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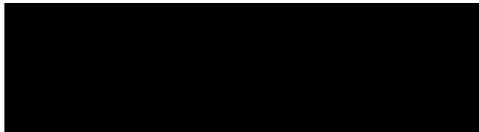
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FILE: LIN 03 201 50105 Office: NEBRASKA SERVICE CENTER Date: OCT 24 2005

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:



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 dismissed.

The petitioner is a surgical equipment design, sales, and repair firm. It seeks to employ the beneficiary permanently in the United States as a surgical instrument repairer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 March 30, 2001. The proffered wage as stated on the Form ETA 750 is \$38,210 per annum. On the Form ETA 750B, signed by the beneficiary on March 2, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, the petitioner claims to have been established in 1998, have a gross annual income of \$135,040, a net annual income of \$13,176 and to currently employ one worker. In support of its ability to pay the beneficiary's proposed wage offer of \$38,210 per year, the petitioner initially provided a copies of its Form

1120S, U.S. Income Tax Return for an S Corporation for 2001 and 2002. They reflect that the petitioner files its federal tax returns using a standard calendar year. These tax returns contain the following information:

Year	2001	2002
Gross receipts or sales	\$58,000	\$135,040
Total Income	\$32,105	\$ 63,488
Compensation of officers	none listed	\$ 12,000
Salaries and wages	\$26,400	\$ 26,400
Ordinary Income (Form 1040)	-\$2,763	\$ 13,176
Current Assets (Sched. L)	\$84,000	\$ 19,055
Current Liabilities (Sched. L)	none listed	\$ none listed
Net Current Assets	\$84,000	\$ 19,055

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities.¹ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of the corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

It is also noted that Schedule K-1, included in the petitioner's federal tax returns for 2001 and 2002, show that the petitioner's two shareholders are ██████████ who holds 85% of the stocks, and the beneficiary, ██████████ Solatch," who holds 15% stock ownership. In 2001, the petitioner's net income loss of \$2,763 was reflected on the individual Schedule K-1 as a loss of \$2,349 to ██████████ and a \$414 loss to the beneficiary. In 2002, the petitioner's net income of \$13,176 was allocated to ██████████ as \$11,200 in ordinary income and to the beneficiary as \$1,976 in ordinary income.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On January 28, 2004, the director instructed the petitioner to provide additional evidence of its ability to pay the proffered salary as of the March 30, 2001, priority date continuing until the present.

In response, the petitioner, through counsel, provided a copy of the beneficiary's Wage and Tax Statement (W-2) for 2003. It shows that he received \$38,400 in wages from the petitioner. Counsel additionally submitted copies of the petitioner's bank statements for the period from August to November 2003 and from January 31, 2004 to

¹ 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.

April 9, 2004, as well as a copy of a bank statement from 1999, and resubmitted copies of the petitioner's 2001 and 2002 corporate tax returns. The figures, however, on the 2001 federal tax return, are different from the ones initially shown on the 2001 tax return submitted with the petition. The unsigned copy of the return is marked as "amended" on line F of the cover page. Gross receipts or sales are shown as \$70,000; total income is \$44,105, and compensation of officers is reflected as \$12,000. No clarification is offered regarding these changes.

The director reviewed the petitioner's financial data reflected on the petitioner's corporate tax returns for 2001 and 2002, as well as other documentation and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of March 30, 2001.

On appeal, counsel asserts that the petitioner's evidence sufficiently establishes its ability to pay the proffered annual salary of \$38,210 per year. He states that the petitioner has employed the beneficiary since 2001 and has paid the full proffered salary of \$38,400 since that date. Counsel also contends that the director ignored the beneficiary's individual tax returns submitted with the other documentation. Having reviewed the evidence submitted to the record, along with any accompanying transmittal letters, we find no copies of the beneficiary's individual tax returns were provided prior to the instant appeal. There are at least two copies of the beneficiary's (2001- and 2002) individual tax returns submitted with the appeal. (Item(s) #3 and #4)

Counsel submits a copy of the 2001 tax return previously offered in response to the director's request for evidence. He contends that the salary of \$26,400 on line 8 was paid to the beneficiary, as well as the officer compensation of \$12,000. In support of this assertion, on appeal, copies of a 2001 Form 1099, Miscellaneous Income, issued to the beneficiary by the petitioner and copies of the beneficiary's amended 2001 individual tax return are provided. The 1099 shows \$12,000 in compensation paid to the beneficiary. The amended tax return shows that the beneficiary claimed a salary of \$26,400, but fails to corroborate the derivation of this salary through a W-2. Moreover, the amended figures on the 2001 tax return make the return unreliable evidence of the petitioner's financial information during that period. It is unsigned, undated, and no evidence that it was filed with the Internal Revenue Service (IRS) is in the record of proceeding. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Similarly, in 2002, a copy of a Form 1099, Miscellaneous Income, is submitted on appeal. It shows that \$12,000 in compensation was paid to the beneficiary. Counsel also submits a copy of the beneficiary's state individual tax return and a copy of his federal individual tax return. They support that he received \$12,000 in compensation and \$1,976 as a distribution of ordinary income. Although claiming a salary of \$26,400 during that year, no W-2 has been submitted to corroborate this claim.

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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the

petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record shows that the petitioner paid the proffered wage to the beneficiary in 2003. In 2002, the record suggests that the beneficiary received \$12,000 in compensation from the petitioner and took \$1,976 in additional income.

If a 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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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.

It is noted that the selected bank statements from 2003 and the first two months in 2004 submitted to the record do not, on their own, establish the petitioner's continuing ability to pay the proffered wage. 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," bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Additionally, in this case, for 2003, the beneficiary's W-2 already shows that he received the full proffered wage.

Here, as noted above, the evidence submitted in the form of the petitioner's 2001 tax returns and lack of objective evidence establishing what figures were filed with the IRS renders the information on both returns unreliable. The 2002 tax return shows that neither the petitioner's net income minus the distribution to the beneficiary, nor its net current assets of \$19,055 could cover the difference of approximately \$24,000 between the compensation paid to the beneficiary and the proffered wage of \$38,210. Although the amounts listed as wages on the beneficiary's tax return and the amount listed as wages on the 2001 tax return are the same, there is some question of reliability of those returns, and since the record doesn't contain any 2001 W-2, the similarity in amounts does not demonstrate that the petitioner paid the beneficiary that amount without supporting evidence. As the evidence fails to credibly demonstrate that the petitioning company had the continuing ability to pay the proffered beginning on the visa priority date of March 30, 2001, the petition may not be approved.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

Beyond the decision of the director, the record in this case also raises a question as to whether the petition is based on a bona fide job offer or whether the a pre-existing business relationship may have affected the labor certification process. As noted above, the beneficiary is one of the two shareholders of the petitioner. Based on the financial information, he represents the petitioner's only salaried employee. 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 petitioner is owned by the person applying for position, it is not a bona fide offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th 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.

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

Although this appeal is being dismissed on other grounds, the observations noted above suggest that if other petitions are filed involving the same parties, further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any business relationship between the petitioner and the beneficiary represents an impediment to the approval of an employment-based visa petition.

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.