

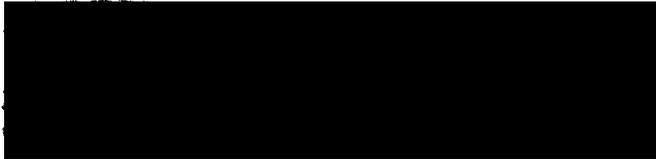
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U.S. Citizenship
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Services

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FILE: EAC 03 006 51930 Office: VERMONT SERVICE CENTER Date: **MAY 25 2005**

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a paper machinery manufacturer. It seeks to employ the beneficiary permanently in the United States as a machine builder. 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 the granting of 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 the granting of 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 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 September 14, 2001. The proffered wage as stated on the Form ETA 750 is \$18.31 per hour, which amounts to \$38,085 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1973, to have a gross annual income of \$4.8 million, and to currently employ 35 workers. In support of the petition, the petitioner submitted:

- A Form G-28;
- A certified ETA 750 application; and
- Educational and experience credentials.

On May 14, 2003, the director requested additional evidence pertinent to the ability to pay the proffered wage. The director specifically requested:

- Copies of the petitioner's complete federal income tax returns for 2001 and 2002;
- Form W-2's, if any, issued the beneficiary in 2001 "and/or" 2002; and,
- Details on the existing vacancy the beneficiary is to fill, including copies of Form 941 for the relevant period.

In response, the petitioner submitted:

- Form 1120 corporate tax returns for the petitioner for the 2000 and 2001 fiscal years beginning September 1;
- An August 4, 2003 summary letter from the petitioner detailing his personal bank account holdings, with an opening balance of \$74,628.70 and an ending balance on July 31, 2003 of \$75,657.32, stating the money in the account would be available for the beneficiary's salary;
- A June 12, 2003 letter from the petitioner stating the proffered position is to replace an existing vacancy, having paid a previous employee an annual wage of \$41,054.55, with a Form W-2 attached; and,
- Three Form 941 employer-taxpayer-quarterly reports for the last three quarters of 2000.¹

The income tax returns reflect the following information for the following fiscal years:

	<u>2000</u>	<u>2001</u>
Net income	\$136,286	-\$765,710
Current Assets	\$1,747,100	\$1,095,899
Current Liabilities	\$1,513,466	\$1,387,042
Net current liabilities	\$233,634	-\$291,143

In addition, counsel submitted copies of single pages from the petitioner's checking account statements for select days during the period from 2001 through 2003, and the petitioner's quarterly wage reports for the last three quarters of 2000². The quarterly wage reports, moreover, do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

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 October 21, 2003, denied the petition.

On appeal counsel submits:

- A page from the company's Summit Bank statement showing a March 31, 2001 account balance of \$300,766.98, and an April 2, 2001 balance of \$285,899.23;
- A page from the company's National Penn Bank statement showing an August 30, 2001 opening account balance of \$31,561.85, and a September 30, 2001 closing account balance of \$93,123.70;
- A page from the company's Wilmington Trust Company bank account showing an August 29, 2003 opening balance of \$30,557.92, and a closing account balance of \$85,809.06;

¹ The quarterly reports are for quarters prior to the Department of Labor's established priority date, and thus not within the relevant time frame for determining whether the petitioner had the ability to pay.

- A payroll check reflecting 40 hours of work issued to the beneficiary October 31, 2003, for \$856.50, with gross pay of \$1,000; and,
- A letter from the petitioner's president that was notarized November 19, 2003, stating he had, and still has, more than \$70,000 in his personal banking account available for the beneficiary's wage, with a summary from his bank statement from the First Union National Bank showing a closing balance of \$78,525.98;

In his brief, counsel asserts that:

- The actual priority date is March 14, 2001, the initial filing date² of the ETA 750, rather than September 14, 2001;
- The petitioner's net loss of \$765,710 for its 2001 fiscal year beginning September 1 was "irrelevant" given its submitted National Penn Bank document showing assets of more than \$93,123.70 on September 30, 2001;
- The petitioner can further establish its ability to pay from the September 30, 2003 Summit Bank account balance of more than \$85,000;
- Because March 14, 2001, falls within the petitioner's fiscal years beginning September 1, 2000, the petitioner's net income for that year is \$136,286, "fully establishing ability to pay offered salary [sic];"
- Despite the petitioner's negative net income for the fiscal year beginning September 1, 2001, the \$765,710 loss that year is actually a paper loss, reflecting in part a depreciation deduction of \$58,913 that would have been available cash for paying the proffered wage.
- Further, as of August 31, 2002 end of that fiscal year, the company had at least \$596,190 consisting of cash on hand, shareholder loans, additional paid-in capital and capital stock, which was available to for paying the beneficiary's wage that year; and,
- The petitioner's president, from the priority date to the present, would cover with his own funds any shortage the company experiences in paying the beneficiary's wage, evidenced by his personal bank statement page as submitted.

Counsel's assertion that the priority date occurs six months earlier is unpersuasive. Short of submitting documentation showing the Department of Labor is willing to adopt counsel's suggested amendment to the Form ETA 750, the assertion does rise beyond the level of mere assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's reliance on the balances in the petitioner's bank accounts is also misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. The

² The Form ETA is stamped March 14, 2001, although the Department of Labor states the department "accepted the application for processing" on September 14, 2001. The petitioner's tax return for the fiscal year beginning September 1, 2000, would only be relevant if the priority date counsel is advocating is the earlier one of March 14, 2001.

petitioner only submitted three different monthly bank statements, each from different banks, reflecting wide variations in account balances. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's reliance on the assets of the petitioner's president, Ambrozy Fasolak, is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *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). CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 the full proffered wage in 2001, 2002 or 2003.

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. 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 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.

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, counsel's argument that the petitioner's total assets should have been 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. The petitioner's net current assets during the year in question, for the fiscal year starting September 1, 2001, however, were negative. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

The petitioner has not demonstrated that it paid any wages to the beneficiary during the period from the priority date until late in October 2003, when the petitioner issued a paycheck to the beneficiary. In the fiscal year beginning September 1, 2001, the petitioner shows a net income of a negative \$291,143 for net current assets, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently. 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.

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