



U.S. Citizenship
and Immigration
Services

B6

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



FILE:



Office: VERMONT SERVICE CENTER

Date: **MAY 31 2006**

EAC-04-056-54405

IN RE:

Petitioner:

Beneficiary:

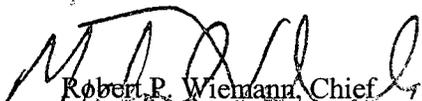


PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 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 curriculum development, research and experiment company. It seeks to employ the beneficiary permanently in the United States as an English instructor. 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.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 4, 2004 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 July 23, 2001. The proffered wage as stated on the Form ETA 750 is \$30,000.00 per year.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and additional evidence.

Relevant evidence submitted on appeal includes a copy of a letter from the beneficiary, copies of a tax statement of the beneficiary in the Republic of China and copies of bank statements of the beneficiary in the Republic of China. Other relevant evidence in the record includes copies of Form W-2 wage and tax statements of the beneficiary for 2000, 2001 and 2002 and copies of U.S. individual tax returns of the petitioner's owner for 2001, 2002 and 2003.

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).

On appeal, the petitioner states that [REDACTED] is a trade name subsidiary of [REDACTED] which is was incorporated in Massachusetts in 1997 as an S corporation. The petitioner states that in 2000 IDIIL Educational Institute became a C corporation. The petitioner states that the beneficiary was working for the petitioner in Boston and was paid at a rate greater than the proffered wage. The petitioner states that the beneficiary was assigned to work in Taiwan from May 22, 2001 to October 1, 2002 and that during her time in Taiwan she continued to be paid at a rate greater than the proffered wage, under a contract with [REDACTED]

On appeal, the petitioner requests oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, the petitioner identified no unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 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 but not dated, the beneficiary claimed to have worked for the petitioner beginning in February 2001 and continuing through the date of the ETA 750B, which was submitted on July 23, 2001.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 2000, 2001 and 2002. The name of the employer on the Form W-2's for 2000 and 2001 is "IDIIL Educational Institute In." The name nearly fills the address block on each form, which suggests that full name has been truncated in the middle of the final word or abbreviation "In." On the Form W-2 for 2002 the name of the employer is [REDACTED] Boston." The employer's identification number on those Form W-2's is a [REDACTED]

number ending with the three digits "887." That number is the same number which appears on the I-140 petition as the petitioner's Internal Revenue Service tax number. On the I-140 petition, neither the petitioner's name nor its trade name includes the word "Boston," nor a word or abbreviation beginning with "In." However, since the tax identification number on the I-140 petition matches the employer's identification number on the Form W-2's, that information is sufficient to establish that the Form W-2's show compensation from the petitioner.

The record before the director closed on September 13, 2004, with the receipt by the director of the petitioner's submissions in response to a request for additional evidence (RFE) which had been issued by the director on August 11, 2004. In the RFE, the director specifically requested financial evidence on the petitioner pertaining to the years 2001, 2002 and 2003. The director stated that if the beneficiary had ever been employed by the petitioner, the petitioner must submit copies of the beneficiary's Form W-2 Wage and Tax Statements showing how much the beneficiary was paid by the petitioner. As of September 13, 2004, any Form W-2 of the beneficiary for 2003 should have been available. However, no copy of any Form W-2 of the beneficiary for 2003 was submitted prior to the director's decision, nor has a copy of any Form W-2 of the beneficiary for 2003 been submitted on appeal.

The beneficiary's Form W-2's show 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.
2000	\$13,550.00	not applicable	not applicable
2001	\$17,800.00	\$30,000.00	\$12,200.00
2002	\$9,600.00	\$30,000.00	\$20,400.00
2003	not submitted	\$30,000.00	\$30,000.00

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 record contains copies of the Form 1040 U.S. Individual Income Tax Return of [REDACTED] and her husband for 2001, 2002 and 2003. Attached to those returns are Schedules C, Profit or Loss from Business, on which the name of the business is stated as IDIIL Learning Center. The employer identification number on the Schedule C's is the same number as that which appears on the I-140 petition and on the beneficiary's Form

W-2's, the number ending in "887." That information is sufficient to show that the Form 1040 tax returns are those of the petitioner's owner and that the petitioner is a sole proprietorship.

As noted above, the record before the director closed on September 13, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, the federal tax return of the petitioner's owner for 2003 was the most recent return available.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax returns each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the tax returns of the petitioner's owner are joint returns of the owner and her husband. Those returns show five dependents. Therefore the household size of the petitioner's owner is seven persons.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns show the following amounts for adjusted gross income:

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2000	not submitted	not applicable	not applicable	not applicable
2001	\$13,645.00	not submitted	\$12,200.00*	\$1,445.00
2002	\$1,679.00	not submitted	\$20,400.00**	\$(18,721.00)
2003	\$5,961.00	not submitted	\$30,000.00***	\$(24,039.00)

* Crediting the petitioner with the \$17,800.00 actually paid to the beneficiary in 2001.

** Crediting the petitioner with the \$9,600.00 actually paid to the beneficiary in 2002.

*** The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2003.

The amount which would have remained to the petitioner's owner after paying the full proffered wage in 2001 is \$1,445.00. That amount is not sufficient for the reasonable household expenses of a seven person household. For 2002 and 2003 the adjusted gross income of the petitioner's owner and her husband was insufficient to pay the full proffered wage, even before considering the household expenses of the petitioner's owner.

The record of proceeding does not contain any information regarding any assets the petitioner's owner might have available to pay the wage and her personal household expenses.

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

The petitioner's brief is signed by [REDACTED], the husband of the petitioner's owner. In the brief, [REDACTED] states that that IDIIL Learning Center is a trade name subsidiary of IDIIL Educational Institute, Inc., which was incorporated in Massachusetts in 1997 as an S corporation. The petitioner states that in 2000 IDIIL Educational Institute became a C corporation. Those assertions by [REDACTED] concerning the status of the petitioner as a corporation are inconsistent with the information on the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and [REDACTED] which show on Schedule C's a sole proprietorship business owned by [REDACTED] with the business name IDIIL Learning Center. Moreover, as noted above, the name of the employer on the beneficiary's Form W-2 Wage and Tax Statements is [REDACTED] IDIIL Learning Center Boston." The name of the petitioner on the I-140 petition is "IDIIL Educational Institute, d/b/a IDIIL Learning Center." (I-140 petition, Part 1.)

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the inconsistencies in the evidence noted above.

The record contains a letter dated November 14, 2004 from the beneficiary in which she states that she worked for IDIIL in Boston and in Taiwan and that she was paid more than the proffered wage. She states that she was in Taiwan from May 2001 to early October 2002 and that she was paid through direct deposits to her banks, E. Sun and the Bank of Taiwan.

The record also contains a copy of a Withholding and Non-withholding Tax Statement form of the Republic of China showing the beneficiary's total compensation, her net withholding tax and her net payment. Most items on the form have both Chinese and English labels, but labels on some items are only in Chinese, and some information entered on the form is only in Chinese. The name of the beneficiary's employer does not appear in English on the form. The record also contains copies of pay statements of the beneficiary signed by [REDACTED] dated from July 5, 2001 through September 5, 2002. At the bottom of each pay statement appears the following statement: "Note: For purposes of interpretation of Taiwanese calendar year, please note that the year 90 corresponds to 2001 and 91 corresponds to 2002." (Pay statements of beneficiary, July 5, 2001 - September 5, 2002). The pay statements appear to show compensation and withholding amounts for the beneficiary during her employment in Taiwan, that is, in the Republic of China.

The record contains a copy of an account statement issued by E. Sun Bank dated "90.5.22" for an account of the beneficiary. The record also contains a copy of an account statement issued by the Bank of Taiwan dated "90.12-7." The name of the account holder does not appear in English on the statement. The figures on both bank statements appear to show amounts in the currency of the Republic of China. In the petitioner's brief, Dr. Hsu states that the exchange rate at the relevant time was between NT 33- NT 37 to the U.S. dollar. No other currency conversion information appears in the record.

The regulation at 8 C.F.R. § 103.2(b)(3) states as follows: "*Translations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to

translate from the foreign language into English.” The petitioner has failed to provide certified English translations of the portions of the above documents which appear only in Chinese.

The bank statements and the beneficiary’s tax statement from the Republic of China are offered by the petitioner as evidence that the petitioner continued to pay the beneficiary a salary greater than the proffered wage during her time in the Republic of China. But nothing in the record establishes that the salary payments to the beneficiary in the Republic of China were made by the petitioner, which, according to the Form 1040 tax returns, is a sole proprietorship. Moreover, according to the petitioner’s brief, the beneficiary’s salary for her work in the Republic of China was paid by IDIIL Taiwan Corporation, which is described to have been incorporated as a subsidiary of IDIIL Educational Institute Inc. (Brief, November 26, 2004, at 2, 3). The record also contains a copy of an employment contract between the beneficiary and IDIIL Taiwan Corporation dated June 13, 2001.

It is a basic rule of law concerning corporations 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). Therefore, any payments to the beneficiary made by IDIIL Taiwan Corporation will not be considered as payments by the petitioner.

Moreover, aside from the fact that salary payments to the beneficiary while in the Republic of China were not made by the petitioner, her job in that country was a different job than the offered job, which, according to the ETA 750, is to be located in Boston, Massachusetts. Payments made to the beneficiary for a different job would not be considered as evidence of the petitioner’s ability to pay the proffered wage for the job offered in the ETA 750.

Based on the foregoing analysis, the evidence in the record 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 her decision, the director correctly stated the petitioner’s net income in 2001, 2002 and 2003 and correctly found that those amounts failed to establish the petitioner’s ability to pay the proffered wage in those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director. The record before the director did not include copies of documents pertaining to the beneficiary’s employment in the Republic of China, which were submitted for the first time on appeal.

For the reasons discussed above, the assertions of the petitioner on appeal and the evidence submitted on appeal fail 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.