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U.S. Citizenship
and Immigration
Services



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FILE:

EAC-03-007-53211

Office: VERMONT SERVICE CENTER

Date:

APR 14 2005

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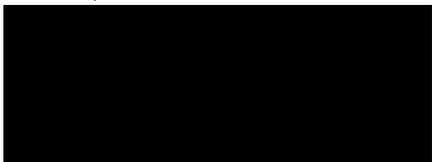
Petitioner:

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 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 an ice cream retail store. It seeks to employ the beneficiary permanently in the United States as a fast food worker. 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which amounts to \$20,800 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 on May 8, 1998, to have a gross annual income of \$127,454, and to currently employ one worker. In support of the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001. The tax return reflects the following information:

	<u>2001</u>
Net income ¹	-\$85,225
Current Assets	\$29,164
Current Liabilities	\$36,879
Net current assets	-\$7,715

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 February 25, 2003, the director requested additional

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director noted that the petitioner's 2001 corporate tax return did not establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date and requested additional evidence.

In response, the petitioner submitted copies of the petitioner's checking account statements for the period from January 2001 through December 2001.

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 July 28, 2003, denied the petition.

On appeal, counsel states that the petitioner experienced "a theft in the store of roughly between \$30,000 to \$40,000." Counsel states that the petitioner used a portion of his own salary to pay the proffered wages and pledges his personal assets to help pay the proffered wage. The petitioner submits unaudited balance sheets and internally general payroll records; and the petitioner's corporate tax returns for 2000² and 2002; and the petitioner's owner's individual income tax returns and W-2 forms. The petitioner's net incomes and net current assets in 2000 and 2002 were negative.

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel's reliance on the balance in the petitioner's bank account is 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. 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 owner 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 who 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

² Information preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 affirmatively present evidence that it employed and paid the beneficiary the full proffered wage in any relevant year. On Form ETA 750B, the beneficiary claimed not to work for the petitioner. On Form G-325, Biographic Information sheet, submitted with the beneficiary's application to adjust status to lawful permanent resident, the beneficiary claimed to be self-employed. The director's request for evidence sought W-2 forms or payroll documentation if the petitioner ever employed the beneficiary. The petitioner did not provide responsive evidence.

On appeal, the petitioner submitted internally generated payroll records. Since they are internally generated, they are of limited value than official records submitted to state or federal tax authorities or audited payroll records. However, those records indicate that the beneficiary has been on the petitioner's payroll since at least 2001. The internal payroll records illustrate that he was paid \$7 per hour and earned \$13,891.25 in 2001 and \$25,864.13 in 2002; and was raised to \$10 per hour and received \$11,680 by July of 2003. Since the petitioner never asserted that it did not employ the beneficiary, the AAO will accept this evidence and not deem it an inconsistency³. The petitioner has established that it paid the beneficiary the full proffered wage in 2002 and was on track to pay the full proffered wage in 2003. Thus, the petitioner has established its continuing ability to pay the proffered wage in 2002 and 2003 because it actually did pay the beneficiary the proffered wage. The petitioner did not establish that it paid the full proffered wage in 2001, however, and must show that it could pay the \$6,908.75 difference for that year.

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

³ *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The beneficiary's representation of his employment history could be deemed inconsistent.

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. 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 has not demonstrated that it paid the full proffered wage to the beneficiary in 2001. In 2001, the petitioner shows a negative net income and negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Although counsel states on appeal that a theft occurred at the petitioner's ice cream store, he presented no corroborating evidence. 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). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, the AAO cannot confirm that a theft factors into the petitioner's financial status in 2001. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

Despite establishing its ability to pay the proffered wage in 2002 and 2003, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. 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.

⁴ 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.