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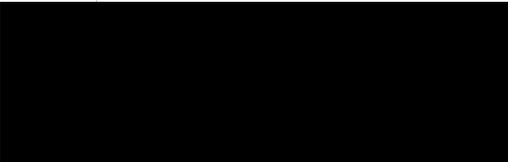


FILE: WAC 03 052 55005 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

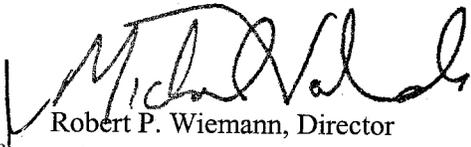
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director  
Administrative Appeals Office

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

The petitioner is a meat market. It seeks to employ the beneficiary permanently in the United States as a butcher. 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 brief 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. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 28, 1997. The proffered wage as stated on the Form ETA 750 is \$11.57 per hour, which equals \$24,065.60 per year.

On the petition, the petitioner stated that it was established on November 12, 1997 and that it employs two workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Azusa, California.

In support of the petition, counsel submitted the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports taxes pursuant to the calendar year.

The 2000 return shows that the petitioner declared a loss of \$2,199 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 return shows that the petitioner declared a loss of \$2,896 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$134,883 and current liabilities of \$92,785, which yields net current assets of \$42,098.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 28, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested that the evidence include (1) the petitioner's 1997, 1998, 1999, and 2002 income tax returns, (2) the petitioner's California Form DE-6 Quarterly Wage Reports for the past four quarters, (3) a statement of the job title and duties of each of the employees listed on the Forms DE-6, and (4) the petitioner's Form W-3 transmittals for 1997 through 2002.

In response, counsel submitted a letter, dated July 21, 2003, in which he stated that he was providing, *inter alia*, "Taxes for the year 1999, 2000, 2002," and W-3 transmittals for 2001 and 2002."

Counsel neither provided nor addressed the absence of (1) the petitioner's 1997 and 1998 tax returns, (2) its four most recent California Form DE-6 Quarterly Wage Reports, (3) the list of the petitioner's employees' titles and duties, and (4) the petitioner's W-3 transmittals for 1997, 1998, 1999, and 2000. Further, the 1999 tax return provided is not the petitioner's tax return, but the petitioner's owner's tax return.

The 2002 return shows that the petitioner declared a loss of \$402 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The W-3 transmittals show that the petitioner paid total wages of \$42,120 and \$35,120 during 2001 and 2002, respectively.

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 September 30, 2003, denied the petition.

On appeal, counsel argues that the evidence demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date, stressing the amount of the petitioner's gross receipts and its assets. Counsel also urges that the petitioner's owner's income and assets should be included in the determination of the petitioner's ability to pay the proffered wage. In support of the appeal counsel provides unaudited financial statements pertinent to the petitioner's and the petitioner's owner's finances.

In his brief, counsel referred to the petitioner's assets, rental property, automobiles, jewelry, etc., when he clearly meant the assets of the petitioner's owner. The petitioner's owner is an individual and the petitioner is a corporation. The significance of the distinction between the corporate petitioner and its individual owner will be explained in detail below.

Counsel's reliance on unaudited financial records 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's reliance on the income and assets of the petitioner's owner 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 (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.<sup>1</sup> 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.

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 submitted no evidence to demonstrate that it employed and paid wages to the beneficiary at any time after the priority date.

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, 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).

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 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, however, 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 the period, if any, do not equal the amount of the proffered wage or more, the

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<sup>1</sup> 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.

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, those expected to be 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 net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$24,065.60 per year. The priority date is April 28, 1997.

Notwithstanding that the April 28, 2003 Request for Evidence requested evidence pertinent to the petitioner's ability to pay the proffered wage during 1997 and specifically requested the petitioner's 1997 tax return, the petitioner submitted neither its 1997 tax return nor any other evidence pertinent to its ability to pay the proffered wage during 1997. The petitioner has failed to demonstrate the ability to pay the proffered wage during 1997.

Notwithstanding that the April 28, 2003 Request for Evidence requested evidence pertinent to the petitioner's ability to pay the proffered wage during 1998 and specifically requested the petitioner's 1998 tax return, the petitioner submitted neither its 1998 tax return nor any other evidence pertinent to its ability to pay the proffered wage during 1998. The petitioner has failed to demonstrate the ability to pay the proffered wage during 1998.

Notwithstanding that the April 28, 2003 Request for Evidence requested evidence pertinent to the petitioner's ability to pay the proffered wage during 1999 and specifically requested the petitioner's 1999 tax return, the petitioner submitted neither its 1999 tax return nor any other evidence pertinent to its ability to pay the proffered wage during 1999. The petitioner has failed to demonstrate the ability to pay the proffered wage during 1999.

The petitioner's 2000 return shows that the petitioner declared a loss during that year. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds that were available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner again declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year, however, with net current assets of \$42,098. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner again declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds that were available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, 2000, and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Additional issues exist in this case that were not addressed in the decision of denial. First, as was noted above the April 28, 2003 Request for Evidence specifically requested submission of (1) the petitioner's 1997, 1998, and 1999 tax returns, (2) its four most recent California Form DE-6 Quarterly Wage Reports, (3) a list of the employee titles and duties, and (4) the petitioner's W-3 transmittals for 1997, 1998, 1999, and 2000. Neither counsel nor the petitioner provided those requested documents, nor did they provide any explanation of their failure to provide them.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied for this additional reason.

Further, the beneficiary is the son of the petitioner's owner. Pursuant to 20 C.F.R. § 656.20(c) (8) and 656.3, the petitioner has the burden when asked to show that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship." See *Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000). That the petitioner's owner is seeking to fill the proffered position with his alien son casts grave doubt on the assertion that the petitioner's owner honestly sought to fill the position with a U.S. worker. Because this issue was not addressed below, however, the petitioner has not been accorded a meaningful opportunity to address it on appeal, and this additional issue forms no part of the basis for today's decision.

Further still, the priority date of the petition, the date the Form ETA 750 was submitted, is April 28, 1997. The petition states that the petitioner was established on November 12, 1997. Those two facts, taken together, indicate that the petitioner was seeking an employee to fill a shortage occupation at a time when it was not in existence and was not doing business. Again, however, because the petitioner was accorded no opportunity to address this apparent contradiction, it plays no part in today's decision.

The petitioner has failed to demonstrate the ability to pay the proffered wage and has failed to provide requested evidence. 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.