



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC-05-064-50684

Office: VERMONT SERVICE CENTER

Date: APR 12 2007

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, 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 company with a business related to heating and cooling. The petitioner seeks to employ the beneficiary permanently in the United States as a heating, refrigeration, air conditioning, mechanic, installer ("Refrigeration Repair"). As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). As set forth in the July 19, 2005 denial, the director denied the case on the basis that the petitioner had not established its ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

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

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 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 DOL. *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).

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).

In the case at hand, the petitioner filed Form ETA 750² with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$16.59 per hour, 50 hours per week, for an annual salary of \$43,134 per year. The labor certification was approved on September 8, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on December 29, 2004.³ On the I-140, counsel listed the following information related to the petitioning entity: date established: March 13, 2000; gross annual income: not listed; net annual income: not listed; and current number of employees: not listed.

On March 22, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide bank statements for [REDACTED] for 2001, or to submit documentary evidence related to the name and account number change; to submit the petitioner's 2003 and 2004 federal tax returns; to submit the beneficiary's 2003 and 2004 W-2 Forms if employed by the petitioner; and to explain the discrepancy on Form ETA 750 regarding the change in the name and address of the petitioning company. The RFE additionally requested that the copy of the DOL ETA 750 cover letter be submitted. The petitioner responded. On July 19, 2005, the director denied the case based on the petitioner's inability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed to the AAO.

We will examine information contained in the record and then consider the petitioner's additional arguments on appeal. The petitioner must establish that its job offer to the beneficiary is a realistic one. 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, Citizenship and Immigration Services ("CIS") requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages.

First, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will 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 case at hand, on Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary did not list that he was employed with the petitioner, but rather that he was self-employed in various jobs as an independent contractor from November 1994 to the present. The petitioner did submit the following W-2 statements:

<u>Year</u>	<u>W-2 Wages⁴</u>	<u>Employer Listed</u>	<u>Employer Federal tax identification number (FEIN)</u>
2002	\$19,350.00	[REDACTED]	[REDACTED]

² The Form ETA 750 submitted to DOL initially listed the employer as [REDACTED] with an address of [REDACTED]. The name of the employer was crossed out and changed to "[REDACTED]" with an address of [REDACTED] 11206. The change is not initialed or stamped by DOL, however, the DOL page with its final determination lists the employer as [REDACTED]. Accordingly, it would appear that the change to the petitioner's name and address was made prior to certification with DOL's knowledge.

³ The petitioner initially filed an I-140 petition on the beneficiary's behalf based on the same certified Form ETA 750 and position on January 13, 2004. The director denied the initial I-140 on July 30, 2004 based on a determination that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage.

⁴ We note that the W-2 Forms also reflect that the beneficiary used a different social security number with each employer. There is nothing in the record to account for this discrepancy.

2001 \$15,583.90

By way of explanation, the petitioner provided in a letter to counsel that “our company was operating under a different name in the year of 2001.” The W-2 statements provided on behalf of the beneficiary, however, demonstrate that the two companies have different FEIN numbers, and, accordingly, the change would have been more than a name or an address change. As the Form ETA was certified under the name [REDACTED], the beneficiary’s wages from 2002 will be considered in terms of the petitioner’s ability to pay. However, since [REDACTED] reflects a different tax ID, wages paid to the beneficiary would not be considered unless [REDACTED] could demonstrate that it is the successor-in-interest to, or otherwise related to, [REDACTED]. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the absence of a successor-in-interest relationship, the payments made to the beneficiary by the first company would not be considered. 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.”

Based on the foregoing, the petitioner cannot demonstrate that it can pay the beneficiary the proffered wage based on prior wage payment alone. The wages that the petitioner paid in the year 2002 would be considered toward the petitioner’s ability to pay. The petitioner must show that it can pay the difference between the proffered wage and the wages paid in 2002, and that it can pay the full proffered wage in 2001, 2003 and 2004.

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. 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).

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 petitioner is formed and operates as a limited liability company (LLC). Although structured and taxed as a partnership, the owners of an LLC enjoy limited liability similar to corporation owners. An LLC, like a

corporation, is a legal entity separate and distinct from its owners. The company's debts and obligations are generally not the owner's debts and obligations.⁵ An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the owners' individual total income and assets cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of the petitioning company's funds.

Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below." Where a partnership has income from sources other than from a trade or business, net income is found on Schedule K,⁶ Form 1065, page 4, Analysis of Net Income (Loss), line 1. The petitioner's Form 1065 tax return for 2002 shows that the petitioner's income in 2002 was exclusively from a trade or business, and accordingly, line 22 reflects the following income:

<u>Tax year</u>	<u>Net income or (loss)</u>
2002 ⁷	\$25,402
2001	-\$2,649

The petitioner's net income does not demonstrate that it can pay the beneficiary the proffered wage in either year. However, if the wages paid to the beneficiary were added to the petitioner's 2002 net income, the petitioner would be able to demonstrate its ability to pay the proffered wage for the year 2002. The petitioner cannot demonstrate its ability to pay in the year 2001 based on net income. Further, the record of proceeding does not contain any regulatory prescribed evidence for the years 2003 or 2004 to allow us to determine whether the petitioner can pay the proffered wages in those years.

⁵ This general rule might be altered in some cases by contract or otherwise, however, no evidence appears in the record to indicate that the general rule would not apply in the instant case.

⁶ The tax returns identify that two individuals own the petitioner and divide profit and loss sharing and ownership of capital at a ratio of 99% for the first owner and 1% for the second owner. Each partner is required to complete Schedule K-1 and report their share of the profits and losses respectively on that Schedule.

⁷ The petitioner did not submit its 2003 or 2004 federal tax returns, which the RFE specifically requested. Counsel provided in response that the 2003 and 2004 federal tax returns "were not available to us at the moment to present you with a copy. We will send them as soon as we received them." It is unclear from counsel's response whether the petitioner's federal tax returns had been filed and were unavailable, or whether the returns had not yet been filed. The petitioner did not provide any documentation that it requested an extension to file its federal tax returns for those years. Based on the date of filing the I-140, the petitioner's 2003 federal tax return should have been available, although its 2004 return would not have been, but should have been at the time of the petitioner's response to the RFE. The petitioner's tax returns should have been available at the time of appeal, however, the petitioner did not provide its 2003 or 2004 tax returns on appeal. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a partnership 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 partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a partnership'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 would 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.

<u>Tax year</u>	<u>Net current assets</u>
2002	-\$120,135
2001	-\$33,984

The petitioner's net current assets would not demonstrate the petitioner's ability to pay in 2001. Further, as noted above, the petitioner has not provided its federal tax returns, audited financial statement or annual report to allow us to conclude whether the petitioner has the ability to pay the beneficiary the proffered wage in 2003 or 2004.

Counsel additionally provided the petitioner's bank statements for the time period, January 31, 2001⁸ through December 31, 2003. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. If we examined the bank statements, the bank statements reflect substantial varying amounts from a low of \$16,041 (as of January 31, 2002) to a high balance of one month at \$208,532 (as of July 31, 2003). However, again we note that the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L,⁹ and accordingly, the balances listed would not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel provides that in the past, the AAO has accepted bank statements as proof of the petitioner's ability to pay and cites to *In Re: Petitioner [Redacted]*, EAC-97-156-51725 (VSC Aug. 7, 1998),

⁸ The 2001 bank statements submitted were in the name of [REDACTED] which as noted in the director's RFE contained a different name and account number than the statements submitted for 2002 and 2003 for [REDACTED]. As noted above, the petitioner has not demonstrated that [REDACTED] is the successor-in-interest to, or related to [REDACTED]. As the two entities have different FEIN numbers, in the absence of further evidence, we would not consider the statements submitted for [REDACTED] to show the petitioner's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

⁹ The petitioner's federal tax returns Schedule L show following amounts listed under the entry cash for year end: 2002: \$59,544; 2001: \$69,528; and 2000: \$8,953. These amounts would have been considered in calculating the petitioner's net current assets.

and *Matter of [no name provided]* 10 Immig. L. Rptr. B2-10 (March 2, 1992) to support the proposition that the AAO will accept bank statements to demonstrate a petitioner's ability to pay.

First, we note that 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). Counsel has provided cites to non-precedent decisions. Second, if we examined *In Re: Petitioner [Redacted]*, EAC-97-156-51725 (VSC Aug. 7, 1998), in that case, the AAO considered the bank statements submitted and determined that the petitioner had not demonstrated its ability to pay.

As noted above, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank statements "in appropriate cases." The RFE requested that the petitioner provide regulatory prescribed evidence in the form of federal tax returns for the years 2003, and 2004. The record before us does not contain such regulatory prescribed evidence for these years. Further, the petitioner has failed to provide its tax returns, or an explanation, for their absence on appeal. Alternatively, the petitioner has not provided an audited financial statement, or an annual report for those years. The bank statements could be considered in addition to this regulatory prescribed evidence. In the absence of such evidence, we would not conclude that the petitioner has the ability to pay the beneficiary the proffered wage from the priority date until he reaches permanent residence. Further, the petitioner's cash assets were considered for the years 2001 and 2002 based on the petitioner's federal tax returns Schedule L submitted.

Additionally, we note that the petitioner has sponsored a second individual. The petitioner would need to be able to demonstrate its ability to pay for both sponsored individuals, which based on the foregoing, it cannot.

The petitioner additionally cites to *Davilla-Bardales v. INS*, 27 F.3d 1 (1st Cir. 1994), and contends that an agency cannot adopt conflicting policies in different case decisions. We note that the decision between the instant matter and the cases that the petitioner cites to are not inconsistent, but rather are consistent with 8 C.F.R. § 204.5(g)(2) and its subsequent treatment in AAO non-precedent decisions.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.