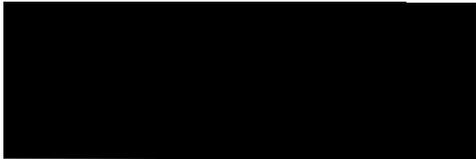




U.S. Citizenship  
and Immigration  
Services

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invasion of personal privacy



BU

FILE:

EAC 04 116 50903

Office: VERMONT SERVICE CENTER

Date:

JAN 22 2007

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 Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record indicates that the director issued the decision on September 1, 2004. The director properly gave notice to the petitioner that it had 30 days to file the appeal. The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party, in order to properly file an appeal, must file the complete appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). Citizenship and Immigration Services (CIS) received the appeal on October 12, 2004, 42 days after the decision was issued. Accordingly, the appeal was untimely filed. On January 25, 2005, the petitioner filed a motion to reopen and reconsider the denial of the petition.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director accepted the appeal as a motion to open or reconsider the director's decision. After review, the director affirmed the prior decision of the director on May 17, 2005. The petitioner appealed the director's decision of May 17, 2005 on June 17, 2005. As stated, the matter is now before the Administrative Appeals Office (AAO) on appeal.

The petitioner is an auto repair corporation. It seeks to employ the beneficiary permanently in the United States as an automobile-radiator mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, 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 single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 22, 2001. The proffered wage as stated on the Form ETA 750 is \$20.83 per hour (\$43,326.40 per year).

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 any new evidence properly submitted upon appeal<sup>1</sup>.

The evidence in the record of proceeding shows that the petitioner is structured as a corporation. On the petition, the petitioner claimed to have been established on August 24, 1970, and to employ seven workers at the time of preparation of the petition. According to the tax returns in the record, the petitioner's fiscal year is April 1<sup>st</sup> to March 31<sup>st</sup> of each year. On the Form ETA 750B, signed by the beneficiary in 2001, the beneficiary did not claim to have worked for the petitioner. According to the petition, the date of the beneficiary's arrival in the United States is September 11, 2003.

During the pendency of this proceeding, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form 1120S tax returns for 2001 and 2002; an explanatory letter dated July 14, 2004; a letter from an accountant for the petitioner dated June 4, 2004, stating that the petitioner, could in opinion meet the payroll obligation of "one more employee;" a W-2 Wage and Tax statement for 2001 for an employee (not the beneficiary) stating wages paid in that year to be \$19,695.46; a letter from the petitioner offering the subject position to the beneficiary at the proffered hourly wage; a letter from the petitioner's accountant dated October 19, 2004, providing a compiled cash basis income statement for the business for the period April 1, 2001 through March 31, 2002; a statement entitled "Summary of Bank Statements;" approximately 9 business checking account statements from [REDACTED] in 2001; approximately 9 business checking account statements from [REDACTED] in 2001; a Montgomery County, Maryland, property tax bill for [REDACTED] a "Declaration" by the petitioner dated July 15, 2005; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.<sup>2</sup>

On the appeal statement, counsel asserts, *inter alia*, that CIS incorrectly interpreted and failed to consider all evidence and information concerning the petitioner's financial records. Counsel contends that the petitioner has met its burden of proof to establish its ability to pay the proffered wage.

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

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<sup>1</sup> 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).

<sup>2</sup> Counsel has submitted and resubmitted several copies of the "Appellant's Brief" with exhibits mentioned above as well as other documents.

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, Citizenship and Immigration Services (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 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 has not employed the beneficiary.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 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 accountant for the petitioner had mentioned in a letter submitted dated June 4, 2004 that depreciation is a non-cash outlay. 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$43,326.40 per year from the priority date of October 22, 2001:

- In 2001, the Form 1120S stated net income<sup>3</sup> of \$4,848.00.
- In 2002, the Form 1120S stated net income of \$9,566.00.

Therefore, for the years 2001 through 2002, the petitioner did not have sufficient net income to pay the proffered wage. Although available according to counsel, no other tax returns were submitted by the petitioner.

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 net current assets. Counsel has submitted the real estate tax bill for the business premises. We reject, however, counsel's contention that the petitioner's total assets such as real estate holdings should have been considered in the determination of the ability to pay the proffered wage. 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 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.<sup>4</sup> 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 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.

- The petitioner's net current assets during 2001 were <\$1,284.00>.<sup>5</sup>
- The petitioner's net current assets during 2002 were \$44,444.00.

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<sup>3</sup> IRS Form 1120S, Line 21 that states the petitioner's ordinary business income or loss. There are Schedule "K" forms submitted with petitioner's returns for the shareholder owner. If a "S" corporation has income from multiple sources other than trade or business, that income is stated on Schedule "K." Similarly, additional deductions and income may be included on Schedule "K." In most instances, and as is present on the Schedule "K" statements submitted with the tax returns in this case, the net income of the petitioner as reported on Line 21 is further reduced by deductions taken on the shareholder's Schedule "K." While income or loss is "reported out" from petitioner through the Schedule "K" statements, the income can be, and is in the present case, reduced by additional deductions. Therefore there is no advantage to petitioner through the use of Schedule "K" income or loss figures to determine the ability to pay the proffered wage. In 2001, the Schedule K stated a loss of <\$4,041.00>, and in 2002, income of \$9,526.00.

<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>5</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

Therefore, for the year 2001 the petitioner did not have sufficient net current assets to pay the proffered wage of \$43,326.40 per year. In 2002, the petitioner did have sufficient net current assets to pay the proffered wage.

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 proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for year 2002.

Counsel has submitted two sets of bank checking statements for year 2001 as proof of the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank 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 a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered in determining the petitioner's net current assets.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, the CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

The documentation presented here indicates that [REDACTED] holds 100 percent of his company's stock and he performs the personal services of the firm. According to the petitioner's IRS Form 1120S Line 7,

Compensation of Officers, he elected to pay himself \$33,755.00 in 2001, and \$32,515.00 in 2002. We note here that the compensation received by the company's owner during these years was not a fixed salary.

CIS (legacy INS) has long held that it 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 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. Thus, the AAO will not consider personal bank account or personal real estate holdings as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In the present case, CIS would not be examining the personal assets of \_\_\_\_\_ but, rather, the financial flexibility that he as the sole owner has in setting his salary based on the profitability of his corporation. A review of the petitioner's amount of general wages paid to its employees indicates \$245,788.00 was paid in 2001, and in 2002, \$234,857.00. The petitioner has submitted a "Declaration" dated July 15, 2005, that the rent that the business pays to the owner of petitioner could be decreased to pay the proffered wage. There is no evidence submitted that rent or any compensation flowing to the owner of petitioner was ever reduced. There is no evidence that \_\_\_\_\_ would be willing or able to forego his officer's compensation in order to pay the proffered wage.

Additionally, the petitioner's general employee wage paid to former employee \_\_\_\_\_ (who according to the counsel, the beneficiary would replace<sup>6</sup>) of \$19,695.46 is not similar to the proffered wage and cast doubt upon the realistic nature of this job offer. No evidence was submitted that proved that the work done by \_\_\_\_\_ was similar to the proffered position. 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)).

Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

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 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. 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.

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<sup>6</sup> According to the I-140 petition, part 6, the proffered position was a new position. Therefore the petitioner's statement that the beneficiary would replace a former employee in an existing position is contradictory and not credible.