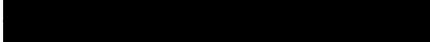




U.S. Citizenship
and Immigration
Services



FILE: LIN 02 126 53300 Office: NEBRASKA SERVICE CENTER Date: **OCT 20 2004**

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.

for 
Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent disclosure of information
in violation of privacy

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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 an injection molds firm. It seeks to employ the beneficiary permanently in the United States as a polishing department supervisor. 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.

On appeal, current counsel¹ submits additional evidence and asserts that the parent corporation of the petitioner establishes the petitioner's continuing financial ability to pay the certified wage.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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) 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 January 8,

¹ Current counsel refers to an earlier "Notice of Entry of Appearance as Attorney or Representative" (Form G-28) as authorizing her to appear for the petitioner. The earlier G-28 was filed by a different attorney, but with the same address. Current counsel's name does not appear on this document. Counsel is reminded that a Form G-28 must either indicate all individual names of a firm's attorneys authorized to act for the petitioner, or separate G-28s must be submitted.

1998. The proffered wage as stated on the Form ETA 750 is \$66,500 per annum. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since 1995.

On Part 5 of the petition, the petitioner claims to have been established in 1948, have a gross annual income of ten million dollars, and to currently employ sixty-five workers. In support of its continuing ability to pay the proffered wage, the petitioner submitted page one of its 1998, 1999, and 2000, Form 1120, U.S. Corporation Income Tax Return. It is noted that the name and employer identification number on the returns are the same as those of the petitioner named in the approved labor certification and visa petition, but the address is in Milwaukee, Wisconsin, not Melrose Park, IL. These partial copies of federal income tax returns reflect that the petitioner files its taxes using a fiscal year running from March 1st to February 28th or 29th of the following year. In 1998, 1999, and 2000, the petitioner reported a taxable income of -\$239,214, -\$1,210,370, and -\$125,196, respectively, before taking the net operating loss (NOL) deduction. The petitioner also submitted a color brochure and e-mail web site description of its activities, which describes it as being "a division of Triangle Tool Corporation."

On April 17, 2002, the director requested additional evidence from the petitioner pertinent to its continuing ability to pay the proffered wage, beginning on the priority date of January 8, 1998. The director advised the petitioner that such evidence must include complete copies of its federal tax returns, annual reports, or audited financial statements. The director further instructed the petitioner that since the record suggested that the petitioner had employed the beneficiary since the ETA 750 was filed, that as an alternative, it could submit copies of the beneficiary's Wage and Tax Statements (W-2) and a copy of the alien's most recent pay stub showing that he had been paid at least the proffered wage since the priority date as established by the ETA 750.

In response, the petitioner, through counsel, submitted a letter, dated July 1, 2002, signed by [REDACTED] a certified public accountant. [REDACTED] describes Triangle Tool Corporation as a closely held company, established in 1963, which purchased the petitioner in 1993. [REDACTED] asserts that Triangle Tool has more than 100 employees and more than \$20,000,000 in gross receipts. He states that Triangle Tool made a \$3,000,000 capital contribution to the petitioner in 1998 and, since that time, the petitioner has been self-sustaining and has had the ability to pay the proffered wage. In a cover letter dated July 9, 2002, counsel reiterates the claims contained in [REDACTED] letter and asserts that the petitioner is not required to produce tax returns or audited financial statements because of Triangle Tool's status.

The director denied the petition on August 30, 2002. 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. The director noted that as a separate legal entity, the petitioner had not established its ability to pay the proffered wage through the submission of any of the requested evidence.

On appeal, current counsel submits a copy of a letter from [REDACTED]. Counsel states that it serves as supplemental evidence demonstrating that the petitioner's ability to pay the proffered wage is established through its corporate relationship to Triangle Tool. In his letter, [REDACTED] states that he is the owner of Triangle Tool and bought the petitioner in 1993. His son is the petitioner's president. Mr. [REDACTED] describes the petitioner as a division of Triangle Tool and asserts that both companies can assure payment of the proffered wage. Counsel also resubmits, on appeal, the same one-page copies of the petitioner's 1998,

1999 and 2000 federal tax returns and a copy of the July 2002 letter from ██████████. Counsel provides a copy of the petitioner's trial balance computer print-out from April 30, 2002 and a copy of a letter, dated June 27, 2002, from ██████████ to the petitioner's counsel, stating that the petitioner's owners are reluctant to provide financial information, but assuring counsel that the petitioner can continue to pay the beneficiary. A copy of a June 26, 2002, letter from the ██████████ the president of the petitioner, also offers similar information as ██████████ June 2002 letter. Finally, counsel submits a copy of a June 26, 2002, letter from ██████████, a senior vice-president of Marshall & Ilsley Bank, Brookfield, Wisconsin. ██████████ expresses confidence that the petitioner has the capacity to pay the proffered salary based on his bank's long relationship with the petitioner and Triangle Tool.

It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner must establish its continuing ability to pay a proffered wage beginning at the priority date through its federal tax returns, audited financial statements, or annual reports. Simply going on record without the appropriate documentary evidence, as specified by the regulation, through its own letters or those of its business associates, as offered here, is not sufficient for a petitioner to meet its burden of proof. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, it is not clear from ██████████ letter whether he is the principal shareholder of both Triangle Tool and the petitioner or whether Triangle Tool is the principal shareholder of the petitioner. Nevertheless, it is noted that while ██████████ and the petitioner's literature describe the petitioner as a "division" of Triangle Tool, the limited evidence submitted to the record suggests that the petitioner is actually organized and operated as a separate corporation, independently reporting and paying taxes on its income. As noted by the director, the petitioner, as the prospective U.S. employer of the beneficiary, must establish its own continuing ability to pay the proffered salary. In this case, the assurances of the principal shareholder of a different corporation, based on its own size and gross income, does not demonstrate the petitioner's ability to pay the certified wage of \$66,500 per year.² It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

² As noted *supra*, 8 C.F.R. § 204.5(g)(2) provides that the director *may* accept a statement from the financial officer of the organization, which establishes the petitioner's ability to pay the proffered wage. Thus, the director retains discretion to require additional evidence in appropriate cases.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

See also, *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Moreover, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, a guarantee is a future promise of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) in support of her contention that Triangle Tool's ability to pay the proffered wage may also be considered as the parent company of the petitioner. That case involved the consideration of whether an alien was a "professional" within the meaning of 8 U.S.C. § 1101(a)(32). With reference to the ability to pay the proffered salary, the court noted that a parish church may rely upon the financial support of the parent nation-wide church. In this matter, although the AAO may consider the guidance suggested in that case, it is noted that the rationale of *Full Gospel* is not binding in this regard, in cases arising outside of its own jurisdiction. Moreover, it is questionable whether *Full Gospel's* rationale is still followed in its own jurisdiction. The same district court, in a case involving the determination of whether an alien could be classified as a special immigrant religious worker, more recently found, that as the parent church organization would not be paying the local religious workers' salaries, the assets of the parent church were irrelevant in evaluating a local church petitioner's ability to pay the proffered wage. *Aveni v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997).

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 that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period.

In the instant matter, on appeal, counsel submits copies of the beneficiary's W-2s for 1998, 1999, 2000 and 2001. She further offers a copy of the petitioner's payroll records showing the beneficiary's earnings during three weeks in April and three weeks in May 2002. The W-2s reveal that the petitioner paid the beneficiary \$45,429.82 in 1998; \$51,118.93 in 1999; \$48,397.74 in 2000; and \$48,186.90 in 2001. The difference between the actual wages paid and the proffered wage of \$66,500, as counsel notes in her brief, was \$21,070.18 in 1998; \$15,381.07 in 1999; \$18,102.26 in 2000; and \$18,313.10 in 2001.

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, as asserted by counsel, 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. 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). 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. As stated by the court in *Chi-Feng Chang v. Thornburgh*:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request 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. INS and judicial precedent support the use of tax returns and the *net income figures* in determining the petitioner's ability to pay. Plaintiff's argument that these figures should be revised by the court by adding back depreciation is without support. 719 F. Supp. at 536.

As an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ It represents a measure of a petitioner's liquidity and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets. In this case, complete copies of the petitioner's federal tax returns were not provided, so no examination of its net current assets is possible.

As discussed above, even without considering the beneficiary's payroll records for 2002, the shortfall of \$21,070.18, between the actual wages paid to the beneficiary and the proposed wage offer of \$66,500, could not be paid out of the petitioner's 1998 net income of -\$239,214. The 1999 shortfall of \$15,381.07, could not be covered by the petitioner's reported net income of -\$1,210,370. The 2000 difference of \$18,102.26, between the actual wages paid and the proffered salary, could not be paid out of the petitioner's net income of -\$125,196. As the petitioner failed to provide any copy of its 2001 federal income tax return, no further comparison can be made.

Upon review of the evidence contained in the record and upon further consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner failed to submit evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage as of the priority date in any of the relevant years.

³ 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.

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Page 7

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.