



U.S. Citizenship
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JUN 28 2007

File: [REDACTED]
SRC-05-190-52142

Office: TEXAS SERVICE CENTER Date:

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:

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, Texas Service Center (“director”), denied the immigrant visa petition. The petitioner appealed, and the appeal is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner operates a dry cleaning business and seeks to employ the beneficiary permanently in the United States as a manager, sales (“Sales Manager”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s November 10, 2005 decision, the petition was denied based on the petitioner’s failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains 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 appeal.¹

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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

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).

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on January 13, 1998.² The proffered wage as stated on Form ETA 750 is \$21.50 per hour, based on a 40 hour work week, which is equivalent to \$44,720.00 per year. The labor certification was approved on April 19, 2005, and the petitioner filed the I-140 on the beneficiary's behalf on June 24, 2005. The petitioner listed the following information on the I-140 Petition: date established: April 5, 1993; gross annual income: \$495,000; net annual income: estimated at \$80,000; and current number of employees: eight.

On October 5, 2005, the director issued a Notice of Intent to Deny ("NOID"), which provided the petitioner 30 days to submit further evidence related to the petitioner's ability to pay. Specifically, the NOID directed that the petitioner provide evidence of its ability to pay for the years 1998 to 2000 in the form of federal tax returns, audited financial statements, or annual reports, as the petitioner had provided no evidence for these years with its initial filing. Additionally, the NOID directed that the petitioner should provide further evidence related to its ability to pay for the years 2001 through 2004, since the evidence submitted initially failed to demonstrate the petitioner's ability to pay. The NOID further requested that the petitioner provide any W-2 statements issued to the beneficiary. The petitioner responded. On November 10, 2005, the director denied the case finding that the petitioner did not establish its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence.³ The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

³ The director initially denied the petition on September 6, 2005 due to abandonment for failure to respond to a NOID issued on July 18, 2005. On October 5, 2005, the director reopened the petition on a CIS motion to reopen, which is allowed by 8 C.F.R. § 103.5(a)(5). The record before us does not reflect that a NOID was previously issued to the petitioner on July 18, 2005.

beneficiary on May 1, 2005, the beneficiary did not list that he was previously employed with the petitioner. The petitioner did not submit any evidence of prior wage payment to the beneficiary. Therefore, the petitioner is unable to establish its ability to pay the beneficiary the proffered wage based on prior wage payment.

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, Citizenship & Immigration Services (“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 record demonstrates that the petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner’s ability to pay the proffered wage:

<u>Tax year</u> ⁴	<u>Net income or (loss)</u>
2004	\$11,318
2003	-\$29,979
2002	-\$52,311
2001	\$22,315
2000	\$25,648
1999	\$143,037
1998	-\$29,975

Based on the foregoing, the petitioner can establish its ability to pay the beneficiary the proffered wage in 1999, but not in any other year.

⁴ The petitioner only submitted its 1998, 1999, and 2000 federal tax returns on appeal, and failed to submit these years in response to the NOID. The purpose of an RFE or a NOID is to obtain further information to clarify whether the beneficiary is eligible for the benefit sought. Eligibility must be established as of the time that the petition was filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). A petitioner’s failure to submit requested evidence, which would preclude a material line of inquiry, serves as a ground to deny a petition. 8 C.F.R. § 103.2(b)(14). Where a petitioner has been put on notice of a deficiency in the evidence, and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). We will, however, exercise discretion and accept the tax returns for consideration.

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 the difference between the petitioner's current assets and current liabilities.⁵ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18, or, if filed on Form 1120-A, on Part III. If a corporation'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, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	-\$60,186
2003	-\$2,042
2002	-\$46,321
2001	-\$28,547
2000	-\$133,350
1999	-\$25,431
1998	-\$49,543

The petitioner's tax returns reflect that it had negative net current assets in each year from the priority date onward. Accordingly, the petitioner cannot demonstrate its ability to pay the proffered wage from its net current assets.

The petitioner also provided a letter from its accountant. The accountant provides that the company can pay the proffered wage as demonstrated by adding the petitioner's net income to the compensation of officers (which he notes is a "discretionary expense and can be added back into the future net income for calculating cash flow"), and depreciation. Based on the addition of the three items, the petitioner's accountant concludes that the petitioner can pay the proffered wage for the years 2001, 2002,⁶ 2003, and 2004.

The petitioner's net income is considered above, and shown to be insufficient to pay the proffered wage with the exception of the year 1999. Regarding officer compensation, the sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, in some cases, the petitioner's compensation of officers may be considered as additional financial resources, in addition to its ordinary income.

In the case at hand, however, the sole shareholder listed on the tax return has not indicated that he is able or willing to give up prior and future wages to pay the proffered wage. Further, while the petitioner's 2001 and 2002 tax returns (1120 Schedule E Compensation of Officers), lists that the officer received compensation, in

⁵According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁶ The CPA concludes that the petitioner would have \$33,687 available in 2002 to pay the proffered wage based on the addition of net income, officer compensation and depreciation. This amount is still less than the proffered wage, and would not demonstrate the petitioner's ability to pay.

the years 1998, 1999, 2000, 2003, and 2004, the tax return does not list any officer compensation. The petitioner has not provided any W-2 information related to any officer compensation paid. 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)). Therefore, the petitioner has not properly documented that officer compensation would be available to pay the proffered wage, and would not be combined with the petitioner's net income to demonstrate the ability to pay the proffered wage.

Further, depreciation as a tax concept is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business. The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) 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.

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage whether considered individually, or combined with other factors.

On appeal, counsel cites to the May 4, 2004 Memorandum from William R. Yates, Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2) (May 4 Yates Memo). The May 4 Yates Memo provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary.

Counsel contends that the petitioner's tax returns, along with the letter from the accountant explaining the availability of officer compensation⁷ would demonstrate the petitioner's ability to pay the proffered wage. Further, the petitioner's officer on appeal provides an affidavit, which provides that when the beneficiary is granted permanent residence, he will no longer draw a salary, but instead would support himself based on revenue derived from other companies.

As noted above, the petitioner's tax returns do not list any officer compensation for the years 1998, 1999, 2000, 2003, and 2004. The petitioner has not provided any other W-2 evidence to support its ability to allocate officer compensation in these years to pay the proffered wage. Further, the officer's statement references that he will not draw a salary after the beneficiary obtains permanent residence. The petitioner

⁷ On appeal, the petitioner's accountant provided a second letter, which listed officer compensation for each year from 1998 through 2004. We note that the petitioner provided no documentation to verify officer compensation figures, which were not listed on the petitioner's 1998, 1999, 2000, 2003, and 2004 tax returns.

must demonstrate its ability to pay the proffered wage from the priority date, 1998, onward until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The future availability of funds does not obviate the need to demonstrate the petitioner's ability to pay from 1998 through the present, which the petitioner has not demonstrated. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Further, we note that the statement signed was provided by [REDACTED] who lists that he is an officer of the petitioner, but does not provide a title. The petitioner's tax returns for the years 2001, 2002, 2003, 2004, list a sole shareholder by the name of [REDACTED]. All officer compensation listed in these years was paid to [REDACTED]. [REDACTED]'s position or relationship to the petitioning entity is unclear from the record. He is not listed on any tax returns, or other corporate information to confirm his position or status with the petitioning entity. Additionally, although he signed the I-140 petition, he did not list his title or position with the petitioner. 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).

[REDACTED] also provides that he has personal funds, and funds from other business that could be used to pay the proffered wage. The petitioner is formed as a C corporation. 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." Therefore, [REDACTED] personal funds, or funds from his other businesses could not be used to demonstrate the petitioner's ability to pay the proffered wage.

Counsel additionally references the American Immigration Lawyers Association ("AILA") Handbook and that the handbook provides that "depreciation can be added to the taxable income and it will consider the sum of these two figures to evaluation the ability to pay."

The AILA handbook is not precedent. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions, or guidance from AILA, 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). We have further addressed the issue of depreciation above, which would be insufficient to demonstrate the petitioner's ability to pay the proffered wage.

Based on the foregoing, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage from the priority date onward, and the petition was properly denied. 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.