



U.S. Citizenship
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Services

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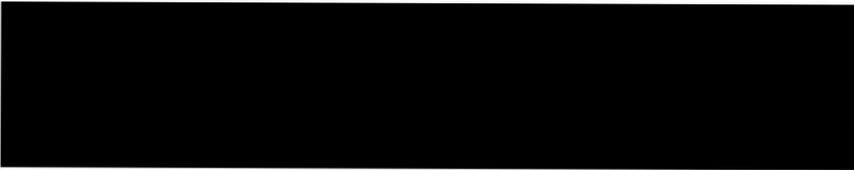
FILE: LIN 05 800 65955 Office: NEBRASKA SERVICE CENTER Date: JUL 25 2008

IN RE: Petitioner:
Beneficiary:



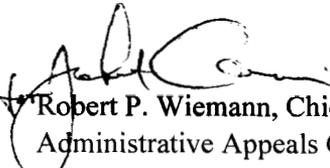
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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

The petitioner is a computer development and consulting business. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.¹ 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 March 4, 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 either 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 C.F.R. § 204.5(d). The priority date in the instant petition is December 27, 2001. The proffered wage as stated on the Form ETA 750 is \$65,000 annually.

¹ It is noted that the petitioner wishes to substitute the current beneficiary for a prior beneficiary, [REDACTED]. CIS records do not show the prior beneficiary received a benefit from the ETA 750.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². Relevant evidence submitted on appeal includes counsel's brief, copies of the petitioner's previously submitted 2002 through 2004 Forms 1120, U.S. Corporation Income Tax Returns, copies of the petitioner's previously submitted bank statements, copies of one of the petitioner's owner's previously submitted bank statements, a copy of the previously submitted 2003 Form W-2, Wage and Tax Statement, for [REDACTED], copies of the petitioner's 1st quarter and 3rd quarter 2004 Employer's Quarterly Report for the State of Florida, and a copy of the 2004 Form W-2, issued by the petitioner on behalf of the beneficiary. Other relevant evidence includes a copy of the petitioner's 2001 Form 1120, copies of payroll records issued by the petitioner on behalf of the beneficiary for the period January 1, 2005 through July 31, 2005, and a copy of the petitioner's compiled profit and loss statement for the period of January 1, 2005 through September 30, 2005.³ The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2004 Forms 1120 reflect taxable income before net operating loss deduction and special deductions or net incomes of \$9,350, -\$29,498, \$10,194, and \$54,062, respectively. The petitioner's 2001 through 2004 Forms 1120 also reflect net current assets of \$112,463, \$30,312, -\$30,976, and \$42,668, respectively.

The 2003 Form W-2 for [REDACTED] reflects wages paid by the petitioner to [REDACTED] of \$58,442.88 in 2003.

The petitioner's 1st quarter 2004 Employer's Quarterly Report for the State of Florida reflects wages paid by the petitioner during that quarter to [REDACTED] of \$13,200.

The petitioner's 3rd quarter 2004 Employer's Quarterly Report for the State of Florida does not reflect any wages paid to either the beneficiary or [REDACTED].

² 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).

³ The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the AAO will not consider the petitioner's compiled profit and loss statement for the period January 1, 2005 through September 30, 2005 when determining the petitioner's ability to pay the proffered wage of \$65,000 from the priority date of December 27, 2001.

The 2004 Form W-2 issued by the petitioner on behalf of the beneficiary reflects wages paid to the beneficiary of \$6,000 in 2004.

The petitioner's payroll records for the period January 1, 2005 through July 31, 2005 reflect wages paid to the beneficiary of \$28,833.32 and per diem paid of \$12,000.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$65,000 based on its bank statements in 2002, its depreciation in 2003 and 2004, the wages paid to Nitin Patel in 2003 and 2004, and the wages paid to the beneficiary in 2004.

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 750 signed by the beneficiary on September 13, 2005, the beneficiary claims to have been employed by the petitioner from August 2004 to the present (September 13, 2005). In addition, counsel has submitted the 2004 Form W-2 issued by the petitioner on behalf of the beneficiary and copies of payroll records for the period of January 2005 through July 2005. Therefore, the petitioner has established that it employed the beneficiary in part of 2004 and in 2005 through July. However, the priority date of the visa petition is December 27, 2001. Hence, the petitioner must establish its ability to pay the entire proffered wage of \$65,000 for the years 2002 and 2003.

The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$65,000 and the actual wages paid to the beneficiary in 2004 and 2005. In this case, the difference between the proffered wage of \$65,000 and the actual wages paid to the beneficiary of \$6,000 in 2004 is \$59,000. The difference between the proffered wage of \$65,000 and the actual wages paid to the beneficiary of \$28,833.32 through July 31, 2005 is \$36,166.68.⁴ The per diem paid to the beneficiary of \$19,500 is not considered as part of the wages paid to the beneficiary.

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

⁴ Since the petitioner did not submit its 2005 tax returns or an audited financial report, the AAO cannot determine if the petitioner had sufficient funds to pay the difference of \$36,166.68 between the proffered wage of \$65,000 and the actual wages paid to the beneficiary of \$28,833.32 in 2005 (through July 31, 2005). Therefore, the AAO will only consider the petitioner's 2002 through 2004 tax returns when determining the petitioner's continuing ability to pay the proffered wage of \$65,000 from the priority date of December 27, 2001.

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. 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 Chang*, 719 F. Supp. at 537.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A. The petitioner's tax returns demonstrate that its net incomes in 2002 through 2004 were -\$29,498, \$10,194, and \$54,062 respectively. The petitioner could not have paid the proffered wage of \$65,000 from its net incomes in 2002 and 2003. In 2004, the petitioner could not have paid the difference of \$59,000 between the proffered wage of \$65,000 and the actual wages paid of \$6,000 to the beneficiary in 2004 from its net income in 2004.

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.⁵ 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 petitioner's 2002 through 2004 net current assets were \$30,312, -\$30,976, and \$42,668,

⁵ 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.

respectively. The petitioner could not have paid the proffered wage of \$65,000 from its net current assets in 2002 and 2003. In 2004, the petitioner could not have paid the difference of \$59,000 between the proffered wage of \$65,000 and the actual wages paid of \$6,000 to the beneficiary in 2004 from its net current assets in 2004.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage of \$65,000 based on its bank statements in 2002, its depreciation in 2003 and 2004, the wages paid to [REDACTED] in 2003 and 2004, and the wages paid to the beneficiary in 2004.

Counsel is mistaken. Counsel's reliance on the balances in the petitioner's bank accounts 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 will be considered below in determining the petitioner's net current assets. In addition, the bank statements for the period July 22, 2002 through December 19, 2002 from SunTrust bank is for [REDACTED] or [REDACTED] at [REDACTED], Orlando, FL 32822-3357 and not the petitioner. 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. 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." Furthermore, it is noted that the petitioner has filed approximately 66 additional petitions, both immigrant and nonimmigrant, from 2001 to the present, when it employs only five employees according to its 2004 third quarter statement.⁶ While an employer's ability to pay the proffered wage may not be an issue before CIS in adjudicating nonimmigrant petitions, the instant petition is an immigrant petition and the petitioner's ability to pay is at issue. The large number of nonimmigrant and immigrant petitions does not support a finding that the petitioner has the available funds to pay the beneficiary the proffered wage.

On appeal, counsel claims that the petitioner's depreciation should be considered when determining the petitioner's ability to pay the proffered wage in 2003 and 2004. However, counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is not persuasive.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to 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 is an actual expense of doing business, whether it is spread over more years or concentrated into fewer years.

⁶ The AAO notes that the petitioner's 2004 first quarter statement reflects employment of nine employees while the I-140 lists the number of current employees as twelve.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated. Therefore, the AAO will not consider depreciation when determining the petitioner's continuing ability to pay the proffered wage of \$65,000 from the priority date of December 27, 2001.

Counsel contends that the wages paid to the prior beneficiary in 2003 and 2004 should be considered when determining the petitioner's ability to pay the proffered wage of \$65,000. Counsel is correct in this instance. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. In this case, the petitioner has submitted the 2003 Form W-2 issued by the petitioner on behalf of the prior beneficiary reflecting wages paid to the prior beneficiary of \$58,442.88 in 2003. The addition of the wages paid to the prior beneficiary of \$58,442.88 to the petitioner's net income of \$10,194 results in a total of \$68,636.88, \$3,636.88 more than the proffered wage of \$65,000. In 2004, the petitioner's first quarter employer's statement indicates that the prior beneficiary was paid \$13,200 in 2004. The addition of the wages paid to the prior beneficiary of \$13,200 and the wages paid to the beneficiary of \$6,000 to the petitioner's net income of \$54,062 results in a total of 73,262, \$8,262 more than the proffered wage of \$65,000. While it appears that the petitioner had sufficient funds to pay the proffered wage of \$65,000 in 2003 and 2004, it is again noted that the petitioner has filed approximately 66 additional petitions, both immigrant and nonimmigrant, from 2001 to the present, when it employs only five employees according to its 2004 third quarter statement. The large number of nonimmigrant and immigrant petitions does not suggest that the petitioner has the available funds to pay the beneficiary the proffered wage. The record does not resolve the petitioner's need to demonstrate an ability to pay the proffered wage for the beneficiary in this matter in addition to paying all of the prospective employees represented by the other petitions filed by the petitioner. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

For the reasons discussed above, the assertions of counsel 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.