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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
LIN 03 129 50126

Office: NEBRASKA SERVICE CENTER

Date: NOV 07 2008

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**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 remanded for further consideration.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as an auditor. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief and additional evidence.

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) 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 23, 2001. The proffered salary as stated on the labor certification is \$48,400 per year.

With the petition, counsel failed to submit any evidence of the petitioner's continuing ability to pay the proffered wage from the priority date. On August 1, 2003 and on November 26, 2003, the director requested evidence pertinent to the petitioner's continuing ability to pay the proffered wage. The director specifically requested copies of the petitioner's 2001 and 2002 federal income tax returns and copies of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax Statements.

In response, counsel submitted copies of the petitioner's 2001 and 2002 Forms 1120S, U.S. Income Tax Returns for an S Corporation, copies of the petitioner's bank statements for the period February 28, 2001 through September 30, 2002, copies of the shareholders' financial statements and Forms 1040, U.S. Individual Income Tax Returns, and a copy of the petitioner's projected incomes for the years 2004

through 2006. The 2001 tax return reflected an ordinary income of -\$207,782 and net current assets of \$200,645. The 2002 tax return reflected an ordinary income of -\$368,138 and net current assets of \$51,746. The bank statements reflected balances ranging from a low of \$16,370.52 to a high of \$181,666.77. The projected income statements for the years 2004 through 2006 reflected net-operating incomes of \$911,469, \$994,236, and \$1,066,374, respectively. The net worth of [REDACTED] and [REDACTED] (32% owner) was \$1,508,000 as of September 20, 2003, and their 2002 Form 1040 reflected an adjusted gross income of \$23,117 (family of five). The net worth of [REDACTED] and [REDACTED] (12% owner) was \$3,032,500 as of July 30, 2003, and their 2002 Form 1040 reflected an adjusted gross income of \$170,378 (family of three). The net worth of [REDACTED] and [REDACTED] (18% owner) was \$1,836,100 as of April 26, 2002, and their 2002 Form 1040 reflected an adjusted gross income of \$62,379 (family of four).

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 May 12, 2004, denied the petition.

On appeal, the petitioner, through counsel, submits previously submitted documentation, a bank statement for the period December 29, 2000 through January 31, 2001, additional statements of net worth for [REDACTED] and [REDACTED] with prior dates, and a letter from [REDACTED] JD, CPA. The bank statement reflects a balance of \$16,885.67 as of December 29, 2000 and a balance of \$74,360.56 as of January 31, 2001. The letter from Richard S. Chisholm states:

As a result of my investigation, I believe it is clear that the Company had the ability to pay an annual salary of \$48,400 to [REDACTED] ([REDACTED] or the "Beneficiary") as of April 23, 2001.

\* \* \*

The Company maintained an average cash balance of \$41,274 for the twelve months ending on December 31, 2001. Accordingly, \$41,274 should be considered as available to pay the proffered wage on April 23, 2001.

Depreciation and amortization are non-cash expenditures which reduce a business' taxable income. They are intended to allow the entity to recover the cost paid for the underlying expenditures. The Vermont (Eastern) Service Center includes non-cash expenditures such as depreciation and amortization in its calculation of an employer's ability to pay a proffered wage. See, Minutes of Eastern Service Center Liaison Teleconference (Nov. 16, 1994), reported in 14 AILA Monthly Mailing 44, 47 (Jan. 1995).

The hotel was appraised as of August 11, 1999 by Hospitality Appraisals, Inc. at approximately \$7,745,000 assuming the hotel reached "stabilization" in 2002. (Please refer to Exhibit D). According to the balance sheet, total liabilities for the Company were only \$5,574,696 at the end of 2001 (lines 17, 18, 19, and 20 of page 4 of Form 1120S, which is hereto as Exhibit E). Of that amount, \$308,223 reflected loans the shareholders had made to the Company, which is more appropriately treated as a contribution to capital. Therefore, the Company's liabilities to third parties totals only \$5,266,475. Consequently,

the Company has equity in the hotel of at least \$2,478,525 which the Company could easily use as collateral for a loan with which to pay the proffered wage.

The letter from Richard Chisholm continues by asserting that the owners of the hotel are willing to contribute funds to the business in order to assure its success. In addition, the letter cites *Masonry Masters v. Thornburgh*, 875 F. 2d 898,903 (D.C. Cir. 1989) in support of counsel's contention that the beneficiary will add value to the business.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner has not established that it paid the beneficiary a salary equal to or greater than the proffered wage. It is noted that although the petitioner states that the beneficiary does not possess a social security card, and, therefore, does not have Forms W-2; there is also no evidence of other forms of payment, such as Forms 1099, Miscellaneous Income, canceled checks, payroll records, etc.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.<sup>1</sup> 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. The petitioner's net current assets during 2001 and 2002 were \$200,645 and \$51,746, respectively. The petitioner could have paid the proffered wage in 2001 and 2002 from its net current assets.

Counsel points to the petitioner's bank statements as proof of its ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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 return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel states that the "Minutes of ESC/AILA Liaison Teleconference, Nov. 16, 1994, reprinted in AILA Monthly Mailing 44, 46-47 (Jan. 1995)" (AILA minutes) are said to compel the addition of depreciation and amortization. Counsel's reliance on the AILA minutes is misplaced.

Counsel does not provide a published citation relating to the use of total assets or depreciation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel contends that the loans from shareholders should be excluded from total liabilities and considered as contributions to the business. Again, counsel has not provided a published citation that would allow shareholder loans to be considered an asset when determining the ability to pay the proffered wage. In addition, CIS 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. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel suggests that the equity in the company could be used as collateral to obtain a loan with which to pay the proffered wage. However, as noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an auditor will significantly increase profits for a hotel. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The 2001 tax return reflects an ordinary income of -\$207,782 and net current assets of \$200,645. The petitioner could have paid the proffered wage from its net current assets in 2001.

The 2002 tax return reflects an ordinary income of -\$368,138 and net current assets of \$51,746. The petitioner could have paid the proffered wage from its net current assets in 2002.

Although it appears that the petitioner has established its ability to pay the proffered wage through its net current assets, another issue beyond the decision of the director concerns whether the petition is based on a bona fide job offer or whether a pre-existing family or business relationship may have influenced the labor certification. The record is unclear as to the relationship of the beneficiary to the corporation. If the beneficiary is a family member (son, brother, etc.), it is questionable that a bona fide job opportunity is available to U.S. workers.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a bona fide job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a bona fide offer. See *Bulk Farms, Inc. v. Martin*, 963

F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

Given that the beneficiary has the same last name as all the owners, the facts of the instant case suggest that he too is a family member. The observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of the this beneficiary.

The director must afford the petitioner reasonable time to provide evidence such as a statement under oath pertinent to the issue of the beneficiary's relationship to the corporation, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's May 12, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.