

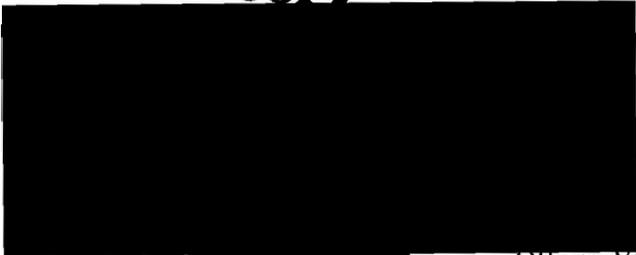


U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAR 28 2006
EAC 04 115 54234

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

The petitioner is a food distribution company. It seeks to employ the beneficiary permanently in the United States as a marketing analyst. 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, the petitioner submits a statement. The petitioner does not submit any further 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. On the I-140 petition, the petitioner indicated the classification for the instant petition was skilled worker.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$35.26 per hour, which amounts to \$73,340.80 annually. The beneficiary did not claim to have been employed by the petitioner on the Form ETA 750.

On the petition, the petitioner indicated that it was established on May 1, 2000, and has three employees. With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 2001, which covers the period from March 1, 2001 to February 28, 2002. This document indicated that the petitioner had taxable income before net operating loss deductions and special deductions of -\$1,638 in 2001. The petitioner also submitted a state of New Jersey certificate of Authority that authorized the petitioner to collect New Jersey sales and use tax, and a new business public records filing document for the state of New Jersey in the name of Gracias Distributors, (USA) Inc.. The petitioner also submitted documentation on orders for dried mango rolls placed by

[REDACTED], Silver Spring, Maryland business and [REDACTED] a company in the Philippines. The record also contains a memorandum of agreement signed by both [REDACTED] and [REDACTED] giving [REDACTED] sole distribution rights for the Filipino company's products under the name [REDACTED]. Finally the petitioner submitted a balance sheet statement for the Philippine company as of December 31, 2003.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 20, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its U.S. federal income tax returns for fiscal years 2002 and 2003, with all schedules and attachments. The director stated that the internally general balance statement for the year that ended December 31, 2000 had very little evidentiary value. The director stated that the petitioner alternatively could submit annual reports for fiscal years 2002 and 2003 accompanied by audited or reviewed financial statements.

In response, the petitioner submitted Form 1120 corporate tax returns for the petitioner for the years 2002 and 2003. The petitioner also resubmitted its 2001 corporate return. The petitioner's tax documents for 2002 and 2003 indicated the petitioner had taxable income before net operating loss deduction and special deductions of -\$4,421 in 2002 and -\$687 in 2003. The petitioner also submitted its state of New Jersey tax document for the period of time from March 1, 2001 to February 28, 2002. The petitioner also submitted federal tax returns for [REDACTED] as well as balance sheet statements for the years 2001, 2002, and 2003. Finally the petitioner submitted additional purchase agreements for the Philippines-based company's products.

The 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 September 8, 2004, denied the petition. The director stated that the petitioner's 2001 federal income tax return indicated the petitioner had negative net income of \$1,638 in 2001, and that the Schedule L balance sheet reflected insufficient net current assets to pay the proffered wage. The director noted the petitioner's negative taxable income in 2002 and 2003, and also noted that the petitioner's Schedules L that accompanied the 2002 and 2003 returns indicated insufficient net current assets to pay the proffered wage in both years. Therefore the director determined that the petitioner had not established its ability to pay the proffered wage as of the April 2001 priority date and to the present.

With regard to the document on the claimed foreign parent of the petitioner, the director stated that the petitioner is a U.S. corporation. The director stated that as a corporation, the petitioner is a separate legal entity distinct from the foreign entity, regardless of ownership. The director further stated that pursuant to 8 C.F.R. § 204.5(g)(2), the U.S. employer has the obligation to demonstrate the ability to pay the proffered wage, and thus, the foreign company's financial resources may not be considered when determining the petitioner's ability to pay the proffered wage.

On appeal, the petitioner submits a letter from [REDACTED] its president. Mr. [REDACTED] states that the petitioner's negative net income for the years 2001, 2002, and 2003 was caused by the non-employment of the beneficiary.

¹ The record reflects that this Philippines-based company is presently known as [REDACTED] Company.

Mr. [REDACTED] states that sales cannot happen or be generated without the full-time involvement of a marketing analyst. The petitioner also stated that the importation, distribution and marketing liaison activities never got off the ground. With regard to the financial support of the petitioner's mother company in the Philippines, Mr. [REDACTED] states that the support of the Philippine company is very necessary although transitional in nature while the petitioner grows its business. Mr. [REDACTED] adds that the petitioner views this financial set-up as somewhat similar to an intra-company relationship. Mr. [REDACTED] finally states that the director's denial of the petition is well supported by legal precedents but that CIS should look at the petitioner's appeal on the basis of the spirit and substance of the law, rather than the letter of the law.

As noted by the director, the assets of the [REDACTED] Manila, Philippines, cannot be used to establish the U.S. petitioner's ability to pay the proffered wage of \$73,340.80. Although the petitioner's president states that the financial relationship between the Philippine company and the petitioner is an intracompany one, Mr. [REDACTED] provides no further evidence to further substantiate that assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is also noted that the tax returns of the petitioner show that no one person or entity owns more than 50 per cent of the petitioner's stock. (See Schedule K.)

Second, the record reflects a memorandum of agreement between the Philippines company and an American distribution company, based in Silver Spring, Maryland. This agreement does not indicate any relationship between the petitioner and the Silver Spring-based distributor, nor does it reflect any financial support offered by the Philippines company to the Silver Spring-based distributor or the Somerset, New Jersey business. Third, the record does not reflect that the owners of the Philippines company are either able or willing to pay the proffered wage, if an intracompany relationship existed and such sharing of financial resources were allowed.

Moreover, as noted by the director, and established by the petitioner, the petitioner is a business incorporated in the state of New Jersey. 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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." In the instant petition, the shareholders or owners of the Philippines company have no legal obligation to pay the wage.

It is also noted that the director correctly noted that the balance sheets submitted by the petitioner are given little evidentiary weight. First, they are the records of a Philippines-based company, whose financial relationship with the petitioner is undefined. Second, the documents are not audited. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. 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.

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 did not claim to have employed the beneficiary as of the priority date. Thus, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 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 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, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner is structured as a corporation. On IRS Form 1120, U.S. Corporation Income Tax Return, taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions. In the instant petition, the petitioner's taxable income is as follows: -\$1,638 in 2001, -\$4,421 in 2002, and -\$687 in 2003. These figures are not sufficient to pay the proffered wage of \$73,340.80.

Nevertheless, counsel is correct that 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. In addition, 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.² 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 tax returns reflect the following information for the following years:

² 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

	2001	2002	2003
Taxable income ³	\$ -1,638	\$ -4,421	\$ -687
Current Assets	\$ 6,822	\$ 0	\$ 14,456
Current Liabilities	\$ 6,460	\$ 4,179	\$ 2,200
Net current assets	\$ 362	\$ 0	\$ 12,256

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001, 2002, or 2003. In 2001, as previously illustrated, the petitioner shows a taxable income of -\$1,638, and net current assets of \$362, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2002, the petitioner shows a taxable income of -\$4,421 and net current assets of \$0, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2003, the petitioner shows a taxable income of -\$687, and net current assets of \$12,256, and has not, therefore, demonstrated the ability to pay the proffered wage. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the 2001 priority date to the present. As previously stated, the petitioner cannot use the assets of another corporation to establish its ability to pay the proffered wage.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.

³ As stated previously, taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.