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U.S. Citizenship
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APR 27 2005

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FILE: [Redacted]
LIN 03 164 53605

Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

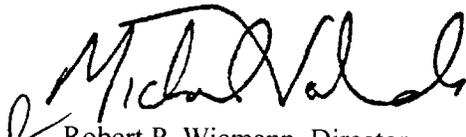
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

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

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The case will be remanded for further consideration and action.

The petitioner is a medical center. It seeks to employ the beneficiary permanently in the United States as a medical technologist/laboratory 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, counsel submits a brief and additional evidence.

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 granting 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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$21.65 per hour, which equals \$45,032 per year.

On the petition, the petitioner stated that it was established during 1996 and that it employs six workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to work for the petitioner, but did not state the date upon which that employment commenced. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Chicago, Illinois.

In support of the petition, counsel submitted copies of the 1999, 2000, and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation of the petitioner, [REDACTED] Limited.

The 1999 return shows that the petitioner declared ordinary income of \$61,570 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$22,225 and no current liabilities, which yields net current assets of \$22,225.

The 2000 return shows that the petitioner declared ordinary income of \$514 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the priority date is April 16, 2001, however, evidence pertinent to the petitioner's income and assets during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2001 return shows that the petitioner declared ordinary income of \$772 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on August 20, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested a copy of the petitioner's 2002 income tax return.

In response, counsel submitted a letter, dated September 12, 2003, from the petitioner's president stating that, in addition to owning the petitioner he owns another company, and that the two have now merged. The president further stated that the two, combined, have gross revenues of approximately \$900,000 and net income in excess of \$125,000. The president also notes that he himself has income in excess of \$270,000 and is willing to reduce his personal income as necessary to pay the proffered wage. The president also stated, but submitted no evidence to demonstrate, that employing the beneficiary would increase the petitioner's revenues sufficiently to pay the proffered wage.

With that response counsel submitted a copy of the 2002 Form 1120S, U.S. Income Tax Return for an S Corporation of the petitioner, [REDACTED] Limited. That return shows that the petitioner declared ordinary income of \$4,514 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had neither current assets nor current liabilities, apparently as a result of the merger of which the petitioner's president spoke. That return indicates that it is the petitioner's final return.

Counsel also submitted the 2002 Form 1120S, U.S. Income Tax Return for an S Corporation of [REDACTED] of Chicago, Limited. That return indicates that [REDACTED] Center of Chicago, Limited, has the same address as the original petitioner and that the 2002 return is the initial return of [REDACTED] of Chicago, Limited.

Further still, counsel submitted the 2002 joint Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse. That return indicates that the petitioner's owner and owner's spouse declared adjusted gross income of \$273,470 during that year.

Finally, counsel submitted pay stubs showing that [REDACTED] Center of Chicago, Limited, employed the beneficiary during some weeks of 2003. The most recent of those pay stubs is for the week of September 8, 2003 to September 14, 2003. A year to date total on that pay stub indicates that, including that week's pay,

beneficiary had received a total of \$4,950 during that calendar year from [REDACTED] Center of Chicago, Limited.

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 October 15, 2003, denied the petition.

On appeal, counsel states that during 2002 the petitioner merged with [REDACTED] Limited, which then held the petitioner's assets. Counsel states that simultaneously [REDACTED] Limited was created to carry on the medical practice of the petitioner's clinics. Counsel states that the same person, [REDACTED] who was president and owner of the petitioner, [REDACTED] Limited, is also president of and owns [REDACTED] Center of Chicago, [REDACTED] Limited. Counsel states that, therefore, both of those corporations are successors-in-interest to the petitioner.

Counsel argued that, in finding that the petitioner had not demonstrated the ability to pay the proffered wage, CIS had failed to consider that the petitioner is an subchapter S corporation and the "flow-through" nature of its income.

Counsel also argued that CIS should consider the income and assets of the petitioner's owner in determining whether the petitioner has demonstrated its ability to pay the proffered wage. Counsel states that, in refusing to consider the petitioner's owner's income and assets, "[CIS] fails to accept what an 'S-Type' corporation is. It is an individual or individuals seeking to gain benefits of a corporation (e.g. limited liability) while still being a small entity."

Counsel submits (1) a copy of a Plan of Merger, dated December 31, 2002, between the petitioner and [REDACTED] Limited, (2) a copy of an undated action of the petitioner's owner merging the petitioner with [REDACTED], (3) a letter, dated October 23, 2003, from an attorney whose appearance is not entered in the instant case, (4) bank statements showing the balance in the petitioner's checking account during various months, and (5) the 2000 and 2001 joint Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse.

The 2000 and 2001 tax returns show that the petitioner's owner and owner's spouse declared adjusted gross income of \$216,173 and \$269,892 during those years, respectively.

The Plan of Merger, the undated action of the petitioner's owner, and the attorney's letter all purport to show that the petitioner merged with [REDACTED] Limited, and that the resulting merged corporation is [REDACTED] Limited, which acquired all of the petitioner's assets. The attorney's letter also states that [REDACTED] of Chicago, Limited is the successor-in-interest to the petitioner's medical practice, but does not state how he reached that conclusion.

Counsel notes that by incorporation, an individual seeks to limit the liability of its owners for the debts and obligations of the business. Counsel correctly summarizes the nature and purpose of a subchapter S corporation, but fails to consider the results that necessarily accompany them.

A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24

(BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else.¹ As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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 returns.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that 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. In the instant case, counsel submitted evidence that [REDACTED] of Chicago, Limited employed during part of 2003 and paid her \$4,950. Although the Form ETA 750 indicates that the beneficiary began working for the petitioner prior to the priority date, no other reliable evidence was provided to indicate that the petitioner employed the petitioner as stated or paid her.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the

¹ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$45,032 per year. The priority date is April 16, 2001.

During 2001 the petitioner declared ordinary income of \$772. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner's had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year.

Counsel asserts, however, that the petitioner's owner would have elected to take less compensation had that been necessary to pay the proffered wage during that year. The September 12, 2003 letter from the petitioner's sole owner confirms that assertion. The petitioner's owner's 2001 Form 1040 U.S. Individual Income Tax Return indicates that he had adjusted gross income of \$269,892 during that year. No evidence pertinent to the petitioner's owner's family's expenses was presented. That the petitioner's owner could have taken less compensation and still supported his family of four, however, appears reasonable and the evidence indicates that the petitioner's owner would have been willing so to do. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner, [REDACTED] Center, Limited, declared ordinary income of \$4,514. That amount is insufficient to pay the proffered wage. The petitioner's 2002 Schedule L shows that at the end of that year the petitioner had neither current assets nor current liabilities, and, therefore, no net current assets. The petitioner's tax return does not demonstrate that it could have paid any portion of the proffered wage out of its net current assets during that year.

The petitioner's owner's 2002 Form 1040 U.S. Individual Income Tax Return, however, shows that the petitioner's owner declared adjusted gross income of \$273,470 during that year. Again, the petitioner's owner states that he was willing, and appears to have been able, to reduce his personal income in order to pay the proffered wage and still to support his family of four on his remaining income. The petitioner has shown the ability to pay the proffered wage during 2002.

As noted above, CIS (legacy INS) has long held that it 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. However, in the present case, CIS is basing its determination solely on the merits of the petitioning corporation. Specifically, CIS is basing its determination on counsel's contention that the petitioner can pay the wage because it has the financial flexibility to set the annual compensation of its sole owner based on the profitability of the instant incorporated medical practice. In presenting an analysis of the instant petitioner's

Federal Tax Returns from the years 2000², 2001, and 2002, counsel offers a compelling argument in regard to this issue. The returns for this period show that the petitioner exercises a large degree of financial flexibility in compensating its sole officer and stockholder, [REDACTED]. Clearly, the petitioning entity is a profitable enterprise for its owner. In 2000, the petitioner paid its sole officer and stockholder \$218,000. In 2001, the petitioner paid him \$248,000. In 2002, the petitioner paid him \$135,000. Such a history of payments lends credence to counsel's contention that the petitioner is a viable enterprise and it compensates its sole officer only after satisfying the corporation's other expenses.

Based on these figures, this office concurs with the arguments presented by counsel on appeal. A review of the distinctive and unique circumstances in this case reveals the instant petitioner's viability as a profitable corporation and confirms that the job offer is realistic and that the petitioner has shown the continuing ability to pay the proffered salary of \$45,032 from the priority date. The AAO will consider the totality of the circumstances concerning the overall magnitude of an entity's business activities when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

An additional issue exists in this case, however, which was not addressed in the decision of denial. Although the evidence indicates that the petitioner has merged with Solutions for [REDACTED] counsel asserts that [REDACTED] Center of Chicago, Limited, which now apparently intends to employ the beneficiary if this petition is approved, is the petitioner's successor-in-interest.

In order to prevail, the substituted petitioner must show that it assumed all of the rights, duties, obligations, and assets of the original petitioner. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

In the instant case, the petitioner has submitted no evidence to show that [REDACTED] Center of Chicago, [REDACTED] assumed any of the original petitioner's rights, duties, obligations, or assets, except in that it now operates a medical practice at the same location where the petitioner did previously. In fact, as the Plan of Merger indicates that [REDACTED] Limited acquired all of the original petitioner's assets, the substituted petitioner clearly did not. Thus, the substituted petitioner in this case is clearly not the original petitioner's successor-in-interest within the meaning of *Matter of Dial Repair Shop*, *supra*, notwithstanding the contrary conclusion reached in the October 23, 2003 attorney's letter.³ Because the substituted petitioner in this case is not the original petitioner's successor-in-interest within the meaning of [REDACTED] the petition may not be approved.

The matter will be remanded for further proceedings and a new decision. The director may request additional evidence on any issue relevant to the approvability or may decline to request additional evidence and issue a new decision in this matter directly.

² This office notes that because the priority date is April 16, 2001, the figures for 2000 would not necessarily be determinative to the question of the petitioner's ability to pay the proffered wage. In this case, however, the figures for 2000 serve to illustrate counsel's contention regarding the compensation of the petitioner's owner and sole officer.

³ This office would address the reasoning underlying the attorney's conclusion, except that no such reasoning was presented.

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 petition is remanded for further consideration and action in accordance with the foregoing.