



U.S. Citizenship
and Immigration
Services



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Office: NEBRASKA SERVICE CENTER

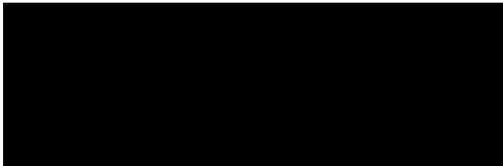
Date:

MAY 19 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:



PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 Acting Director, Nebraska 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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 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 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 13, 2001. The proffered wage as stated on the Form ETA 750 is \$2,000 per month, which equals \$24,000 per year.

On the petition, the petitioner stated that it was established on November 11, 1993 and that it employs eight workers. The petition states that the petitioner's gross annual income is \$741,900 and that its net annual income is \$113,514. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since April 1997. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Seattle, Washington.

In support of the petition, counsel submitted the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner files income tax returns pursuant to the calendar year. During 2002 the petitioner had ordinary income of \$113,514. At the end of 2002 the petitioner had current assets of \$22,568 and current liabilities of \$14,379, which yields net current assets of \$8,189.

In connection with a previous petition for the same beneficiary, the petitioner submitted a copy of the unaudited income statement of Galeria's Broadway. The relationship of that company to the petitioner, Gallerias Incorporated dba Gallerias, is unknown.

In conjunction with that previous decision the petitioner also submitted its 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. The priority date, however, is April 13, 2001. Evidence pertinent to the petitioner's finances during previous years is not, therefore, directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The Acting 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 June 21, 2004, denied the petition.

On appeal, counsel argues that "the [petitioner's] 2000 tax returns . . . are for the year 2001" and "the tax returns from 2000 . . . cover the year 1999."

In a brief filed to supplement that appeal counsel argues that the 2000 returns upon which the decision of denial relied are irrelevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel further argues that the petitioner's 2002 tax return clearly shows that ability.

Counsel further argues that Form I-140 petitions filed by the petitioner for two other alien workers were approved and that the instant petition should, therefore, be approved. Counsel submits FNMA Form 1004 appraisals showing estimates of the value of three properties ostensibly owned by the petitioner's owner.¹

Counsel also provided a copy of the petitioner's 1999 tax return. As was noted above, the priority date is April 13, 2001, and evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.² Counsel did not, however, submit copies of annual reports, federal tax returns, or audited financial statements pertinent to 2001.

The petitioner's 1999 tax return states, at the top of page one, that it covers the 1999 calendar year. The 2000 return states that it covers the 2000 calendar year and the 2002 return that it covers the 2002 calendar year. The record contains no evidence that the petitioner has ever reported taxes pursuant to a fiscal year. Even if the petitioner reported taxes pursuant to a fiscal year, the fiscal year would begin during the nominal year, that is; a 2000 fiscal year would begin during 2000, and a 2001 fiscal year would begin during 2001. Counsel's assertion that the petitioner's tax returns cover any period other than the calendar years indicated is not

¹ Counsel did not, however, provide any evidence that the properties are owned free and clear, or of the amount by which they are encumbered. As such, the record contains no evidence of the petitioner's owner's equity in those properties. Because the properties are not owned by the petitioner, however, that equity is not considered a fund available to the petitioner to pay the proffered wage, as will be further explained below. This office need not, therefore, dwell further on counsel's failure to demonstrate the value of the petitioner's owner's equity.

² Counsel also convincingly argued this point on appeal in stating that the Service Center should not have relied upon the petitioner's 2000 tax returns in determining its ability to pay the proffered wage.

evidence, *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980), and is not supported by any evidence.

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, 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. *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 shall not be further considered.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Even if the unaudited financial statement submitted in this case shows the finances of the petitioner, rather than some other company, it would not be convincing evidence of the petitioner's ability to pay the proffered wage.

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, although the beneficiary claims to have worked for the petitioner since April 1997, no evidence was submitted of any wages paid to the beneficiary. The record does not establish, therefore, that the petitioner employed and paid the beneficiary.

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 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.

The proffered wage is \$24,000 per year. The priority date is April 13, 2001.

The petitioner submitted no evidence that it paid the beneficiary any wages during 2001. Further, the petitioner submitted no copies of annual reports, federal tax returns, or audited financial statements pertinent to 2001. The record contains no competent evidence pertinent to the petitioner's ability to pay the proffered wage during 2001. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The record contains no evidence that the petitioner paid the beneficiary wages during 2002. During 2002, however, the petitioner declared ordinary income of \$113,514. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2002.

The appeal in this matter was submitted on July 22, 2004. On that date the petitioner's 2003 tax return should have been available. Counsel did not submit that return, however, nor any explanation for its absence. Further, the record contains no evidence that the petitioner paid any wages to the beneficiary during 2003. The record contains no competent evidence pertinent to the petitioner's ability to pay the proffered wage during 2003. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel argues that two previous alien worker petitions filed by the petitioner during March of 2003 were approved. Counsel argues that to deny the instant petition, therefore, is arbitrary.

Counsel submitted no evidence, however, of the proffered wages and priority dates of those petitions. Without such evidence in the record, this office cannot conclude that the wages, dates, and the other facts salient to those petitions are the same as in the instant case.

If the previous petitions were approved based on the same facts as those in the instant case, as counsel implies, then they were approved in error. The AAO is not bound to approve petitions where eligibility has

not been demonstrated merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). CIS need not treat errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1998).

Furthermore, the AAO's authority over the Service Centers is comparable to the relationship between a court of appeals and a district court. The AAO is not, in any event, bound to follow the decisions of the service centers. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Further still, if other petitions are pending or recently approved, the petitioner would be obliged to show the ability to pay the proffered wage in addition to the wages due to the other beneficiaries. If, for instance, the proffered wage in each of the other two cases relied upon by counsel were the same as in the instant case, then the petitioner would be obliged to demonstrate the ability to pay \$72,000 in new wages, rather than only \$24,000.

Thus, even if the petitioner had demonstrated the ability to pay \$24,000 in new wages, given counsel's assertion that two other petitions were recently approved, this office would remand the instant case for evidence of the amount of the wages proffered in the other two cases, and of the petitioner's continuing ability to pay the aggregated proffered wages of all three beneficiaries beginning on the priority date of the instant petition. Because the petitioner has failed to show the ability to pay the proffered wage of even this single beneficiary, however, no such remand is necessary.

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.