

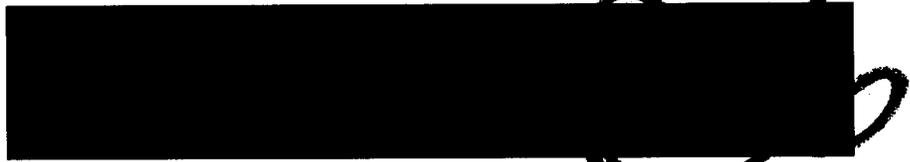
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY



MAY 18 2005

FILE: EAC 02 218 52617 Office: VERMONT SERVICE CENTER Date:

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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 statement 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 granting 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 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 the Service.

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 750 is \$12.61 per hour, which equals \$26,228.80 per year.

On the petition, the petitioner stated that it was established during 2000. The petitioner failed to state the number of workers it employs in the space provided. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Bellingham, Massachusetts.

In support of the petition, counsel submitted the petitioner's 2001 Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary \$8,424 during that year and the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation.

The petitioner's 2001 tax return shows that the petitioner reports taxes based on the calendar year and that it reported a loss of \$10,132 as its ordinary income during that year. The corresponding Schedule L shows that at the end of 2001 the petitioner had current assets of \$59,312 and current liabilities of \$49,248, which yields net current assets of \$10,064.

Counsel also submitted the 2001 Form 1040 U.S. Individual Income Tax Returns of [REDACTED] and their spouses and monthly statements pertinent to the petitioner's bank account.

In a cover letter dated June 10, 2002, counsel states that the amount of the petitioner's 2001 ordinary income added to its 2001 net current assets is almost equal to the proffered wage. Counsel argues that that sum, plus the amount shown on the W-2 form as having been paid to the beneficiary, and the amounts shown on the petitioner's bank statements show the petitioner's ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on March 6, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center noted that amounts in bank accounts may be duplicative of amounts stated on the petitioner's tax returns and, therefore, cannot be counted in the determination of funds available to pay additional wages. The Service Center also noted that the petitioner is a corporation, and that the funds of its owner or owners cannot, therefore, be included in the determination of its ability to pay the proffered wage.

In response, counsel submitted a letter, dated April 30, 2003, in which he reiterated the argument that the amounts in the petitioner's bank account demonstrate its ability to pay the proffered wage. Counsel also submitted 2002 W-2 forms showing that the petitioner paid wages of \$28,000 to the beneficiary during that year and the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation.

The petitioner's 2002 tax return shows that it declared ordinary income of \$31,714 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$85,738 and current liabilities of \$56,244, which yields net current assets of \$29,494.

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 3, 2003, denied the petition.

On appeal, counsel states that the petitioner's owners are able to contribute additional capital to the petitioner, as demonstrated by their tax returns. Counsel states that the income and assets of the petitioner's owner are a proper consideration in the case of a subchapter S corporation, because it is a "flow-through" entity. Again, counsel reiterates the argument that the petitioner's bank accounts show its continuing ability to pay the proffered wage beginning on the priority date.

Counsel's argument that the petitioner's owner's income and assets should be considered is unconvincing. That the petitioner is an S corporation, and its profits "flow through," merely indicates that the petitioner's income or losses retain their character as income or losses when passed to its owner or owners. It does not render an S corporation fundamentally different from a C corporation for the present purpose.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, its owners or shareholders are not obliged to satisfy its debts and obligations out of their own funds, and the income and 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner, and his ability to contribute additional capital to the petitioner, shall not be further considered.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.¹ 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 reported on its tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed the beneficiary and paid him \$8,424 during 2001 and \$28,000 during 2002. The amount the petitioner paid to the beneficiary during 2002 exceeds the amount of the proffered wage. The petitioner has therefore demonstrated the ability to pay the proffered wage during 2002. The petitioner must establish the ability to pay the balance of the proffered wage during 2001.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736

¹ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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 total 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Contrary to the implication of counsel's letter of June 10, 2002, a petitioner's net income may not correctly be added to its net current assets in determining the petitioner's ability to pay the proffered wage.

The proffered wage is April 30, 2001. The priority date is \$26,228.80.

Having established that it paid the beneficiary \$8,424 during 2001 the petitioner must establish the ability to pay the \$17,804.80. During 2001 the petitioner reported ordinary income of \$10,132. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had \$10,064 in net current assets. That amount is also insufficient to pay the balance of the proffered wage. The petitioner has

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submitted no reliable evidence of any other funds available to it during that year with which it could have paid the balance of the proffered wage.

The petitioner has not demonstrated 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.