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U.S. Citizenship  
and Immigration  
Services

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B/C

FILE:



Office: VERMONT SERVICE CENTER

Date: JAN 23 2007

EAC-02-148-52015

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:

SELF-REPRESENTED

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. The subsequent appeals were untimely filed, but the director treated them as motions to reopen/reconsider (MTR). After granting MTRs, the director affirmed his previous decision and denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a bricklayer (concrete block mason). 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 its 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 record shows that the appeal is properly filed timely 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.

As set forth in the director's April 14, 2003 denial, 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 C.F.R. § 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 December 22, 1997. The proffered wage as stated on the Form ETA 750 is \$24.41 per hour (\$50,772.80 per year<sup>1</sup>). The Form ETA 750 states that the position requires three years of experience in the job offered.

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<sup>1</sup> The director miscalculated the annual proffered wage as \$50,357.

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 appeal<sup>2</sup>. Relevant evidence in the record includes the petitioner's corporate federal tax return for 1997 through 2001, bank statements for the petitioner's account for December 1997 and December 2002, the federal individual tax return filed by [REDACTED] for 1998 through 2004 and the beneficiary's individual tax returns for 1998 through 2004, W-2 forms and Form 1099 for 1997 through 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year runs from August 1 to July 31. On the petition, the petitioner claimed to have been established in 1981, to have a gross annual income of \$528,685, to have a net annual income of \$26,438, and to currently employ twelve workers. On the Form ETA 750B, signed by the beneficiary on December 18, 1997, the beneficiary claimed to have worked for the petitioner since May 1996.

On appeal, the petitioner submits its owner's 2003 and 2004 tax returns, and letters regarding the beneficiary's illness and asserts that the petitioner is willing, able and capable to pay the beneficiary 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 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 submitted the beneficiary's income tax returns, W-2 forms and Form 1099s. These documents show that the petitioner hired and paid the beneficiary in the relevant years as follows:

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<sup>2</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).

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
1997	\$22,247.75	\$50,772.80	\$28,525.05
1998	\$31,383.00	\$50,772.80	\$19,389.80
1999	\$26,255.00	\$50,772.80	\$24,517.80
2000	\$16,872.06	\$50,772.80	\$33,900.74
2001	\$16,530.66	\$50,772.80	\$34,242.14
2002	\$13,696.74	\$50,772.80	\$37,076.06
2003	\$18,947.27	\$50,772.80	\$31,825.53
2004	\$9,475.00	\$50,772.80	\$41,297.80

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. The petitioner is obligated to demonstrate that it could pay the difference between wages actually paid to the beneficiary and the proffered wage in any of the relevant years.

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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 petitioner's tax returns for its fiscal years (August 1 to July 31) of 1997 through 2001 demonstrates the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date:

Tax Year	Net income <sup>3</sup>	Wage increase needed to pay the proffered wage	Surplus or deficit
1997	\$26,438.00	\$28,525.05	\$(2,087.05)
1998	\$49,916.00	\$19,389.80	\$30,526.20
1999	\$8,045.00	\$24,517.80	\$(16,472.80)
2000	\$54,718.00	\$33,900.74	\$20,817.26
2001	\$6,364.00	\$34,242.14	\$(27,878.14)

Therefore, for the years of 1997, 1999 and 2001, the petitioner did not have sufficient net income to pay difference between wages actually paid to the beneficiary and the proffered wage, however, the petitioner established its ability to pay the proffered wage through its net income for the years of 1998 and 2000.

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 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.

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 for those years the petitioner failed to establish its ability to pay through its net income.

<sup>3</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

<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.

Tax Year	Net Current Assets	Wage increase needed to pay the proffered wage
1997	\$513.00	\$28,525.05
1999	\$59,024.00	\$24,517.80
2001	\$(609.00)	\$34,242.14

Therefore, for the years 1997 and 2001, the petitioner did not have sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage while its net current assets were sufficient to pay the difference in 1999.

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 because it failed to establish its ability to pay for 1997 and 2001.

The petitioner asserts in the brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. The petitioner submits bank statements for the petitioner's account covering December 1997 and December 2002. The petitioner's reliance on the balance in its bank account 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 was considered in determining the petitioner's net current assets.

The record contains copies of the individual income tax returns filed by [REDACTED] (Mr. [REDACTED]) for 1998 through 2004. Mr. [REDACTED] is the sole owner of the petitioner. The petitioner appears to try to establish the petitioner's ability to pay with the assets of its owner. However, the record does not contain any evidence that the petitioner's structure changed to a sole proprietorship, the petitioner did not submit the petitioner's corporate tax returns for 2002 onwards and the Mr. [REDACTED] **individual tax returns do not show the petitioner, [REDACTED] Corp. is a sole proprietorship.** Instead, evidence shows that the petitioner is a corporation. Contrary to the petitioner'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 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 Mr. [REDACTED] cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The petitioner asserts that it experienced in the past some financial difficulties related to the events of September 11, 2001. There is no doubt that "September 11" influenced to economy negatively not only in New York, but also in the United States and even in the globe. A mere broad statement that because of the nature of the petitioner's industry its business was adversely impacted by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the

priority date. The petitioner would have to establish the year 2001 was an uncharacteristically unprofitable year in a framework of profitable or successful years for the petitioner<sup>5</sup>. The petitioner did not provide any evidence showing its profitability and successfulness for the years after 2001. The record of proceeding does not contain any clear nexus between a decline in the petitioner's business and the events of September 11, 2001. 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's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns 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.

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.

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<sup>5</sup> See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years.