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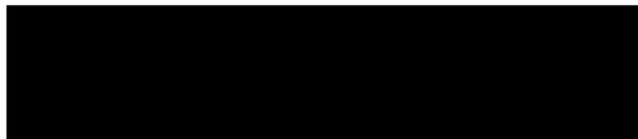
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:

LIN 03 273 50118

Office: NEBRASKA SERVICE CENTER

Date: JAN 30 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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a multicultural public relations/publishing corporation. It seeks to employ the beneficiary permanently in the United States as an account manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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.

According to the petition, the petitioner's business was established in 1995, and, at the time the petition was prepared, employed seven individuals.

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) 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 April 30, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$23.40 per hour (\$48,672.00 per year).

On appeal, the petitioner submits an explanatory letter and additional evidence.

With the petition, the petitioner 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 tax returns Form 1120S for 2001 and 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined, *inter alia*, the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on April 1, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested additional financial evidence beyond the 2001 and 2002 U.S. federal tax returns submitted. Supplementary evidence was also requested to the above. The director indicated audited profit/loss statements, bank account records or personnel records would be additional evidence of the ability to pay the proffered wage.

As the Form ETA 750 stated that the petitioner employed the beneficiary, the director requested that the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements from 2001, 2002 and 2003.

In response to the request for evidence, the petitioner submitted copies of the beneficiary's W-2 Wage and Tax Statements from 2001, 2002 and 2003, as well as other documentation.

The director denied the petition on May 31, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner asserts that there were reasons that the company's fortunes have "been hurt due to the economy taking a downturn" specifically the petitioner's loss of high tech clients. The petitioner states in years 2000, 2002 and 2004, the shareholders received a discretionary distribution that could have been used to pay the proffered wage. Further, the petitioner states that the director failed to take into account the company's accounts receivable as an asset.

The petitioner states that it has "potential projects in the pipeline" and by implication, prospects for future profitability.

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

As additional evidence, the petitioner provides a spread-sheet style representation for the years 2002 through 2004 of the petitioner's sales, income, shareholder distributions and retained earnings, as well as copies of the following documents: CIS Form I-797C; U.S. Internal Revenue Service tax returns Form 1120S for 2000, 2001, 2002, 2003 and 2004.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. Evidence was submitted to show that the petitioner employed the beneficiary since March 2000. As set forth below, the petitioner must demonstrate that it is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date. In years 2001, 2002 and 2003, the petitioner paid the beneficiary \$29,326.92, \$30,000.00 and \$29,326.92 in those years respectively. Since the proffered wage is \$48,672 per year, these wage payments are less than the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng* at 537.

The tax returns² demonstrated the following financial information concerning the petitioner's³ ability to pay the proffered wage of \$48,672.00 per year from the priority date of April 30, 2001:

- In 2001, the Form 1120S stated a loss⁴ of <\$670.00>⁵.

² Tax returns and information submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. In 2000, the petitioner stated \$98,410.00 net income.

³ There is Schedule "K" forms submitted with petitioner's return for each shareholder owner's. If a "S" corporation has income from multiple sources other than trade or business, that income is stated on Schedule "K." Similarly, additional deductions (i.e. charitable deductions, Section 179 expense deductions, and additional depreciation) 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 apportioned taxable income of the petitioner as reported on Line 21 is further reduced by deductions taken on each shareholders Schedule "K." Therefore 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.

⁴ Internal Revenue Service Form 1120S, line 21, "Ordinary business income (loss) ..."

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial

- In 2002, the Form 1120S stated a loss of <\$8,453.00>.
- In 2003, the Form 1120S stated a loss of <\$19,029.00>.
- In 2004, the Form 1120S stated net income of \$87,206.00.

Therefore, in years 2001, 2002 and 2003, there was no net income available to pay the proffered wage even considering the wages paid to the beneficiary during those years.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has net income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage or the difference between wages actually paid and the proffered wage, at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence. Also, in the subject case the petitioner has not paid the beneficiary the proffered wage in tax years 2001, 2002, and 2003 from an examination of the evidence submitted found in the record of proceeding.

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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$24,928.00 and \$13,259.00 in current liabilities. Therefore, the petitioner had \$11,669.00 in net current assets. Since the proffered wage is \$48,672.00 per year, this sum is less than the proffered wage. The petitioner is obligated to demonstrate that is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date.
- In 2002, petitioner's Form 1120S return stated current assets of \$2,868.00 and \$21,600.00 in current liabilities. Therefore, the petitioner had <\$18,732.00> in net current assets. Since the proffered wage is \$48,672.00 per year, this sum is less than the proffered wage and the difference between wages actually paid to the beneficiary and the proffered wage from the priority date.
- In 2003, petitioner's Form 1120S return, Schedule L was blank.
- In 2004, petitioner's Form 1120S return, Schedule L was blank.

statement, a loss, that is below zero.

⁶ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the period 2001⁷ through 2002 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

The petitioner asserts in her explanatory statement accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁸ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

As stated above, the petitioner states that it has "potential projects in the pipeline" and by implication, prospects for future profitability. Counsel maintains that the petitioner's potential to increase its revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. Although the petitioner indicated that the petitioner would have the ability to pay the proffered wage in the future, this is insufficient and not probative evidence to demonstrate the ability to pay the proffered wage. Petitioner's taxable income is examined from the priority date, April 30, 2001. It is not examined contingent upon some event in the future. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Based upon the evidence submitted, the petitioner could not pay the proffered wage from the priority date for a three year period.

The petitioner states that the director failed to take into account accounts receivable as an asset. As already elucidated above, the calculation of net current assets takes into account the petitioner's accounts receivable (Schedule L, line 2a) in the determination of the petitioner's net current assets. At no time for which tax returns were submitted did the petitioner's net current assets equal or exceed the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage from the priority date.

In 2000, 2002 and 2004, the shareholders received a discretionary distribution that the petitioner contends could have been used to pay the proffered wage. 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 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." No agreement was introduced by any shareholder to eliminate or reduce compensation owed them by the corporation, or, to demonstrate that any shareholder could reduce or eliminate their officer's compensation. Going on record without supporting documentary evidence is not sufficient for purposes of

⁷ Even adding the wages paid to the beneficiary for 2001 to the net current assets for that year does not equal the proffered wage.

⁸ 8 C.F.R. § 204.5(g)(2).

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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date through 2003.

The petitioner's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns for 2001, 2002 and 2003 as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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 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.