



U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **OCT 14 2006**
EAC-04-134-50043

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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 company engaged in leasing, renting and repairing equipment and tools. It seeks to employ the beneficiary permanently in the United States as a supervisor, tools and equipment repair. 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$33.94 per hour for a 35-hour work week, which amounts to \$61,770.80 annually. On the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary claimed to have worked for the petitioner beginning in October 1994 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on March 30, 2004. On the petition, the petitioner claimed to have been established on June 1, 1963, to currently have nine employees, to have a gross annual income of \$2,074,313.00, and to have a net annual income of \$1,011,897.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated August 20, 2004, the director requested additional evidence. The director stated, "If the beneficiary was employed by you in 2001, 2002 and 2003, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business." The director also stated, "Submit bank statements for the three months prior to filing, April 26, 2001." (RFE, August 20, 2004, at 1).

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 November 8, 2004.

In a decision dated December 29, 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. In the decision, the director makes no mention of the RFE, but the decision considers the relevant evidence submitted in response to the RFE, specifically a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2003.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that additional evidence submitted on appeal, additional to the tax return evidence submitted previously, shows that the petitioner did have sufficient funds to pay the beneficiary the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 April 5, 2001, the beneficiary claimed to have worked for the petitioner beginning in October 1994 and continuing through the date of the ETA 750B.

The record contains a copy of a Form W-2 Wage and Tax Statement of the beneficiary for 2003. The record before the director closed on November 8, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. At that time the beneficiary's Form W-2 for 2003 was the most recent Form W-2 available. Although the director had requested copies of the beneficiary's Form W-2's for 2001, 2002 and 2003, no Form W-2's for 2001 or 2002 were submitted. The record contains no explanation for the absence of Form W-2's for 2001 and 2002. The beneficiary's Form W-2 for 2003 states compensation received from the petitioner as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	not submitted	\$61,770.80	\$61,770.80
2002	not submitted	\$61,770.80	\$61,770.80
2003	\$18,381.23	\$61,770.80	\$43,389.57

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any 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 a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002. The record before the director closed on November 8, 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 should have been available, but a copy of that return was not submitted. The date on the signature line of the petitioner's return for 2001 is September 13, 2002, and the date on the signature line of the petitioner's return for 2002 is September 15, 2003. Those dates suggest that the petitioner customarily prepares its returns in September of each year. But even taking that fact into account, the petitioner's tax return for 2003 should have been available by November 8, 2004 when the record before the director closed.

As noted above, the petitioner failed to submit copies of the beneficiary's Form W-2's for 2001 and 2002 which had been explicitly requested by the director in the RFE. Moreover, the Form W-2 for 2003 submitted in response to the RFE fails to establish the petitioner's ability to pay the proffered wage in 2003. The petitioner was put on notice by the regulation at 8 C.F.R. § 204.5(g)(2) of the need for evidence of its continuing ability to pay the proffered wage. That regulation states, "The petitioner must demonstrate this ability [to pay the proffered wage] at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." 8 C.F.R. § 204.5(g)(2). The record contains no explanation for the failure of the petitioner to submit a copy of its federal tax return for 2003 for the record. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	-\$248,644.00	\$61,770.80*	-\$310,414.80
2002	-\$104,700.00	\$61,770.80*	-\$166,470.80
2003	not submitted	\$43,389.57**	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001 or 2002.

** Crediting the petitioner with the \$18,381.23 actually paid to the beneficiary in 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any 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	-\$322,875.00	-\$225,735.00	\$61,770.80*
2002	-\$225,735.00	-\$290,494.00	\$61,770.80*
2003	not submitted	not submitted	\$43,389.57**

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001 or 2002.

** Crediting the petitioner with the \$18,381.23 actually paid to the beneficiary in 2003.

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

The record also contains a copy of a letter dated January 18, 2005 from a certified public accountant. In the letter, the accountant states that the petitioner's majority shareholder had the financial resources during 2001 and 2002 to pay the proffered wage. The accountant states that the personal residence of the majority shareholder was in excess of \$400,000.00 during those years, and that the mortgage balance at the end of 2001 was \$6,317.41 and at the end of 2002 was \$4,053.59. The record also contains a copy of a Form 1098 Substitute Mortgage Interest Statement of the petitioner's majority shareholder and his wife for 2002 showing a beginning principal balance of \$6,317.41 and an ending principal balance of \$4,053.59. The record also contains a copy of a lender's account statement dated January 6, 2004 relating to that same property, apparently showing mortgage escrow account activity during 2003. The January 18, 2005 letter, the Form 1098 and the lender's account statement are all submitted for the first time on appeal.

The above evidence pertains to an asset held by the petitioner's majority shareholder and his wife, namely their personal residence. If the petitioner was a sole proprietorship, assets of the petitioner's owner would be relevant to an evaluation of the petitioner's ability to pay the proffered wage, since a sole proprietorship is not legally distinct from its owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). In the instant petition, however, the petitioner is a corporation. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *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.

The record contains no other evidence relevant to the financial condition of the petitioner.

For the foregoing reasons, the evidence fails 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.

In his decision, the director correctly stated the petitioner's negative net income for 2001 and correctly calculated the petitioner's net current assets for the end of 2001. The director also correctly analyzed the copy of the beneficiary's Form W-2 Wage and Tax Statement for 2003. The director found that the evidence failed to establish the petitioner's ability to pay the proffered wage in the years 2001 and 2003. The director failed to discuss the petitioner's federal tax return for 2002, which was also in the record. Although the director's analysis was incomplete in failing to address the evidence relating to 2002, the director's decision to deny the petition was correct, based on the evidence in the record before the director. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted for the first time on appeal are insufficient 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 not met that burden.

ORDER: The appeal is dismissed.