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U.S. Citizenship
and Immigration
Services

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BJ

FILE:

SRC 06 065 52512

Office: TEXAS SERVICE CENTER

Date:

JAN 28 2008

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the Form I-140 petition, the petitioner is a provider of medical practice management services. It seeks to employ the beneficiary permanently in the United States as an information systems manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the 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 and denied the petition accordingly.

On appeal, the petitioner submits additional evidence. For the reasons discussed below, we uphold the director's findings and note several inconsistencies that have not been resolved.

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.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 28, 2003. The proffered wage as stated on the Form ETA 750 is \$88,881 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of March 2003. On the petition, the petitioner claimed to have an establishment date in 2001, a gross annual income of \$332,851, an undisclosed net income and eight employees.

After issuing a request for additional evidence and considering all of the evidence of record, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 10, 2006, denied the petition.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner 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, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

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 income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). 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, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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.

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. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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.

¹ 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.

The entity that filed the Form ETA 750, filed on July 28, 2003, is [REDACTED]. This corporation is also listed as the petitioner on the Form I-140, filed on December 22, 2005. The petitioner submitted 2003, 2004 and 2005 Forms W-2 issued to the beneficiary by "[REDACTED]" and "[REDACTED]" reflecting wages of \$33,843.68, \$37,700 and \$47,500 respectively. Assuming these wages were paid by the petitioner, it must demonstrate its ability to pay the difference between these wages and the proffered wage in 2003, 2004 and 2005, \$50,037.32, \$51,181 and \$41,381 respectively. Despite the use of the abbreviation "Inc." on both the Form ETA-750 and the Form I-140 petition, the document submitted as the petitioner's 2003 tax return, covering April 1, 2003 through December 31, 2003, is filed on an Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income and lists the taxpayer as [REDACTED]. It lists the date business began as April 1, 2003 and identifies the principal product or service as "billing collections," code number [REDACTED]. On Schedule B, the entity filing the return is identified as a "Domestic limited liability partnership." Schedule L shows that the limited partnership ended the year with the following balance sheet items:

Cash	\$0
Other current assets	\$40,404
Buildings and other depreciable assets less accumulated depreciation	\$12,246
Intangible assets less accumulated amortization	\$257
Other current liabilities	\$19,761
Partners' capital accounts	\$33,146

The schedules K-1 reflect that [REDACTED] and [REDACTED] each owned 50 percent of the company, with [REDACTED] ending the year with a capital account of \$52,823 and [REDACTED] ending the year with a capital account of (\$19,677). We further note that the return indicates that the limited partnership suffered a net loss of \$39,409 in 2003. According to the above-quoted Schedule L, the limited partnership ended 2003 with net current assets of \$24,643. Thus, in 2003, the limited partnership could not have paid the difference between the wages paid and the proffered wage out of its net income (there was none) or its net current assets.

The document submitted as the petitioner's 2004 tax return is also an IRS Form 1065 and lists the taxpayer as [REDACTED]. The date business began is listed as January 1, 2004, after the Form ETA 750 was filed. The principal product or service is listed as "consulting," code number 541519. On Schedule B, the taxpayer is characterized as a "Domestic general partnership." If the 2004 return was filed by the same entity that filed the 2003 return, the assets, liabilities and equity for the beginning of the year should match the year-end assets, liabilities and equity for 2003. Instead, according to Schedule L, the general partnership began the year with the following balance sheet items:

Cash	\$21,000
Other current assets	\$0
Buildings and other depreciable assets less accumulated amortization	\$0
Intangible assets less accumulated depreciation	\$0
Other current liabilities	\$0
Partners' capital accounts	\$21,000

The 2004 tax return includes three Schedules K-1 identifying three partners, one of which is the beneficiary [REDACTED]. In addition, the 2004 tax return shows that the general partnership had a net income of \$99,868, sufficient to cover the difference between the proffered wage and the wages paid in that year.

The 2005 IRS Form 1065, submitted in response to the director's request for additional evidence, also indicates that the tax payer is a general partnership. In 2005, the general partnership shows a net income of \$1,058 and current assets that exceed current liabilities. Thus, according to the record before the director, the general partnership was unable to pay the proffered wage from its net income or net current liabilities in 2005. On appeal, the petitioner submits a new 2005 IRS Form 1065 for a general partnership. The return is not designated as an amended return in Part G. This new return also shows a net income of only \$1,058 but now shows net current assets of \$4,207, still insufficient to cover the difference between the proffered wage and the wages paid in 2005.

In light of the above, the limited partnership and the general partnership are unable to cover the difference between the proffered wage and the wages paid in 2003 and 2005. Assuming these entities are the petitioner, the petitioner has not demonstrated its ability to pay the proffered wage as of the priority date in this matter. Thus, we uphold the director's decision.

Moreover, the record also contains serious discrepancies regarding the petitioning entity and raises concerns about the beneficiary's ownership of the petitioner. As stated above, the entity that filed the Form ETA 750 and Form I-140 is identified on both forms as a corporation. According to the 2003 tax return, however, the entity claimed to be the petitioner was operating as a limited liability company since at least April 1, 2003, prior to the dates both the Form ETA 750 and Form I-140 petition were filed. Thus, it is not clear that an existing entity filed the Form ETA 750 or the Form I-140. Moreover, on January 1, 2004, the petitioner appears to have changed structures an additional time from a limited liability partnership to a general partnership.

The record contains no evidence that the petitioner exists or existed as a corporation, as would be expected from the abbreviation "Inc." The Schedules K-1 reflect that both the limited partnership and the general partnership are or were owned by individuals, not a holding corporation. If a separate entity exists as a corporation, it is that corporation, as the filer of the Form ETA 750 and the petition, that must establish its ability to pay. Thus, in that case, the partnership tax returns would be irrelevant.

Alternatively, it is possible that the petitioner may have existed as a corporation and changed its organizational structure. In that case, in order for the general partnership that now exists to rely on an alien employment certification filed by a different entity, it must establish that the general partnership is the successor-in-interest to the corporation or that it is the successor-in-interest to the limited liability partnership *and* that the limited liability partnership is the successor-in-interest to the corporation. See *Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481, 482 (Commr. 1986). The general partnership must also show that each successor assumed all of the rights, duties, obligations, and assets of the predecessor and continues to operate the same type of business as the original employer. *Id.*

It is unknown whether either the limited liability partnership or the general partnership assumed the rights, duties, obligations and assets of the corporation. The record suggests that the general partnership did not assume the rights, duties, obligations and assets of the limited liability partnership as the year-end numbers for the limited liability partnership in 2003 do not match the beginning of the year numbers for the general partnership in 2004. Moreover, according to the 2003 and 2004 tax returns, boxes B and C, the general partnership does not continue to operate the same type of business as the limited liability partnership.

In addition, the ETA 750 indicates that the beneficiary will report directly to the "Owner (Majority Share Holder)" of [REDACTED]. In 2003, as stated above, the Schedules K-1 of the limited partnership identify the two owners as [REDACTED] and [REDACTED]. In 2004, however, the general partnership had three partners, one of which is the beneficiary, [REDACTED] who owns 37.5 percent of the partnership, as much or more than the other two partners. The ownership of the corporation, if it ever existed, is unknown. If the beneficiary already owned a percentage of the entity that filed the ETA 750 when it was filed, the assertion that the beneficiary would report to the majority owner was a misrepresentation.

Under the regulations at 20 C.F.R. §§ 626.20(c)(8) and 656.3, as in effect when the ETA 750 was filed in this matter, the petitioner has the burden, when asked, to show that a valid employment relationship exists and that a bona fide job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for the position, it is not a bona fide offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286, 1287 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

As the above concerns relate to the petitioner's ability to use the Form ETA 750 filed by what appears to be a different entity and the overall validity of that certification, any future petition relying on this Form ETA 750 would need to resolve these issues.

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.