

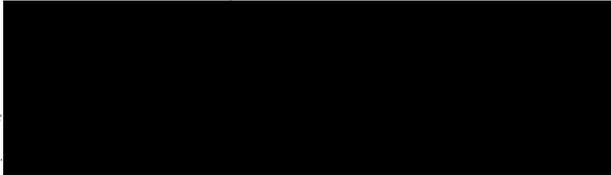
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U.S. Citizenship
and Immigration
Services

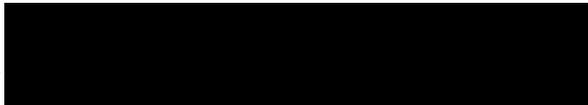


B6

FILE: WAC 99 254 54063 Office: CALIFORNIA SERVICE CENTER

Date MAR 16 2005

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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Acting Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is an Indian restaurant and deli. It sought to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

The acting director initially determined that the petitioner had abandoned the petition and denied it on October 10, 2001. In response to former counsel's motion, the director reopened the case. A request for additional evidence was issued on December 13, 2001. The petitioner was instructed to submit evidence of its ability to pay the proffered wage as of the priority date of July 14, 1998. Consistent with 8 C.F.R. § 204.5(g)(2), the acting director requested evidence in the form of annual reports, federal tax returns, or audited financial statements covering the period from 1998 through 2000. The acting director also instructed the petitioner to submit copies of Wage and Tax Statements (W-2s) issued to its employees, Transmittal of Wage and Tax Statements (W-3s), copies of the petitioner federal quarterly tax returns, and copies of its state quarterly wage reports.

The acting director subsequently concluded that the petitioner's evidence failed to support its continuing financial ability to pay the proffered wage of \$8.00 per hour and denied the petition on March 19, 2002. The AAO dismissed the petitioner's appeal on June 5, 2003. The AAO reviewed the financial information submitted to the record including the petitioner's corporate federal tax returns for 1998 through 2000, finding that the evidence failed to demonstrate the petitioner's ability to pay the proffered wage. The AAO noted that in each of those years, the petitioner's tax returns showed that the petitioner's net income of \$3,370, \$1,771, and \$1,129, respectively, was not sufficient to cover the proposed annualized wage offer of \$16,640.

Current counsel filed a motion to reconsider on June 30, 2003. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or CIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. By way of contrast, pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be provided and must be supported by affidavits or other documentary evidence.

In this case, as counsel also provides copies of the petitioner's 2001 and 2002 federal tax returns, it will also be considered as a motion to reopen as well as a reconsideration of the existing evidence in the record at the time of the initial decision.

The regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

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. In a case where the prospective United States employer employs 100 or more workers, the director may

accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

On motion, counsel reiterates the assertion previously submitted on appeal; that the assets and assurances of the petitioner's sole shareholder should establish the petitioner's ability to pay the proffered salary irrespective of the petitioner's status as a corporation. Counsel states that as a "S-corporation," the petitioner's status is similar to that of a sole proprietorship in that "officer compensation" would be reported as profit on the shareholder's individual return and should be reviewed in evaluating the petitioner's ability to pay the proffered salary.

Counsel cites no legal authority for these arguments and his claim is not persuasive. The AAO disagrees that the legal status of the petitioner is irrelevant to the evaluation of its continuing ability to pay the proffered salary. 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). Moreover, it is noted that the petitioner's tax returns reflect that the petitioner is a C-corporation, not a S-corporation as suggested by counsel. Counsel's statements in this regard do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506.

The petitioner, a corporation, has been presented as the prospective corporate U.S. employer. As such, it must establish its own continuing ability to pay the proffered salary. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

See also, 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). Moreover, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, a guarantee is a future promise of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or

after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period.

In the instant matter, although the ETA 750B, signed by the beneficiary on July 7, 1998, indicated that the beneficiary had been working for the petitioner since 1996, none of the subsequent payroll or wage reports provided by the petitioner corroborated this claim.

CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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 salary or that the petitioner already expended monies in wages or officer compensation 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.

As an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ It represents a measure of a petitioner's liquidity and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

In this case, in 1998, 1999, and 2000, as set forth in the acting director's denial and AAO decision, neither the petitioner's net current assets, nor its net income in any of these years was sufficient to cover the beneficiary's proposed wage offer of \$16,640 per year. Further, as shown by the petitioner's 2001 tax return submitted with this motion, neither its net income of \$15,942, nor its net current assets of \$9,826 was sufficient to pay the certified salary. Only the 2002 tax return, submitted on motion, shows that the petitioner's net income of \$22,391 reached a sufficient level to cover the proposed wage offer. As noted above, however, the petitioner

¹ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

must demonstrate a *continuing* ability to pay the proffered wage, beginning on the visa priority date of July 14, 1998. *See* 8 C.F.R. § 204.5(g)(2). Upon review, counsel has been unable to present convincing additional argument or evidence to overcome the findings of the director and the prior AAO decision that the petitioner failed to establish its continuing ability to pay the proffered wage as of the petition's 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 motion for reconsideration is granted, and the previous decisions of the director and the AAO are affirmed. The petition remains denied.