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U.S. Citizenship
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FEB 01 2007

FILE:



EAC 04 144 53297

Office: VERMONT SERVICE CENTER

Date:

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
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director (director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal from the director's denial. The appeal will be dismissed.

The petitioner is a bagel bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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, counsel submits additional evidence and contends that the petitioner established its continuing financial ability to pay the proffered salary.

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 at 8 C.F.R. § 204.5(g)(2) provides:

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. 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 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 CFR § 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 \$18.23 per hour, which amounts to \$37,918.40 per annum. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claims to have worked for the petitioner from 1995 to 1998 and from October 1999 to the present.

Part 5 of the visa petition, filed on April 12, 2004, indicates that the petitioner was established in 1999 and currently employs eight workers. In support of its ability to pay the proffered wage of \$37,918.40, the petitioner initially provided a partial copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and a

copy of its 2002 corporate tax return. The petitioner did not provide any data for 2003. The tax returns submitted with the petition contain the following information:

	2001	2002
Ordinary Income ¹	-\$18,116	\$ 31,115
Current Assets (Sched. L)	omitted	\$ 16,683
Current Liabilities (Sched. L)	omitted	\$ 20,407
Net Current Assets		-\$ 3,724

As shown above, the petitioner's net current assets are the difference between its current assets and current liabilities and are shown on Schedule L of its corporate tax return. Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given period and as a possible resource out of which a proffered wage may be paid. Current assets are found on line(s) 1(d) through 6(d) of Schedule L and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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 petitioner also supplied copies of the beneficiary's Wage and Tax statements (W-2s) indicating the amount of wages he received from the petitioner in 2001, 2002 and 2003. They are shown as follows:

2001	\$11,960
2002	\$15,600
2003	\$15,600

On August 11, 2004, the director requested the petitioner to provide a complete tax return for 2001 as well as evidence of the beneficiary's qualifying experience. Relevant to its ability to pay the certified salary, the petitioner provided a complete copy of its 2001 federal tax return, including its Schedule L balance sheet. It reveals that the petitioner had \$7,859 in current assets and \$16,757 in current liabilities, yielding -\$8,898 in net current assets.

The director denied the petition on November 8, 2004, concluding that the petitioner had not established its continuing financial ability to pay the proffered wage beginning at the 2001 priority date. She noted that the petitioner had paid the beneficiary far less than the certified wage in 2001 and that its corporate tax return showed a loss of ordinary income, as well as current liabilities exceeding current assets.

On appeal, counsel provides copies of a variable annuity account statement(s) held individually by the petitioner's sole shareholder. It was purchased in October 2001 for \$89,383.72 and was valued at \$77,147.20 as of December 31, 2002. Counsel also provides an affidavit from the petitioner's sole shareholder, [REDACTED], who affirms that he has always been prepared to cover the proffered wage from his personal accounts as necessary. Citing this

¹ For the purpose of this review, ordinary income will be treated as net income.

evidence, as well as [REDACTED] 2002-INA-104 (2004 BALCA) and *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel maintains that the issue of whether Mr. Baruch's personal assets are held in individual accounts or are part of the corporate accounts should be considered irrelevant for the purpose of funding the corporate operations such as hiring an additional employee, but is only relevant when determining the availability of funds to pay the corporate debts.

Counsel assertions are not persuasive. It is noted that CIS jurisdiction includes a determination of whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a *de novo* determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

It is noted that Board of Alien Labor Certification Appeals (BALCA) decisions are not binding upon CIS. 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, BALCA 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). Moreover, at least as to *Ranchito Coletero*, the analysis applied to a sole proprietorship, which is an entity that indistinguishable from the assets and liabilities of its individual owner, is not directly applicable to the instant petition, which deals with a corporate employer.

As noted above, the personal assets of the sole shareholder will not be considered in this case where the named petitioner is a corporation. The court in *Sitar v. Ashcroft*, 2003 [REDACTED] also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, the court 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." A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, 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.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the shortfalls resulting from the comparison of the actual wages paid the beneficiary and the proposed wage offer of \$37,918.40 are as follows:

Shortfall

2001	\$25,958.40
2002	\$22,318.40
2003	\$22,318.40

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. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)).

The record contains two of the petitioner's tax returns. It indicates that while in 2002 the petitioner could cover the shortfall of \$22,318.40 between the \$15,600 in wages paid to the beneficiary and the certified wage of \$37,918.40 shown on the approved labor certification, it could not demonstrate this ability in 2001 where neither its -\$18,116 in net income, nor its -\$8,898 in net current assets could pay the difference of \$25,958.40 between the actual wages paid of \$11,960 and the proffered wage of \$37,918.40. It is noted that the beneficiary's wages in 2003 were \$22,318.40 less than the proffered wage. The record does not contain a corresponding corporate tax return or audited financial statement covering this period which might demonstrate whether the petitioner had the ability to pay the proffered wage in that year. It cannot be concluded that the petitioner has demonstrated its continuing ability to pay the certified wage as set forth in the approved labor certification and as required by 8 C.F.R. § 204.5(g)(2), as of the priority date of April 30, 2001.

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.