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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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APR 21 2005

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

EAC 03 156 51365

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

[REDACTED]

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:

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, Director
Administrative Appeals Office

Cc:

[REDACTED]

DISCUSSION: The employment-based immigrant visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] states that it is composed of full service hotels. It seeks to employ the beneficiary as a cook. As required by statute, the petition was accompanied by certification from the Department of Labor. The director concluded that the petitioner had not established that it had the continuing financial ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner contends that it has been acquired by another entity that will continue the sponsorship of the beneficiary.

Section 203(b)(3)(A)(i) of 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) also provides 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is 12.17 per hour, which amounts to \$25,313.60 annually. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claims to have worked for the petitioner since March 2000.

On Part 5 of the petition, filed April 14, 2003, the petitioner states that it was established in 1972 and currently employs 86 workers

In support of its ability to pay the proffered salary, the petitioner initially submitted a letter, on Holiday Inn letterhead, dated April 7, 2003, from [REDACTED]. She states that the "Holiday Inn of Danbury is financially able to pay [the beneficiary] \$12.17 per hour." She states that the tax identification number of this business is [REDACTED].

The director requested additional evidence from the petitioner on June 26, 2003, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that evidence of its continuing ability to pay shall be in the form of copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In a case where a prospective U.S. employer employs 100 or more workers, a statement from a financial officer may be accepted. The director also advised the petitioner to submit copies of the beneficiary's Wage and Tax Statement (W-2s) for 2001 and 2002.

In response, the petitioner submitted an internally generated "summary of operations" covering 2000 and 2001. The petitioner also submitted a letter, dated July 9, 2003, on Holiday Inn letterhead, from [REDACTED] Human Resources, Danbury Holiday Inn. She states that the purpose of the letter is to verify that [REDACTED] has the ability to pay the proffered salary to the beneficiary. She then states that the tax identification number of this business is [REDACTED].

The petitioner also provides the beneficiary's W-2s for 2001 and 2002. They both reflect that the beneficiary's employer was [REDACTED] Services," federal identification number [REDACTED].

The director denied the petition on October 10, 2003, determining 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 found that the petitioner's internally generated financial statements in the form of statement of operations were insufficient to establish its ability to pay the proffered wage and that the W-2s failed to establish that the beneficiary was employed by the petitioner.

On appeal, the petitioner submits another letter, on Holiday Inn letterhead, dated October 22, 2003, from Ms. [REDACTED]. She states that the beneficiary "is under the employ of the Danbury Holiday Inn d.b.a. MJ Employment Services with a parent company Motel Hotel Associates." She advises to call a telephone that if further verification is needed to certify that "the same payroll account number supports all of the titles to these companies."

Another letter appears in the file subsequent to the filing of the notice of appeal. This one, dated December 6, 2004, is also on Holiday Inn letterhead and is from [REDACTED] General Manager/Owner." He states that "we have recently purchased the entity known as [REDACTED]. We are now called SMP Investment Corp., DBA The Holiday Inn. Also please be advised that we will continue the sponsorship on behalf of [the beneficiary]."

Despite the additional information of acquisition or ownership imparted by the correspondence from Ms. [REDACTED] and Mr. [REDACTED] nothing in their letters addresses the director's reasons for denying the petition.

As noted by the director in both her request for additional evidence and decision denying the petitioner, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner's ability to pay the proffered wage be supported by evidence in the form of audited financial statements, federal tax returns, or annual reports. Unaudited financial statements consisting of a petitioner's internal summary of operations have limited probative value and are not persuasive evidence of a petitioner's ability to pay the proffered wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the

unsupported representations of management. The unsupported representations of management are not convincing evidence of a petitioner's ability to pay the proffered wage.

As initially noted, the record in this case shows that [redacted] Inc. is the named petitioner on the approved labor certification and on the Immigrant Petition for Alien Worker (I-140). Subsequent to this representation, no fewer than five other entities¹ are described as being either the same as, related to, parent of, or owning the petitioner. As noted by the director, as a general matter, a corporate petitioner is a separate and distinct legal entity from its owners, stockholders, or other enterprises. Consequently, any assets of its shareholders or other entities cannot be considered when examining a petitioning corporation's ability to pay the proffered salary. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). 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). In some situations, where a different entity may have acquired the original employer named on the labor certification, as a successor-in-interest, it has the burden to demonstrate that it has assumed the rights, duties, obligations, and assets of the original employer. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In determining a petitioner's continuing ability to pay a proffered wage, CIS will examine a petitioner's federal income tax return, if provided, 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. 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.

CIS will also 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.² A corporate petitioner's year-end current assets and current liabilities are generally shown on Schedule L of its federal tax return. If a corporation's 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.

In this matter, none of the requisite evidence described by the regulation at 8 C.F.R. § 204.5(g)(2) consisting of annual reports, audited financial statements, or federal tax returns, has been submitted. The beneficiary's W-2s do not reflect that she has been employed by the petitioner. In view of the foregoing and after consideration of the documentation contained in the underlying record and further presented on appeal, the AAO cannot conclude

¹ The five are [redacted] Employment [redacted] and [redacted]

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

that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of April 30, 2001.

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.