

U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

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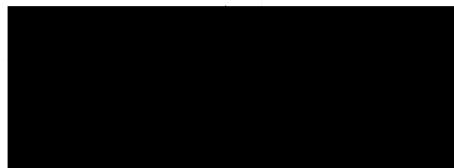
FILE: EAC 04 126 50669 Office: VERMONT SERVICE CENTER Date: JUL 25 2006

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a picture gallery. It seeks to employ the beneficiary permanently in the United States as a picture framer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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.

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

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. 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)].

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 30, 2001. The proffered wage as stated on the Form ETA 750A is \$450 per week, which amounts to \$23,400 per annum. On the Form ETA 750B, signed by the beneficiary on February 9, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on March 22, 2004, the petitioner claims to have been established in 1983, to currently employ four workers, to have a gross annual income of \$390,316 and to have a net annual income of \$236,204. In support of its ability to pay the beneficiary's proposed wage offer of \$23,400 per year, the petitioner

initially submitted no financial documentation other than a letter, dated March 5, 2004, stating its current number of employees and its gross income for 2001 and 2002.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On August 6, 2004, the director instructed the petitioner to submit evidence of its ability to pay the proffered salary in the form of its 2001 federal income tax return or an annual report for 2001 accompanied by audited or reviewed financial statements.¹ The director also requested that the petitioner submit copies of the beneficiary's Wage and Tax Statement (W-2) if the petitioner employed the beneficiary during that year.

In response, the petitioner provided a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It reflects that the petitioner files its federal tax returns using a fiscal year running from July 1st to June 30th of the following year. Thus, the 2001 tax return contains financial data pertaining to the period from July 1, 2001 to June 30, 2002. The tax return contains the following information pertinent to taxable income before the net operating loss (NOL) deduction and special deductions, current assets and liabilities, and net current assets.

2001

Taxable Income before NOL	-\$27,170
Deduction (Form 1040)	
Current Assets (Sched. L)	\$25,054
Current Liabilities (Sched. L)	\$56,699
Net current assets	-\$31,645

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net taxable income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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 also supplied another letter, dated October 5, 2004, from its accountant affirming the petitioner's address, date of establishment, number of current employees, and its ability to pay the proffered wage, adding that the shareholder subsidizes cash flow needs from personal funds. The letter also confirms the net income loss on the 2001 tax form and adds that the petitioner's 2002 return shows a deficit of \$51,396 and assets of \$41,434.

¹ It is unclear why the director did not request financial documentation for any subsequent period.

² 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.

The letter also states that the shareholder and company's recent bank statements are enclosed. The record does not indicate that such statements were enclosed with this letter, nor do the attachments contain a copy of the 2002 return.

The director denied the petition on November 24, 2004. She reviewed the petitioner's financial data contained within its 2001 and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the visa priority date of April 30, 2001.

On appeal, counsel asserts that the petitioner has been in business for twenty years and reported gross income of \$388,992, \$410,034, and \$390,316 in fiscal year(s) 2000, 2001, and 2002, respectively. He maintains that the petitioner has met its cash flow needs with the assistance of additional funds by the shareholder and refers to enclosed bank statements of the principal shareholder and the petitioner. With the appeal, counsel resubmits a copy of the petitioner's 2001 tax return consisting of page one. He also provides a copy of the petitioner's 2000 return, which covers the period from July 1, 2000 to June 30, 2001, and an incomplete copy of the petitioner's 2002 corporate tax return consisting of only page one. The 2000 and 2002 return provide the following information:

	2000	2002
Taxable Income before NOL	-\$20,584	-\$29,698
Deduction (Form 1040)		
Current Assets (Sched. L)	\$25,119	not provided
Current Liabilities (Sched. L)	\$44,949	not provided
Net Current Assets	-\$19,830	

Three of the corporate petitioner's bank statements from April 6, 2001, May 7, 2002, and December 7, 2004 are provided on appeal. On those dates, the respective closing balances are approximately \$10,000, \$17,000, and \$9,000. Two of the principal shareholder's 2002 bank statements are also provided.

Counsel's contentions are not persuasive. Relevant to the individual shareholder's individual assets and the generalized assertion that the shareholder provides financial support to petitioner if needed, it is noted that as a corporation, the named petitioner is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. The debts of the corporation are not the debts of the shareholders or owners. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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). As the named corporate petitioner in the visa petition, it must establish its own financial ability to pay the proffered wage of \$15,750 per year. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) affirmed the rejection of the offer of the petitioner's director to personally pay the proffered wage stating "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Moreover, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits an individual willingness to provide additional funds or guarantee future payment to be utilized in lieu of

proving the petitioner's own ability to pay through the prescribed financial documentation set forth in 8 C.F.R. § 204.5(g)(2). 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).

Similarly, reliance on the petitioner's corporate bank statements is misplaced. 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," in this case it has not been established why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, with the exception of the December 2004 statement, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which would correlate to the periods covered by the submitted tax returns (if they had been provided as complete copies), somehow would show additional available funds that would not be reflected on the corresponding tax return.

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 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 during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, as noted above, the record does not show that the petitioner has employed and paid wages to the beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; 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 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross income is not reasonable because it excludes consideration of the expenses incurred to produce that income. 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.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

As noted above, the petitioner's financial data set forth on its tax returns is based on a fiscal year. As shown on 2000 return, which covers the April 30, 2001, priority date, both the petitioner's net income and net current assets are reflected as losses of \$20,584 and \$19,830, respectively. Similarly, in 2001 neither the petitioner's net income of -\$27,170, nor its net current assets of -\$31,645 show sufficient funds to pay a proposed wage offer of \$23,400 per year. The 2002 tax return also shows net income as -\$29,698.

While the longevity of the petitioner's business may be considered as a factor in its favor, it does not outweigh the evidence provided, which shows that the figures given for net current assets or net income on the three tax returns provided are reflected as losses. The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate a *continuing* ability to pay a certified wage beginning at the priority date. Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered salary as of the April 30, 2001, priority date of the petition.

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.