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U.S. Citizenship
and Immigration
Services

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FILE: EAC 01 256 50144 Office: VERMONT SERVICE CENTER Date: JAN 04 2005

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

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 renovation and repair firm. It seeks to employ the beneficiary permanently in the United States as an ornamental plasterer supervisor. 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 asserts that the petitioner is paying the beneficiary the certified wage and that it has established its financial ability to pay the proposed wage offer.

Counsel indicates on that notice of appeal that she will be submitting a brief and/or additional evidence to the AAO within 30 days. As of this date, more than eighteen months later, nothing further has been received to the record. Therefore, the AAO will base its review on the record as it currently stands.

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) 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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$30.40 per hour, which amounts to \$63,232 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since January 1998.

On Part 5 the petition, the petitioner claims to have been established in 1989, to have a gross annual income of approximately \$235,000, and to currently employ five workers. In support of its continuing ability to pay the proposed wage offer, the petitioner initially submitted a copy of a letter, dated September 14, 2000, from [REDACTED] an attorney and financial advisor, who states that it is common for a business owner who solely owns his own firm to personally fund costs during a year where expenses exceed revenues.

The petitioner also provided a copy of its 1998 Form 1120S, U.S. Income Tax Return for an S Corporation. It shows that the petitioner files its taxes using a standard calendar year. In 1998, the petitioner declared net income of -\$2,505. Schedule L of the tax return shows that the petitioner had \$2,805 in current assets and \$2,364 in current liabilities, resulting in \$441 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as a measure of a petitioner's ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on line(s) 1 through 6 of Schedule L of the federal tax return. The current liabilities are shown on line(s) 16 through 18 of Schedule L. 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.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on October 25, 2001, the director requested additional evidence pertinent to that ability. The director also specifically requested that the petitioner provide a copy of its 2000 federal tax return and a copy of the beneficiary's Wage and Tax Statement (W-2) for 1999 and 2000 if it employed the beneficiary during that period.

In response, the petitioner submitted its corporate tax returns for the petitioner for 1999 and 2000.

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

	1999	2000
Net income	-\$23,827	-\$11,834
Current Assets	\$ 2,106	\$ 8,892
Current Liabilities	\$13,992	\$ 912
Net current assets	-\$11,886	\$ 7,980

In addition, counsel submitted copies of the W-2s that the petitioner issued in 1998, 1999, and 2000. None included any issued to the beneficiary. A copy of a Form 1099, Miscellaneous Income was provided, which shows that the petitioner paid [REDACTED] nonemployee compensation of \$26,000 in 2000. It is unclear if this individual is the alien beneficiary. Counsel also submitted copies of the petitioner's Chase Bank checking account statements from January to July 2001 and from September to October 2001, as well as copies of the petitioner's checking account statements from The Bank of New York covering the first nine months of 2001. Finally, counsel submitted an affidavit from the sole shareholder of the petitioner, [REDACTED] lists some of his assets and indicates that he has always been able and willing to commit additional funds to the equity of the corporation in order to fund additional payroll expenses. He states that he has loaned the business various amounts in the past.

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

On August 19, 2002, the director requested additional evidence from the petitioner related to its ability to pay the proffered wage. The director instructed the petitioner to provide copies of its 1997 and 1998 federal tax returns, as well as copies of the beneficiary's W-2s for 1997 and 1998 if it employed the beneficiary during this period.

In response, the petitioner did not provide any W-2s, but offered a copy of its 1997 tax return, as well as another copy of its 1998 corporate tax return. The 1997 tax return shows that it reported \$1,838 net income. Schedule L reflects that the petitioner had \$5,980 in current assets and \$15,534 in current liabilities, resulting in -\$9,554 in net current assets.

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 January 9, 2003, denied the petition.

On appeal, as noted above, counsel merely states that the petitioner has demonstrated its financial ability to pay the proffered wage and that the petitioner is paying the beneficiary the wage certified by the Department of Labor.

Counsel's assertions are not supported by the evidence and are not persuasive. 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 may have 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 has not demonstrated that any wages have been paid to the beneficiary during the relevant period.

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.

In this case, the petitioner's corporate tax returns fail to demonstrate that either the petitioner's net income or its net current assets were sufficient to cover the proffered annual wage of \$63,232 in either 1998, 1999, or 2000. As noted above, the petitioner's reported net income of -\$2,505, -\$23,827, and -\$11,834, respectively, fell well short of the beneficiary's proposed wage offer in each of the relevant years. Similarly, its net current assets of \$441 in 1998, -\$11,886 in 1999, and \$7,980 in 2000, were also substantially less than the proffered wage.

It is noted that the petitioner's 2001 bank statements, submitted to the underlying record, cannot be considered in isolation. 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. It is also noted that the bank statements show only a portion of the petitioner's assets during a limited time and do not reflect other encumbrances that may affect the petitioner's financial status during the entire period under consideration.

Finally, the sole shareholder's indication of willingness to support the petitioner's ability to pay the proffered wage from his individual resources does not establish the petitioner's ability to pay the proffered wage. 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). 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). It is also noted that shareholder loans to a corporate petitioner are already reflected on line 19 of the Schedule L balance sheet of the corporate tax return. Moreover, an employment-based immigrant visa proceeding requires evidence of an ability to pay a proffered wage as of the priority date, not a demonstration of a guarantee to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2). 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. A future pledge of payment 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).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability 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.