



U.S. Citizenship
and Immigration
Services

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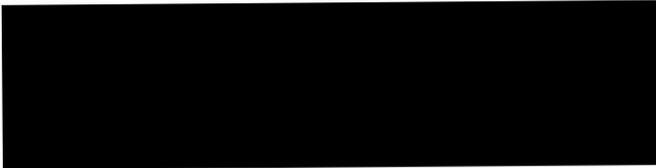
FILE: EAC-05-007-51143 Office: VERMONT SERVICE CENTER Date: **MAY 02 2006**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 an engineering consultants firm. It seeks to employ the beneficiary permanently in the United States as a product engineer manager (traffic database service). 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. 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 December 26, 2001. The proffered wage as stated on the Form ETA 750 is \$98,089.00 annually. On the Form ETA 750B, signed by the beneficiary on December 13, 2001, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on February 19, 2004.

The I-140 petition was submitted on October 8, 2004. On the petition, the petitioner claimed to have been established in 1995, to currently have 7 to 10 employees, and to have a gross annual income of \$307,216.00. With the petition, the petitioner submitted supporting evidence.

In a decision dated November 8, 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 additional evidence. Counsel states on appeal that CIS failed to examine the entire record because CIS did not take into consideration the petitioner's retained earnings and the petitioner's balance sheets, and the petitioner has met its burden in establishing its ability to pay the proffered wage because the petitioner submitted additional evidence. Counsel submits the petitioner's Certificate of Incorporation and copies of the Form 1040 U.S. Individual Income Tax Returns for the petitioner's owner for 2001, 2002, and 2003. Counsel also submits additional copies of evidence already in the record.

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 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 December 13, 2001, the beneficiary did not claim to have worked for the petitioner.

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, 2002, and 2003. The record before the director closed on October 8, 2004 with the receipt by the director of the I-140 petition and supporting documents. As of

that date the petitioner's federal tax return for 2004 was not yet due. Therefore the petitioner's tax return for 2003 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. Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on line 23 of the Schedule K.

The petitioner's tax returns show the amounts for taxable income as shown in the table below.

| Tax year | Net income | Wage increase needed to pay the proffered wage | Surplus or deficit |
|----------|--------------------------|--|--------------------|
| 2001 | \$76,312.00 | \$98,089.00* | -\$21,777.00 |
| 2002 | \$13,336.00 | \$98,089.00* | -\$84,753.00 |
| 2003 | \$36,185.00 ¹ | \$98,089.00* | -\$61,904.00 |

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, 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 End of year | Wage increase needed to pay the proffered wage |
|----------|--------------------------------|--|
| 2001 | \$9,890.00 | \$98,089.00* |
| 2002 | -\$2,632.00 | \$98,089.00* |

¹ Only the first page of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2003 appears in the record. Thus, the AAO will use the petitioner's ordinary income as listed on line 21 of page one.

| | | |
|------|----------------|--------------|
| 2003 | No Information | \$98,089.00* |
|------|----------------|--------------|

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

Counsel asserts that “[CIS] erred by not incorporating the petitioner’s retained earnings into an examination of ability to pay the wage.” Counsel also cites to 8 C.F.R. § 204.5(g)(2) as permitting the petitioner to submit retained earnings as profit/loss statements. Evidence in support of this assertion includes a letter from the petitioner’s tax, accounting, and financial advisor stating that the petitioner “did have the available funds to pay the salary offered in the forms of retained earnings” and balance sheets listing the petitioner’s retained earnings.

The regulation at C.F.R. § 204.5(g)(2) states that “[i]n appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted.” Nowhere in the regulation does it state that retained earnings may be submitted as additional evidence. At any rate, the federal tax returns in the record have a line item on the Schedule L for retained earnings.² In addition, profit/loss statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay the proffered wage. While this regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why all three types of documentation specified at 8 C.F.R. § 204.5(g)(2) are inapplicable or otherwise paint an inaccurate financial picture of the petitioner.³

Retained earnings are the total of a company’s net earnings since its inception, minus any payments to its stockholders. That is, this year’s retained earnings are last year’s retained earnings plus this year’s net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year’s net income, rather than the cumulative total of the previous years’ net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner’s continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The

² The amounts listed for retained earnings in the letter from the petitioner’s tax, accounting, and financial advisor do not match those on the petitioner’s tax returns. According to the letter, “[r]etained earnings for [the petitioner] were significant for 2001, 2002, 2003, and 2004. They were \$130,746.00, \$126,291.00, \$265,840.00 and \$232,146.00 respectively.” According to the petitioner’s tax returns, retained earnings in 2001 and 2002 were \$24,524.00 and \$4,368.00 respectively.

³ Counsel states that the petitioner’s balance sheets should be examined because the petitioner’s tax returns are based on the accrual accounting system, and “returns [on the petitioner’s tax returns] do not recognize all the funds [the] [p]etitioner had disposable.” However, he does not state why copies of annual reports or audited financial statements are not available.

record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.⁴

Counsel also asserts that "[CIS] erred by not exercising its power to examine additional evidence such as balance sheets. Evidence in support of this assertion includes the petitioner's balance sheets for 2001, 2002, 2003, and part of 2004.

The balance sheets in the record are essentially financial statements. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Moreover, counsel states that the petitioner has met its burden in demonstrating its ability to pay the proffered wage because it met the burden set by *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985) and also provided additional evidence. Counsel states that the court in *K.C.P. Food Co., Inc.* "did not state [that] [CIS] must only use the corporate tax returns and the court did not state [that] [CIS] could not use additional evidence." CIS does look to other evidence, aside from tax returns, in determining a petitioner's financial ability to pay the proffered wage. In fact, as stated above, 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).

Counsel also states that "[CIS] refers to [*K.C.P. Food Co., Inc.*] to argue it may properly rely on corporate income tax returns and that it need not consider [income] before expenses" and tries to differentiate the petitioner in that case with the petitioner in the case at hand. As stated above, 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).

Furthermore, counsel asserts that the petitioner has met its burden in demonstrating its ability to pay the proffered wage because the petitioner has one primary shareholder, and the shareholder "could have easily left the funds [that he received as income] in [the petitioner] to pay the offered salary." Evidence in support of this assertion includes the petitioner's Certificate of Incorporation, and the Form 1040 U.S. Individual Income Tax Returns for the petitioner's owner for 2001, 2002, and 2003.

Contrary to counsel's assertion, 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

⁴ The letter from the petitioner's tax, accounting, and financial advisor states that "small corporations often set the earnings aside as a form of savings to be used as needed to support corporation activities. These funds are therefore readily and immediately available to the company at any time." No evidence supporting this statement accompanied the letter. A general statement that is not supported by 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)).

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.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was correct, based on the evidence in the record before 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.