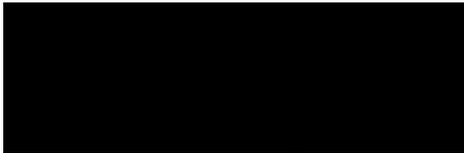


ANALYZING THIS DOCUMENT TO
PREVENT UNLAWFUL INVESTIGATION
VIOLATION OF PERSONAL PRIVACY
PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



66

FILE: WAC-01-244-61513 Office: CALIFORNIA SERVICE CENTER Date: MAY 18 2007

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

DISCUSSION: The Director of the California Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted. The prior decision of the AAO will be affirmed. The petition remains denied.

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 July 18, 1997. The proffered wage as stated on the Form ETA 750 is \$1,291.33 per month, which is \$15,495.96 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner¹.

The petitioner is a residential care facility. 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.

On February 18, 2002, 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 because its net incomes reported for 1998 and 1999, were than the proffered wage, and no evidence was presented for 1997, and denied the petition accordingly. The AAO affirmed the director's decision on December 23, 2003 for many of the same reasons. The AAO's decision also cited *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) to exclude consideration of the petitioner's 1997 tax return submitted into the record of proceeding for the first time on appeal. The AAO's decision also noted discrepancies in information provided by the petitioner's certified public accountant (CPA) and a lack of clarity concerning the entity, [REDACTED] and its relationship to the petitioner, whose owner had submitted individual income tax returns with Schedule Cs indicating that the petitioner was a sole proprietorship, not a corporation.

¹ 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.

On motion, the petitioner submits additional evidence and summarizes that evidence for consideration in its accompanying motion. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Although failing to state the new facts to be proved, since the petitioner is unrepresented, the AAO will exercise favorable discretion, and since new evidence is presented, the motion will be considered a motion to reopen.

On motion, the petitioner submits an unaudited personal financial statement of [REDACTED] the petitioner's owner, and a statement of her individual retirement account (IRA) holdings and life insurance policy value; a letter from the petitioner's CPA explaining that the petitioner was operated as a sole proprietorship until March 31, 1998 until it was incorporated and its employer identification number (EIN) changes; and articles of incorporation and bylaws of [REDACTED]

On review, the record of proceeding affirms the AAO's prior determination that the petitioner has not demonstrated a continuing ability to pay the proffered wage beginning on the priority date. The petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date in 1997 for failure to present evidence with its initial petition or in response to the director's request for evidence², and was properly excluded on appeal through the application of *Matter of Soriano*.

Additionally, regardless of whether or not the petitioner is [REDACTED] and the new documentation submitted on appeal fails to unequivocally establish that fact as will be discussed below, the tax returns filed by [REDACTED] fail to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date. [REDACTED] net incomes in 1998 and 1999 were -\$3,940 and \$127, respectively, both of which are less than the proffered wage. Additionally, [REDACTED] net current assets in 1998 and 1999 were \$357 and \$0, respectively, both of which are less than the proffered wage. Thus, the petitioner could not establish that it could pay the proffered wage out of its net income or net current assets even if it could establish its relationship to [REDACTED]

The petitioner has not established its relationship to [REDACTED]. On its visa petition, filed in 2001, long after its purported date of incorporation, it utilized [REDACTED] social security number instead of an EIN, such as the EIN belonging to [REDACTED]. If the petitioner intended to represent its identity as [REDACTED] then it could have utilized its EIN on that form at that time to avoid inconsistent representations or lack of clarity on that factual point. Additionally, the petitioner's CPA statements notwithstanding³, no document

² The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax return for 1997 prior to filing the petition or in response to the director's request. The 1997 tax return would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

³ Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

submitted on motion provides an address for [REDACTED] that corresponds to the petitioner's address or otherwise demonstrates a successor-in-interest relationship⁴. Thus, the AAO properly cited to *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) in its prior decision concerning this issue.

Additionally, if the petitioner is no longer structured as a sole proprietorship, then [REDACTED] personal assets may not be considered when analyzing the petitioner's continuing ability to pay the proffered wage beginning on the priority date. 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." The documentation of [REDACTED] life insurance policy and IRA are therefore not properly under consideration as evidence of the petitioner's continuing ability to pay the proffered wage from April 1998 onwards if the petitioner incorporated at that time as stated on motion.

Regardless, the petitioner only submitted an unaudited statement with respect to [REDACTED] personal assets. 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 persuasive evidence of a petitioner's ability to pay the proffered wage.

The unsigned corporate tax return for 2000, for [REDACTED] submitted on appeal shows sufficient net income to pay the proffered wage; however, in any additional proceedings in this matter, a certified IRS-return must be submitted to corroborate the financial figures submitted with the unsigned version contained in the record of proceeding.

Upon review, the AAO's prior adjudicator accurately assessed the petitioner's net income, as well as the totality of circumstances concerning its financial situation, and determined that the petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date in 1997, 1998, or 1999, out of its net income or any other source.⁵ The AAO on review determines that the petitioner failed to show sufficient net

⁴ This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

⁵ 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). Reliance on the petitioner's gross

current assets and a relationship to [REDACTED] as well. Therefore, the petitioner has not established 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 motion to reopen or reconsider is granted. The prior decision of the AAO, dated December 23, 2003, is affirmed. The petition remains denied.

receipts and wage expense is misplaced. 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.

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. 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. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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.