Diversinet’s 2005 Annual Report, the petitioner’s 2005 tax return and 2005 Forms W-2 issued by DSS Software Technologies and the petitioner to the beneficiary.

The director determined that the evidence submitted did not establish that DSS Software Technologies and the petitioner had the continuing ability to pay the proffered wage in 2003 and 2004 and, on January 19, 2007, denied the petition.

On appeal, counsel asserts that because the finances of Diversinet and DSS Software Technologies are both reflected on consolidated returns in 2003 and 2004, they are not separate legal entities. Counsel then asserts: “Whether Diversinet was legally obligated to pay the wage is a matter of contract law and is outside the scope of this I-140 petition.” Counsel does not explain why any contractual agreements between Diversinet and DSS Software Technologies could not be submitted to resolve this issue. Rather, counsel continues to assert that the parent/subsidiary relationship is documented and sufficient to allow the Diversinet’s net current assets to be taken into consideration when evaluating DSS Software Technologies’ ability to pay the proffered wage. Finally, counsel

² The petitioner also submitted Forms W-2 for 2000 and 2001, but these forms do not relate to the relevant period after the priority date in 2002.

notes that the regulation at 8 C.F.R. § 204.5(g)(2) requires only a showing of the ability to pay the proffered wage, not the legal obligation.

The regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to show that it has the ability to pay the proffered wage. Where a successor-in-interest is using the alien employment certification, it must demonstrate that the predecessor had the ability to pay the proffered wage. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Commr. 1986). Diversinet is not the petitioner or the predecessor. Thus, the requirement that a petitioner only demonstrate an “ability” to pay the proffered wage does not preclude requiring the petitioner to demonstrate that a separate entity other than the petitioner has a legal obligation to pay the proffered wage before relying on the finances of that separate entity.

A corporation is a separate and distinct legal entity from its owners or stockholders whether those stockholders are individuals or a parent corporation. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Citizenship and Immigration Services (CIS) will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), CIS will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 Forms W-2 reflect the following wage:

	Form W-2 Wages	Difference between W-2 Wages and Proffered Wage
2002	\$54,493.08	\$29,094.12
2003	\$59,356.01	\$16,231.19
2004	\$65,377.50	\$10,209.70
2005*	\$67,455.00	\$8,132.20

* Combined wages paid by DSS Software Technologies and the petitioner.

Thus, the petitioner must demonstrate that, prior to February 2005, DSS Software Technologies had the ability to pay the difference between the wages paid and the proffered wage and that the petitioner had that ability after February 2005.

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, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner’s ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*,

632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). See also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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 the Service should have considered income before expenses were paid rather than net income.

In 2002, 2003 and 2004 DSS Software Technologies declared a net loss. In 2005, the petitioner declared a net loss. Thus, the petitioner cannot demonstrate the ability of DSS Software Technologies (2002 – 2004) or itself (2005) to pay the proffered wage during the relevant period from net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year 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.

In 2002, DSS Software Technologies listed \$103,859 in current assets and \$6,893 in current liabilities, resulting in net current assets of \$96,966. Thus, as noted by the director, DSS Software Technologies had the ability to pay the difference between the wages paid and the proffered wage in 2002.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

DSS Software Technologies' 2003 Tax Return Listing does not include sufficient information from Schedule L such that we can determine the company's net current assets in that year. Thus, the director concluded that the petitioner could not establish DSS Software Technologies' net current assets as of the end of 2003. The 2004 tax return filed by DSS Software Technologies, however, lists the beginning of tax year Schedule L information that should correspond to the end of 2003. According to this information, DSS Software Technologies listed current assets of \$950,942 and current liabilities of \$876,585, resulting in net current assets of \$74,357 at the beginning of 2004/end of 2003. Thus, DSS Software Technologies did have the ability to pay the difference between the wages paid and the proffered wage in 2003 from its net current assets and we withdraw the director's adverse finding on this issue.

In 2004, DSS Software Technologies listed current assets of \$482,299 and current liabilities of \$676,414. As DSS Software Technologies' current liabilities exceeded its current assets in 2004, the record does not establish its ability to pay the difference between the wages paid and the proffered wage out of its net current assets in 2004.

In 2005, the petitioner listed current assets of \$385,084 and current liabilities of \$514,305. As its current liabilities exceeded its current assets in 2005, the petitioner cannot demonstrate its ability to pay the difference between the proffered wage and wages paid in that year. Thus, we withdraw the director's favorable finding on this issue, which was unexplained in the decision. We note that if the director considered DSS Software Technologies' net income or net current assets in 2005 that consideration was in error as the petitioner claims to have assumed its successor-in-interest status in February 2005. Thus, the finances of DSS Software Technologies are irrelevant after that date.

The petitioner has not demonstrated that any other funds belonging to the petitioner or its predecessor were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2004 and 2005.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage continuously after the priority date. 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.