

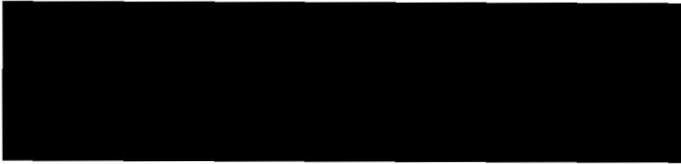
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: OCT 24 2006

EAC-04-245-51494

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 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 provides digital cable installation and maintenance services. It seeks to employ the beneficiary permanently in the United States as a communication engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification application or Form ETA 750), approved by the Department of Labor. 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. The director denied the petition accordingly.

The petitioner filed a timely appeal timely with additional evidence.¹

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 who are members of the professions.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on October 29, 2001. The proffered wage as stated on the Form ETA 750 is \$79,893 per year. On the petition, the petitioner claimed to have been established in 2001, and to currently employ three (3) workers. The petitioner did not provide information pertinent to gross annual income and net annual income on the form.

With the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 2001 covering a period from August 22, 2001 to December 31, 2001, and Form 1040, U.S. Individual Income Tax

¹ 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 AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

Return for 2001 filed by [REDACTED] and [REDACTED] jointly pertinent to its ability to pay the proffered wage.

The director denied the petition on January 21, 2005, finding that the record did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date since the petitioner had net current assets of \$48,237 in 2001.

On appeal, counsel asserts that [REDACTED] engaged in business as a sole proprietorship under the name Desouza Cable High Speed Data Company from January 1, 2001 until August 22, 2001 and then as a corporation under the name UNICOM Broadband Services, Inc. from August 22, 2001, and therefore, net incomes of Desouza Cable High Speed Data Company and the petitioner both should be considered in determining the petitioner's ability to pay. Counsel requests that Citizenship and Immigration Services (CIS) prorate the proffered wage for a portion of the year that corresponds to its tax return covering only four months in 2001.

The record contains no evidence that the petitioner qualifies as a successor-in-interest to Desouza Cable High Speed Data Company (DCHSDC) or that DCHSDC qualifies as the petitioner's predecessor company. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The facts that the petitioner is doing business at the same location as the predecessor, and that [REDACTED] owns 100 percent of both company's shares do not establish that the petitioner is a successor-in-interest. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Counsel's assertion on appeal is not supported by objective evidence. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). The petitioner must address this issue in any future proceedings and must provide documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of DCHSDC to establish the petitioner's status as a successor-in-interest to DCHSDC in order the income of DCHSDC be considered as a part of funds available in determining the petitioners ability to pay in 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not submit evidence that either the petitioner or DCHSDC paid any compensation to the beneficiary in 2001 and onwards despite the beneficiary claimed to have worked for DCHSDC since August 2001. Therefore, the petitioner has not established that it employed and paid the beneficiary the proffered wage during the period from the priority date to the present.

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). Reliance on the petitioner's gross receipts, depreciation/amortization deduction or wage expense is misplaced. 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. Counsel cites unpublished AAO decisions regarding adding back depreciation to net income in determining the petitioner's ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the **depreciation expense charged for the year**. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537

The record of proceeding contains the petitioner's tax return for 2001. The tax return shows that the petitioner is structured as a C corporation and the 2001 tax return covers a period from August 22, 2001 to December 31, 2001. The tax return stated net income² of \$34,772. **Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the proffered wage of \$79,893.**

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

² Taxable income before net operating loss deduction and special deductions as reported on Line 28, Form 1120.

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 of Form 1120, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In the instant case, Schedule L of the 2001 tax return shows that the petitioner had net current assets of \$13,465 at the end of year 2001. Therefore, the petitioner had not established that it had sufficient net current assets to pay the proffered wage in the year 2001.

On appeal counsel requests that CIS prorate the proffered wage for a portion of the year since the tax return covers only four months in 2001. In general, we will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. In the instant case, the petitioner filed the tax return for a period of four months from August 22, 2001 to December 31, 2001. We concur with counsel's argument and will review the tax return to determine whether the petitioner's net income or net current assets reported on tax form were sufficient to pay four months of the proffered wage to the beneficiary. As discussed above, for the four months period the petitioner had a net income of \$34,772 and net current assets of \$13,465 while four months of the proffered wage would be \$26,631. The petitioner had sufficient net income to pay the beneficiary the proffered wage for four months and established its ability to pay one third of the proffered wage while its net current assets were insufficient to cover even the four months. **However, the petitioner is obligated to demonstrate that it could pay the proffered wage for the other eight months with regulatory-prescribed evidence or its predecessor company could cover the proffered wage for the first eight months in 2001.**

As previously noted, the petitioner was structured as a C corporation on August 22, 2001 and reported income and assets on its tax return only for a period from August 22 to the end of the year. The petitioner had no additional income or assets for the first eight months in 2001. The petitioner also failed to establish its status as a successor-in-interest to DCHSDC or DCHSDC's status as a predecessor company. Therefore, the petitioner failed to establish its ability to pay the proffered wage in 2001.

The AAO finds that even if the petitioner had established its successor-in-interest status, it would fail to demonstrate its ability to pay the full proffered wage in 2001. As claimed by counsel, DCHSDC was a sole proprietorship and [REDACTED] was the sole proprietor. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, 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 return 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. Sole proprietors must show that they can cover their existing business expenses as well as pay the

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

proffered wage. In addition, they must show that they can sustain themselves and their 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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supports a family of five (5). In 2001, the sole proprietorship's adjusted gross income of \$70,411 covers the remaining proffered wage of \$53,262.⁴ It appears that the sole proprietor's adjusted gross income was sufficient to pay the beneficiary's first eight months proffered wage. The petitioner did not submit a statement of monthly expenses for the sole proprietor's family of five. However, it is improbable that the sole proprietor could support himself and his family on \$17,149 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the remaining proffered wage.

In addition, the petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. The priority date in the instant case is October 29, 2001. The record closed before the director on August 24, 2004 when the director received the initial filing of the petition. By that time, the petitioner's tax returns or other regulatory-prescribed evidence for 2002 and 2003 should have been available. Therefore, the petitioner must demonstrate its ability from 2002 through 2003. However, the petitioner did not submit any regulatory-prescribed evidence of its ability to pay the proffered wage for 2002 and onwards. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Therefore, the petitioner failed to establish its ability to pay the proffered wage for 2001, the year of the priority date and also failed to establish its ability to pay the proffered wage in 2002 through 2003 because it failed to meet the burden of proof.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the difference between the wage paid and the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date to the present.

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.

⁴ Prorated proffered wage for the eight months from January to August of 2001.