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MAR 03 2005

FILE: WAC-03-111-54344 Office: CALIFORNIA SERVICE CENTER Date:

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:

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a caregiver. 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, the petitioner submits a letter and additional evidence.

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.

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 February 13, 2001. The proffered wage as stated on the Form ETA 750 is \$1,321.72 per month, which amounts to \$15,860.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in April 1994, to have a gross annual income of \$129,367.88, and to currently employ one worker. In support of the petition, the petitioner did not submit any evidence of its continuing ability to pay the proffered wage beginning on the priority date¹.

On July 21, 2003, the director requested additional evidence to ascertain the petitioner's relationship to [REDACTED] or [REDACTED] LLC. The petitioner submitted a letter stating that "[REDACTED] LLC and [REDACTED] . . . are one and the same." and submitted two businesses licenses and an articles of organization. One license is for facility number [REDACTED] for [REDACTED] in Santa Clara, CA and the other license is for facility number [REDACTED] for [REDACTED] #2 in San Jose, CA. The articles of organization are for [REDACTED] LLC, showing that the petitioner is structured as a limited liability corporation. The employer identification number (EIN) on the visa petition is [REDACTED]. The petitioner's name on the ETA 750A is "[REDACTED] of [REDACTED]" and "[REDACTED]" on the visa

¹ The petitioner may have submitted its tax returns since the director references them in a subsequent request for evidence but the order of the documents in the record of proceeding makes this unclear.

petition. The visa petition lists its address in Saratoga, CA while the ETA 750A lists its address in Santa Clara, CA.

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, on June 9, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide 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. The director specifically requested complete and signed tax returns for 2001 and 2002. Additionally, the director requested the petitioner's quarterly wage reports for the last four quarters and the beneficiary's W-2 forms for 2001 and 2002.

In response, the petitioner submitted Forms 1065 partnership tax returns for [REDACTED] LLC, with EIN [REDACTED] located in San Jose, CA, for the years 2001 and 2002. The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ²	-\$29,350	\$20,822
Current Assets	\$0	\$0
Current Liabilities	\$0	\$0
Net current assets	\$0	\$0

In addition, the petitioner submitted Unicorn [REDACTED] LLC's quarterly wage reports for the last three quarters in 2002 and the first quarter in 2003. Those reports show that [REDACTED] LLC actually employed and paid wages to the beneficiary in the total amount of \$3,150 in 2003; and \$11,550 in 2002. An additional submission contains a chart of the petitioner's employees that shows that the beneficiary did not work for the petitioner at any other time than the last three quarters in 2002 and the first quarter in 2003. A copy of Forms W-2, Wage and Tax Statements, issued by [REDACTED] LLC to the beneficiary also shows that the beneficiary was paid \$15,975 in 2002 and \$8,609 in 2001.

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 September 17, 2003, denied the petition, citing the petitioner's reported loss in 2001 and lack of net current assets. The director noted that the record "indicates the petitioner is a [l]imited [l]iability [c]ompany, not a partnership."

On appeal, the petitioner states that the beneficiary was also paid wages by [REDACTED] which when combined with the wages paid to it by [REDACTED] LLC, add up to \$11,559.80 and evidences the petitioner's continuing ability to pay the proffered wage. The petitioner states that [REDACTED] and the petitioner are owned and operated by the same person [REDACTED]. The petitioner states that it pays the beneficiary's health insurance. The petitioner also states that it underwent major renovations towards "[the] end of 1999 and year 2001," and this adversely impacted its profits until the renovations were completed towards the end of 2001. The petitioner also states that its owners receive income at other places of employment and submits their W-2 forms. Finally, the petitioner states the following: "Our [p]artnership was established in 1994, but in 1999 we became a [l]imited [l]iability [c]ompany, with no change in personnel in the partnership." The petitioner submits W-2 forms issued by [REDACTED] LLC, with an EIN of [REDACTED] to the beneficiary in 2001; paystubs

² Ordinary income (loss) from trade or business activities as reported on Line 22.

without employer identification information; a copy of the beneficiary's health plan; previously submitted evidence; and a number of construction work proposals and invoices for work performed at various locations in California. The petitioner claims that the expenses evidence on its renovations were for two of its facilities – one located in Santa Clara, CA and the other in San Jose, CA. Some renovation evidence pertains to work done in Saratoga, CA, the address listed on W-2 forms issued to ██████████ as her personal address, such as replacing a dishwasher or painting an exterior fence. Finally, the petitioner submits its owner's W-2 wage statements for 2001 and 2002.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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.

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. 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.

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.³ A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

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.

are shown on lines 15 through 17 on its partnership returns for 1998 through 2001, but 16 through 18 on its corporate return in 2002⁴. If a petitioning entity'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.

At the outset, the record of proceeding is unclear concerning the relationships among the various names of business entities and EIN numbers used through these proceedings. It appears as if [REDACTED] owns and operates multiple residential care facilities, but it is not clear that they are related or the same. Submitting licenses for two separate businesses, with different EIN and locations in different cities in the state of California, does not illustrate a nexus between the two. Similarly, the articles of organization did not explain how Parkview or [REDACTED] fall under the business identity of [REDACTED] LLC. Finally, [REDACTED] failure to submit her individual income tax returns adds suspicion to the apparently purposeful cluttering of the business entities since the schedules to those tax returns would clearly evidence her sources of income – whether it is one company or two or three. The petitioner is [REDACTED] with an EIN of [REDACTED] with an address of [REDACTED] Ln, Saratoga, CA 95070. Since that street address matches the personal residence of [REDACTED], it is more likely that the intended place of employment was the address listed on the ETA 750A, which is [REDACTED] in Santa Clara, CA. The tax returns submitted into the record of proceeding are for [REDACTED] LLC; with an EIN of [REDACTED] and an address of [REDACTED] San Jose, CA. The W-2s issued to the beneficiary are for employment at the San Jose address. The petitioner indicates that it renovated two facilities and one address matches the possible place of employment in this case, in Santa Clara, CA. Apparently the beneficiary resides at the Santa Clara address since she lists that as her personal address on her individual income tax returns.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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." This issue of establishing the petitioner's identity is critical to the adjudication of this case since the supporting evidence must match the petitioner. A match is not clear in this case so the tax returns submitted in this case cannot clearly be assigned as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner is structured as a limited liability corporation, then [REDACTED]'s personal assets may not be considered. If the petitioner is structured as a partnership, then [REDACTED]'s personal assets may be considered. Since the petitioner submitted documentation that [REDACTED], LLC is structured as a limited liability corporation, but then submitted tax returns using a form indicating a partnership structure, again, the identity and structure of the petitioner are unclear.

Matter of Ho, 19 I&N Dec 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002. An entity called [REDACTED], LLC, with an EIN of [REDACTED] and an address on [REDACTED] in San Jose, CA paid wages to the beneficiary from 2001 through 2003. The petitioner has not established that [REDACTED], LLC, with an EIN of [REDACTED] and an address on [REDACTED] in San Jose,

⁴ The AAO notes that the director determined the petitioner to have negative net current assets. The AAO cannot ascertain how the director ascertained his figures.

CA, has a legal obligation to pay the proffered wage and is the same entity as the petitioner. Thus, these wage payments may not be attributed towards the petitioner paying actual wages to the beneficiary. However, it is noted that the beneficiary indicated on Form ETA 750B, signed in February 2001, that she did not work for the petitioner in 2001 even though [REDACTED], LLC issued a W-2 form to her to evidence actual employment and wages paid to her in 2001. Again, *Matter of Ho*, 19 I&N Dec. at 591-592 states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Even if [REDACTED] LLC, with an EIN of [REDACTED] and an address on [REDACTED] in San Jose, CA is actually the petitioner in this case, it does not have a net income or net current assets sufficient to cover the proffered wage. In 2001, its net income is less than the proffered wage. In 2002, its net income could show its ability to pay the proffered wage since it is greater than the proffered wage, but it is unclear if [REDACTED] LLC is the petitioner. The petitioner reports no net current assets in either year.

The petitioner discussed its renovation activities as an explanation as to its low profits in 2001 but some of the evidence appears to pertain to [REDACTED] personal residence. Again, *Matter of Ho*, 19 I&N Dec. at 591-592 states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." [REDACTED] has not cited precedent or otherwise connected the evidence she presented to the petitioner's ability to pay in 2001. Explaining why a petitioning entity experienced a loss in a certain year does not excuse that entity from establishing that it had the funds in every relevant year to pay the proffered wage.

Finally, the petitioner states that its payment of health benefits to the beneficiary should further demonstrate its ability to pay the proffered wage. However, health benefits are routinely provided to employees and are not typically considered additional compensation by CIS. There is also no indication on the ETA 750A portion of the job offer that the provision of health benefits would be additional compensation. Such additional compensation would need to have been advertised to potential U.S. applicants for the proffered position during the advertisement and recruitment phase monitored by the U.S. Department of Labor. See 20 CFR §§ 656.20, 656.21, and 656.21(b)(1)(i)(F).

There are many inconsistencies among the evidentiary submissions in the record of proceeding and a lack of clarity among critical issues. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has failed to establish that it has the continuing ability to pay the proffered wage beginning on the priority date.

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.