



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

FILE:

[REDACTED]
EAC 05 206 53845

Office: VERMONT SERVICE CENTER

Date: **MAY 29 2007**

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

[REDACTED]

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a host/hostess. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original February 9, 2006 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 or seasonal 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. 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, which is the date 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). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$550.00 per week or \$28,600 annually.

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 appeal¹. Relevant evidence submitted on appeal includes counsel's statement. Other relevant evidence includes copies of the 2001 through 2004 Forms 1120S, U.S. Income Tax Returns for an S Corporation, for RL, Inc., copies of the beneficiary's 2001, 2002, and 2004 Forms W-2, Wage and Tax Statements, a letter dated December 28, 2005 from the petitioner's co-owner, an undated letter from the petitioner's accountant, and a letter dated December 28, 2005 from the petitioner's accountant. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The 2001 through 2004 Forms 1120S for RL, Inc.² reflect ordinary incomes or net incomes from Schedule K of -\$44,447, \$102,671, \$127,497, and \$220,381, respectively. The 2001 through 2004 Forms 1120S for RL, Inc. also reflect net current assets of -\$138,008, -\$91,402, -\$65,136, and -\$62,086, respectively.

The 2001, 2002, and 2004 Forms W-2, issued by the petitioner for the beneficiary, reflect wages earned by the beneficiary of \$19,903.76, \$12,469.06, and \$16,843.21,³ respectively. No evidence was provided that indicates that the petitioner issued a Form W-2 to the beneficiary in 2003.

The letter from the petitioner's owner states:

Please be informed that I, [REDACTED], am the [REDACTED] [REDACTED] and the Vice President of [REDACTED]. I am a majority shareholder in both corporations.

The undated letter from the petitioner's accountant states that in his professional judgment, the petitioner has demonstrated the financial ability to pay the proffered wage of \$550 per week to the beneficiary as a Host.

The letter dated December 28, 2005 from the petitioner's accountant claims that the requested federal tax returns for 2001 through 2004 for the petitioner is unavailable and that his company and its accountants are working at getting all the documentation for submission within the next 30 days. As of today, seventeen months later, those tax returns have not been submitted.

On appeal, counsel states:

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).

² Because 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, the tax returns for RL, Inc. will not be considered when determining the petitioner's ability to pay the proffered wage of \$28,600.

³ It is noted that data records show that the beneficiary used two different social security numbers, [REDACTED] and [REDACTED] both of which are invalid, and the beneficiary is shown to have used several different addresses on his Forms W-2s (the beneficiary has Forms W-2 from another company) and Forms 1040, U.S. Individual Income Tax Returns, all within the same years and sometimes at the same time.

The decision of CIS is erroneous [sic] in law, arbitrary, capricious, against the weight of the evidence and a violation of due process and fundamental fairness. Petitioner has established, through submission of tax returns of its affiliate entity, the financial ability to pay the proffered wage to the beneficiary at the time of filing the labor certification application and on a continuing basis. Cash assets of the affiliate entity for the year 2001 totaled \$40,853.00 at the end of the tax year, an amount substantially in excess of the proffered wage. The affiliate entity's net income for years 2002, 2003, and 2004 totaled the respective amounts of \$120,235.00, \$141,033.00, and \$228,861.00, demonstrating the petitioner's [sic] continuing financial ability to pay the proffered wage to the beneficiary. The majority shareholder of the affiliate entity is the owner of petitioner. The tax returns of petitioner have been available, as documented previously. It is proper to consider affiliate entity evidence if the evidence merits a determination [sic] that it is more likely than not that petitioner [sic] has the financial ability to pay the proffered wage to the beneficiary.

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, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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 beneficiary on April 20, 2001, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has provided copies of Forms W-2, issued by the petitioner for the beneficiary, for 2001, 2002, and 2004. Therefore, the petitioner has established that it employed the beneficiary in 2001, 2002, and 2004. The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$28,600 and the actual wages paid of \$19,903.76, \$12,469.06, and \$16,843.21 to the beneficiary in 2001, 2002, and 2004, respectively. Those differences are \$8,696.24 in 2001, \$16,130.94 in 2002, and \$11,756.79 in 2004. As the petitioner has not supplied its federal tax returns for 2001 through 2004, the AAO cannot determine if the petitioner had sufficient funds to pay those differences. *See* footnote 2. Since the petitioner provided no evidence that it employed the beneficiary in 2003, the petitioner is obligated to demonstrate that it had sufficient funds to pay the entire proffered wage of \$28,600.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *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.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

In the instant case, the 2001 through 2004 net incomes for RL, Inc. from Schedule K were -\$44,447, \$102,671, \$127,497, and \$220,381, respectively. As the tax returns are not for the petitioner, they will not be considered in determining the petitioner's ability to pay the proffered wage of \$28,600. See footnote 2.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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.⁴ 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 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 out of those net current assets. The tax returns for RL, Inc. show net current assets in 2001 through 2004 were -\$138,008, -\$91,402, -\$65,136 and -\$62,086, respectively. As the tax returns are not for the petitioner, they will not be considered in determining the petitioner's ability to pay the proffered wage of \$28,600. See footnote 2.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$28,600 based on its affiliate entity, RL, Inc. Counsel also contends that the majority shareholder of RL, Inc. is the owner of the petitioner and that it is proper to consider an affiliate entity's evidence if the evidence merits a determination that it is more likely than not that the petitioner has the financial ability to pay the proffered wage to the beneficiary.

Counsel is mistaken. As stated in footnote 2, the petitioner is a corporation, and, as such, 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. 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." In addition, although counsel states that the majority shareholder of RL, Inc. is the owner of the petitioner, counsel has submitted no evidence to corroborate this statement. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). Furthermore, counsel has not provided any authority or precedent decisions to support the use of tax returns for an affiliate company in determining the petitioner's ability to pay the proffered wage. 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, unpublished 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).

On appeal, counsel states that the cash assets of \$40,853.00 at the end of the year in 2001 for RL, Inc. are substantially in excess of the proffered wage. However, again CIS will not consider the tax returns for another company when determining the petitioner's ability to pay the proffered wage of \$28,600. See footnote 2. In addition, the cash assets at the end of the year as reported on Schedule L is used in the calculation of net current assets as explained above and cannot be considered separately when determining the petitioner's ability to pay the proffered wage.

⁴ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

As the petitioner has not submitted its own tax returns and since the Forms W-2 provided for the beneficiary does not show he was compensated at a salary equal to or greater than the proffered wage of \$28,600, the petitioner has not established its continuing ability to pay the proffered wage from the priority date of April 30, 2001.

Finally, it should be noted that if the petitioner wishes to continue with this petition, there are several items that must be explained and/or submitted. Those items include the submission of the petitioner's 2001 through 2004 Forms 1120S, an explanation concerning the invalid social security numbers used by the beneficiary, and an explanation regarding the several different and sometime simultaneous addresses used by the beneficiary on the Forms W-2 and Forms 1040. In addition, the original letter of experience would need to be submitted as it appears that the copy that was provided by the petitioner has the 0 on the number 1990 hand written in and not typed like the remainder of the letter.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

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.