

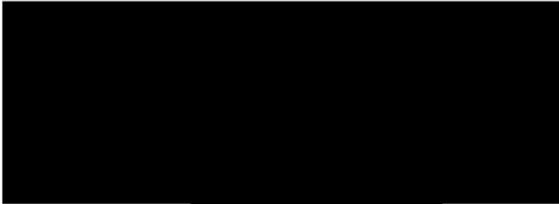
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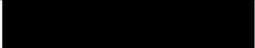
**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: VERMONT SERVICE CENTER

Date:

AUG 09 2008

EAC 04 134 52441

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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto repair company. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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 an affidavit from the petitioner's owner, and other documentation.

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 November 13, 2000. The proffered wage as stated on the Form ETA 750 is a weekly salary of \$843.20, or an annual salary of \$43,846.30. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in April 1998, and to have two employees. The petitioner did not indicate its gross annual income or its net annual income on the petition. In support of the petition, the petitioner submitted two letters of work verification from previous Mexican employers, as well as the beneficiary's training credentials in auto mechanics. The petitioner also submitted copies of the beneficiary's weekly paychecks in the amount of \$750 or \$775 from August 9, 2003 to November 22, 2003, as well as a copy of the beneficiary's checking account with [REDACTED] dated September 7, 2003 with deposits of \$750. The petitioner also submitted two pages of its IRS Form 1120S, corporate income tax return for 2000.

On October 29, 2004, the director denied the petition. The director stated that Citizenship and Immigration Services (CIS) had denied a previous petition submitted by the petitioner on behalf of the beneficiary. The director noted that the petitioner had submitted the same Form 1120S in support of the previous petition. The director stated that the petitioner's tax return for 2000 submitted with the previous petition indicated the petitioner had an ordinary income of \$5,560, with current assets of \$1,916.¹ The director also determined that the beneficiary's weekly wages of \$750 or \$775 were less than the proffered weekly wage of \$843.20, and that the petitioner also had to establish its ability to pay the proffered wage as of the November 2000 priority date.

On appeal, counsel submits a sworn affidavit from [REDACTED] the petitioner's owner. [REDACTED] states that despite the reported financial figures, the petitioner is very profitable and that the bulk of the petitioner's customers pay cash for automotive repairs. [REDACTED] stated that the beneficiary started working for the petitioner in August 2003. [REDACTED] then states that the beneficiary earned \$750 a week as established by the check copies submitted and the beneficiary's 2003 tax return. [REDACTED] states that in addition to the base salary paid to the beneficiary, he received substantial weekly fringe benefits, including a uniform allowance of \$33 a week, a daily meal and beverage allowance of \$10, a weekly use of the petitioner's motor vehicles, a weekly tool and equipment allowance of \$30, and weekly tips from customers averaging \$40 a week.² [REDACTED] asserts that from November 2003 to the present, in addition to any fringe benefits, the beneficiary earns a weekly salary of \$775. [REDACTED] states that the petitioner has in fact paid the proffered wage of \$43,846.40, which includes the fringe benefits, since the beneficiary began working for the petitioner in August 2003.

[REDACTED] then states that in the year 2000 and to the present, as the sole shareholder and owner of the petitioner, he accumulated substantial savings from the petitioner's business revenue. [REDACTED] states that in November 2000, he had a balance of \$99,276.82 in his [REDACTED] savings account. [REDACTED] stated that his accumulated savings were solely from the petitioner's business activities. The record reflects a [REDACTED] passbook submitted with [REDACTED] affidavit that shows an ending balance of 99,957.07 as of August 31, 2001.

Counsel also resubmits copies of the beneficiary's paychecks from September to November 2003, and submits the following new documentation : the beneficiary's Form 1040 for tax year 2003 that indicates an adjusted gross income of \$11,577; a document entitled Other Name QuickReport that listed checks in the amount of \$750 totaling \$28,389 issued by the petitioner to the beneficiary from January 1 to December 21, 2004; and four pages of photocopied checks issued to the beneficiary and others in 2004.

On appeal, the petitioner's owner states that he had accumulated savings as of November 2000, the priority date. Although the petitioner's owner does not explicitly state as such, he appears to imply that such savings could be used to pay the proffered wage in the priority year. This statement is not persuasive. Contrary to the petitioner's owner and sole shareholder's assertion, Citizenship and Immigration Services (CIS) may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability

¹ The director examined Schedule L of the previously submitted IRS Form 1120S and identified the petitioner's net current assets, which will be discussed further in these proceedings.

² [REDACTED] presented no further documentation of the claimed fringe benefits.

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), 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.

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 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. The petitioner submitted the beneficiary's paychecks and bank account for specific periods in 2003 that support a weekly salary in that period of time of \$750 to \$775. The petitioner submitted no W-2 salary statements or Forms 1099-MISC to further substantiate this salary level. It is noted that such a wage level would result in annual salaries of either \$39,000 or \$39,525, which is less than the proffered wage of \$43,846.30. Although the petitioner's owner on appeal claims that the beneficiary's fringe benefits can be included in the beneficiary's salary, no further evidence is provided to establish that the beneficiary's salary is considered his base weekly pay and any claimed fringe benefits. The AAO considers the beneficiary's wages, as would be reported on the beneficiary's federal individual income tax, to be the actual salary. It is also noted that the fringe benefits to which [REDACTED] refers are all work-related necessary expenses, such as uniforms, as opposed to actual fringe benefits, such as health insurance, life insurance, and participation in an employee pension plan. Finally the priority date for the instant petition is November 2000, while the petitioner claimed that the beneficiary began working for it in August 2003. The petitioner cannot establish that it employed and paid the beneficiary the full proffered wage in 2000 and onward. Thus, the petitioner cannot establish that it paid the beneficiary a salary equal to or greater than the proffered wage since 2000 and onward.

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.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. Since the petitioner did not submit its federal income tax returns for the years 2001, 2002, and 2003, if filed, the AAO will only examine the petitioner's net income for tax year 2000, which is \$5,560. This figure fails to establish the ability of the petitioner to pay the proffered wage of \$43,843.60.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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. The record for the current petition does not contain a complete copy of the petitioner's corporate federal income tax return, with accompanying schedules and attachments. Nor did the petitioner submit any other federal tax returns, beyond its 2000 federal income tax return. Therefore the AAO will only review the petitioner's 2000 federal income tax return. As previously stated, the petitioner in the instant petition only submitted the first two pages of its 2000 federal income tax form. Based on the petitioner's more complete 2000 Form 1120S with accompanying Schedule L submitted with a previous petition, the petitioner's tax return for 2000 shows the following information:

	2000
Ordinary Income	\$ 5,560
Current Assets	\$ 1,916
Current Liabilities	\$ 0
Net current assets	\$ 1,916

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2000. In 2000, the petitioner shows a net income of \$5,560, and net current assets of \$1,916, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. As stated previously, the petitioner did not submit its federal tax returns for the years 2001, 2002 or 2003, if filed. Therefore the petitioner cannot establish its ability to pay the proffered wage based on its net income or net current assets for these tax years.

³ 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.

As noted previously, the assets of the shareholders are not viewed as corporate assets. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2000 and continuing to the present date. 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 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.