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U.S. Citizenship
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Services

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BE

FILE:



Office: VERMONT SERVICE CENTER

Date: NOV 02 2005

EAC-03-125-50816

IN RE:

Petitioner:
Beneficiary



PETITION:

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 sustained. The petition will be approved.

The petitioner is a engine rebuilding company. It seeks to employ the beneficiary permanently in the United States as an automotive machinist. 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.

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 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:

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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$19.04 per hour, which amounts to \$39,603.20 annually. On the Form ETA 750B, signed by the beneficiary on January 25, 2001, the beneficiary claimed to have worked for the petitioner beginning in August 1999 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on February 10, 2003. On the petition, the petitioner claimed to have been established on February 1, 1991 and to currently have four employees. The items on the petition for the petitioner's gross annual income and its net annual income were left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated January 20, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on March 29, 2004.

In a decision dated June 1, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and no additional evidence. Counsel states on appeal that the director erred in referring in his decision to unaudited financial statements of the petitioner. Counsel asserts that the only financial statements submitted were the petitioner's tax returns. Counsel also states that the director failed to consider the petitioner's depreciation deductions as additional financial resources available to the petitioner. Counsel also states that the petitioner's tax returns show substantial amounts paid in rent to an entity which is controlled by the petitioner's owners, and that the amounts of the rent payments are determined at the end of the tax year for the purpose of minimizing the petitioner's tax liability.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 25, 2001, the beneficiary claimed to have worked for the petitioner beginning in August 1999 and continuing through the date of the ETA 750B.

The record contains copies of a Form W-2 Wage and Tax Statement of the beneficiary showing compensation received from the petitioner in 2002. The amount of compensation stated on that Form W-2 is shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	not submitted	\$39,603.20	no information
2002	\$9,179.66	\$39,603.20	\$30,423.54

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either of the years at issue in the instant petition.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001 and 2002. The record before the director closed on March 29, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. *See Internal Revenue Service, Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.*

In the instant petition, the petitioner's tax returns indicate no income from activities other than from a trade or business. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns will be considered as the petitioner's net income.

The petitioner's tax returns show the amounts for ordinary income on line 21 as shown in the table below.

Tax year	Ordinary income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	-\$54,407.00	\$39,603.20*	-\$94,010.20
2002	\$1,557.00	\$30,423.54**	-\$28,866.54

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001.

** Crediting the petitioner with the \$9,179.66 paid to the beneficiary in 2002.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either of the years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current

liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	\$50,346.00	\$6,552.00	\$39,603.20*
2002	\$6,552.00	-\$2,011.00	\$30,423.54**

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001.

** Crediting the petitioner with the \$9,179.66 paid to the beneficiary in 2002.

The figures for the petitioner's net current assets at the beginning of each year, as shown above, reflect the assets available to the petitioner at the beginning of its tax year. Those assets could be drawn upon by the petitioner, if necessary, to pay the proffered wage to the beneficiary. The figures for the petitioner's net current assets at the end of each year, also shown above, reflect the assets available to the petitioner at the end of its tax year as a result of the petitioner's activities during the tax year. Those assets could be drawn upon by the petitioner during the year as they are accumulated if needed to pay the proffered wage to the beneficiary. Therefore in evaluating the petitioner's ability to pay the proffered wage it is appropriate to base the analysis either on the petitioner's net current assets for the beginning of each tax year or its net current assets for the end of each tax year.

The above table shows that the petitioner's net current assets for the beginning of 2001 of \$50,346.00 were higher than the proffered wage of \$39,603.20. The net current assets for the beginning of 2001 are therefore sufficient to establish the petitioner's ability to pay the proffered wage in 2001. In 2002, however, the petitioner's net current assets at the beginning of the year and at the end of the year were less than the amount needed to raise the beneficiary's compensation to the proffered wage. Therefore, those figures fail to establish the petitioner's ability to pay the proffered wage in the year 2002.

In his brief, counsel states that the director erred in referring in his decision to unaudited financial statements of the petitioner. Counsel asserts that the only financial statements submitted were the petitioner's tax returns.

Notwithstanding counsel's assertions, the record contains an accountant's compilation report dated July 1, 2002, prepared by a certified public accountant, along with a statement of cash receipts and disbursements for the year 2001. In the compilation report the account states, "I have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them." (Accountant's Compilation Report, July 1, 2002, at 1).

Unaudited financial statements 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 of its 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.

The record also contains a copy of a letter dated March 17, 2004 from the same certified public accountant who signed the accountant's compilation report discussed above. In his March 17, 2004 letter, the accountant asserts that the petitioner's deductions on its tax returns for depreciation and for bad debt expenses are non cash expenses which represent additional financial resources available to the petitioner.

While it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.

Aside from depreciation deductions, some taxpayers may claim deductions on their tax returns for other non-cash items such as amortization of the cost of business start-up expenses, amortization of the cost of good will, and depletion of oil, gas and timber reserves. Such deductions raise similar issues to those discussed above concerning depreciation deductions. See *Id.*, at 2; *Instructions for Form 1120 and 1120A* (2004), at 14-15; *Business Expenses*, IRS Pub. 535 (2004), at 30-42, available at <http://www.irs.gov/pub/irs-pdf/p535.pdf>.

The issue of bad debt deductions raised by the petitioner's accountant may also be a non-cash deduction. In the instant case, the accountant states that the petitioner's books are maintained on an accrual basis, so that all income whether received or not is recorded as taxable income. The accountant states that a bad debt expense is allowed as a deduction for tax purposes only when a debt becomes worthless and all attempts at collection have failed. The accountant states that for these reasons, a bad debt deduction in a given year represents a tax deduction for income reported in prior years.

The accountant's March 17, 2004 letter indicates that all income reported by the petitioner on its tax return for 2001 should be counted when evaluating the petitioner's ability to pay the proffered wage that year, even though the accountant acknowledges that under the petitioner's accrual method of accounting, all income is recorded as taxable income, whether received or not. However, to ignore bad debt deductions while at the same time counting all accrued income, whether received or not, would be likely to overstate the financial resources available to the petitioner in any given year.

For the foregoing reasons, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements.

In his brief, counsel states that the petitioner's tax returns show substantial amounts paid in rent to an entity which is controlled by the petitioner's owners, and that the amounts of the rent payments are determined at the end of the tax year for the purpose of minimizing the petitioner's tax liability.

In his letter of March 17, 2004, the accountant states that rent expenses shown on the petitioner's tax returns for 2001 and 2002 represent payments to a "captive rental management company," T & T Properties, which is 100% owned by the owners of the petitioner. (Accountant's letter, March 17, 2004, at 1). The accountant states that the rent payments were \$102,805.00 in 2001 and \$97,500.00 in 2002. The accountant states that the rent payments exceed the building's operating costs by approximately \$50,000.00 to \$60,000.00 each year and that if those funds were needed to pay salaries they could be used for that purpose. The accountant also states that compensation of officers was \$66,450.00 in 2001 and \$67,600.00 in 2002 and that those funds could be used in part to pay salaries if needed.

The petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002 show that 100% of the shares of the petitioner are owned by the two persons named by the accountant as the petitioner's owners. The expense figures for rents and for compensation of officers are the same as the figures stated in the accountant's letter.

CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958); *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

Nonetheless, under the principles of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. The sole shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Rent is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. Compensation of officers is also a separate expense category on the Form 1120S.

The accountant states that the petitioner's rent expenses exceed the building's operating expenses by \$50,000.00 to \$60,000.00 per year and that the rent is paid to an entity controlled by the petitioner's owners. No further corroborating evidence has been submitted to establish that the rent expenses shown on the petitioner's tax returns were paid to an entity owned by the petitioner's owners. Nonetheless, a public Internet Web site with information on New Jersey property records shows that the property where the petitioner does business is owned by the two individuals who are the petitioner's owners. See New Jersey Association of County Tax Boards, *Welcome to NJACTB*, <http://www.njactb.org/>; select Record Search, select Bergen County, select Saddle Brook TWP, search by location 236 Route 46 (accessed October 24, 2005).

As noted above, the petitioner's accountant states that the available excess rents are \$50,000.00 to \$60,000.00 per year. Since no further details have been submitted, for purposes of analysis the lower of those two figures, or \$50,000.00, will be considered as excess rent expenses available to the petitioner for other expenses each year, beyond the rent required to cover the costs of operating the building.

The effect of adding \$50,000.00 to the petitioner's net income in each of the relevant years is shown in the table below.

Tax year	Excess rent expenses	Ordinary Income	Total available income	Proffered wage	Surplus or deficit
2001	\$50,000.00	-\$54,407.00	-\$4,407.00	\$39,603.20*	-\$44,010.20
2002	\$50,000.00	\$1,557.00	\$51,557.00	\$30,423.54**	\$21,133.36

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001.

** Crediting the petitioner with the \$9,179.66 paid to the beneficiary in 2002.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in 2002, but not in 2001, which is the year of the priority date. However, as noted above, the petitioner's net current assets at the beginning of 2001 amounted to \$50,346.00, a figure higher than the proffered wage of \$39,603.20. Therefore the petitioner's net current assets for the beginning of 2001 are sufficient to establish the petitioner's ability to pay the proffered wage in 2001, and the petitioner's total available income in 2002, including excess rents paid to an entity owned by the petitioner's owners, is sufficient to establish the petitioner's ability to pay the proffered wage in 2002.

As noted above, the petitioner's expenses for compensation of officers were \$66,450.00 in 2001 and \$67,600.00 in 2002. The accountant states that those expenses would be available "in part" to pay for salary expenses if needed. (Accountant's letter, March 17, 2004, at 1). The record does not establish what portion of the petitioner's expenses for compensation of officers would be available for salary expenses if needed. Nonetheless, the figures for compensation of officers show that additional financial resources were available to the petitioner in 2001 and 2002, beyond the amounts discussed above.

For the foregoing reasons, considering the totality of the circumstances under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the evidence is sufficient to establish the petitioner's ability to pay the petitioner's ability to pay the proffered wage in 2001 and 2002, which are the only two years at issue in the instant petition.

In his decision, the director correctly stated the petitioner's net income in 2001 and 2002, and correctly calculated the petitioner's year-end net current assets for each of those years. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years.

The director did not conduct any further analysis based on the principles in *Matter of Sonogawa*. As shown above, however, under those principles the petitioner's evidence is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of counsel on appeal are sufficient to overcome the decision of the director.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.