

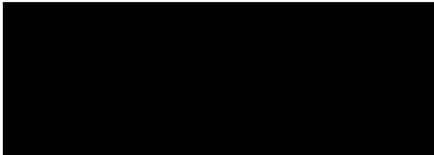
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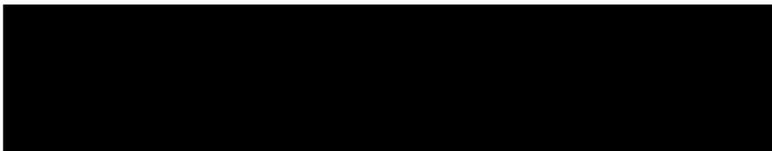


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 05 2007**
WAC 06 103 53168

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

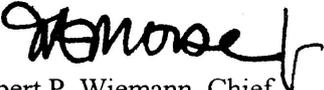
PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a group sales coordinator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

On appeal, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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) provides:

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, the day 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). Here, the Form ETA 750 was accepted for processing on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$16.50 per hour, which amounts to \$34,320 per annum. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary does not claim to have worked for the petitioner.¹

¹ On the biographic information form (G-325A) submitted with the application for permanent residency, the beneficiary states that she has been helping at the petitioner's business since September 2000.

On Part 5 of the visa petition, filed on February 10, 2006, the petitioner claims to have been established in 1974, to currently employ nine workers, to generate \$9,300,000 per annum and to net \$725,000 per year. The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2001, 2002, 2003, 2004, and 2005. They reflect that the petitioner files its federal tax returns using a fiscal year running from July 1st to June 30th of the following year. Thus, the returns below reflect information from July 1, 2001 to June 30, 2006. The returns contain the following information pertinent to taxable income before the net operating loss (NOL) deduction and special deductions, current assets and liabilities, and net current assets.

	2001	2002	2003	2004	2005
Taxable Income before NOL	-\$ 140,593	\$ 34,303	\$ 12,879	\$ 15,877	\$ 10,969
Deduction (Form 1120)					
Current Assets (Sched. L)	\$ 949,802	\$590,559	\$1,026,451	\$ 1,780,381	\$ 1,654,353
Current Liabilities (Sched. L)	\$1,202,303	\$809,032	\$1,209,147	\$ 1,952,650	\$ 1,951,103
Net current assets	-\$ 252,501	-\$218,473	-\$ 182,696	-\$ 172,269	-\$ 296,750

As noted in the above table, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

On August 14, 2006, the director requested the petitioner to submit evidence of its continuing ability to pay the proffered salary beginning at the priority date, in the form of federal tax returns such as the petitioner responded with above. The director also requested that the petitioner provide copies of the corresponding Wage and Tax Statements and/or 1099s and to identify the other group sales travel agents in its employ. If the petitioner did not have any other group sales travel agents, the director instructed it to provide the W-2 of the last person to hold the job.

The petitioner provided copies of W-2s for two years, 2004 and 2005. By letter, the petitioner's president identified one of the employees as a group sales travel agent. She had received \$16,245 and \$18,120 in compensation for 2004 and 2005, respectively.

The director denied the petition on October 11, 2006. Noting that the petitioner's financial data shown on its federal tax returns failed to demonstrate sufficient funds to cover the proffered wage, the director concluded that

² 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.

the petitioner had failed to demonstrate its continuing ability to pay the proffered wage as of the priority date of April 20, 2001, and that additionally, the 2004 and 2005 W-2s of the worker currently bearing the same job, was paid substantially less than the proffered wage.

On appeal, counsel emphasizes that the individual mentioned by the director worked only part-time and did not have the same kind of experience as the beneficiary. Counsel's statement is not documented by the record. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel does suggest that the petitioner has substantial cash assets and provides copies of two bank letters discussing bank balances. One letter is addressed to the petitioner's principal shareholder and one is addressed to the corporate petitioner. Counsel further submits two additional letters, dated October 25, 2006 November 13, 2006, respectively, from [REDACTED] an accredited tax advisor from [REDACTED] who asserts that the determination should focus on the petitioner's current cash assets reflected on Schedule L. He also maintains that non-cash expenditures such as depreciation, should be added back to the petitioner's net income as representing funds to be added to the cash flow. Referring to the end of the June 2006 tax year, [REDACTED] further states that the corporation gave the principals \$40,000 in bonuses to eliminate double taxation, thereby increasing funds available to pay the proffered wage.

The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record contains no evidence that the petitioner has employed and paid compensation to the alien.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*,

632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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 depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. As noted above, CIS will consider *net current assets* as an *alternative* method of demonstrating the ability to pay the proffered wage. Net current assets include consideration of the petitioning corporation's cash and cash-equivalent assets reflected on Schedule L (line(s) 1(d) through 6(d)), but are also weighed against the net current liabilities reflected on Schedule L (line(s) 16(d) through 18(d)). For this reason, the bank letters submitted to the record, are not independently probative of the petitioner's continuing ability to pay a proffered wage beginning on the priority date. As noted above, while the regulation at 8 C.F.R. § 204.5(g)(2) allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation such as the federal tax return is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statements generally reflect only a portion of a petitioner's financial profile and are not indicative of other encumbrances affecting its position. Further, no evidence was submitted to demonstrate when the certificate of deposit mentioned in the corporate petitioner's letter was opened, whether the accounts mentioned in the letter to Mr. [REDACTED] were held by him or by the corporate petitioner, and whether such funds discussed in the bank letters somehow reflected 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 is already included in an examination of the petitioner's net current assets.

We note that it is well settled that a corporation is a distinct legal entity from its owners or individual shareholders. See 18 Am. Jur. 2d *Corporations* § 44 (1985). The court in *Sitar v. Ashcroft*, 2003 WL 22203713

(D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court 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."

It is also observed that if reference on appeal to bonuses paid to the owners took the form of officer compensation, such compensation is paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. There is also no first-hand evidence (affidavits, pertinent tax returns) from the officer that such compensation could have been foregone during the period given.³

In this case, the petitioner's 2001 federal tax return shows that neither its -\$140,593 in net income, nor its net current assets of -\$252,501, was sufficient to cover the certified wage of \$34,320 during that year. Moreover, the financial documentation did not cover the period marked by the priority date of April 20, 2001.

In 2002, the petitioner's reported net income of \$34,303 was sufficient to demonstrate its ability to pay the proffered salary for that year.

In 2003, neither the petitioner's net income of \$12,879, nor its net current assets of -\$182,696 was sufficient to pay the proposed wage offer and demonstrate its ability to pay for this year.

In 2004, neither the petitioner's net income of \$15,877, nor its net current assets of -\$172,269 was enough to cover the certified salary of \$34,320 and demonstrate the petitioner's ability to pay during this year.

Finally, in 2005, neither the petitioner's net income of \$10,969, nor its net current assets of -\$296,750 was sufficient to pay the proffered wage and establish its ability to pay during this period. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning at the priority date. Based on the evidence contained in the underlying record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.

³ The suggestion that the beneficiary would be assuming a portion of this officer's compensation and that such compensation would be considered available to pay the proffered wage is not documented. 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)).