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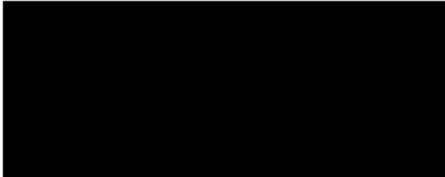
U.S. Department of Homeland Security
20 Mass, NW, Rm. A3000
Washington, DC 20529



**U.S. Citizenship
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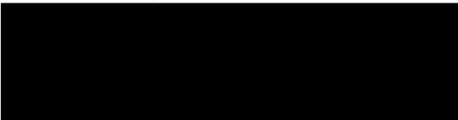
Office: TEXAS SERVICE CENTER

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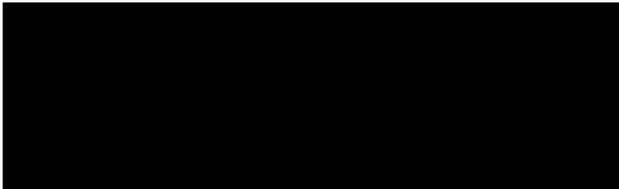
Petitioner:

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, Chief
Administrative Appeals Office

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

The petitioner is a horse farm. It seeks to employ the beneficiary permanently in the United States as a horse trainer. 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. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on August 29, 2002. The proffered wage as stated on the Form ETA 750 is \$20,500 per year.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on June 3, 1997, to have a gross annual income of \$124,951, and to currently employ one worker. According to the tax returns in the record, the petitioner's fiscal year lasts from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on August 26, 2002, the beneficiary claimed to have worked for the petitioner since December 1995.

With the petition, the petitioner submitted the following documents:

- A Form 1120S for the year 2002; and,
- An original certified ETA 750.

On January 7, 2005, the director issued a Notice of Intent to Dismiss, and requested additional evidence pertinent to the ability to pay the proffered wage. 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 also specifically requested evidence of the petitioner's ability to pay the proffered wage for the period from August 2002 to December 2004.

In response, the petitioner submitted:

- The petitioner's Form 1120S for 2003;
- The Form 1120S of Manuden Farms, Inc. for 2003;
- Manuden Farms, Inc.'s W-3 (Transmittal of Wage and Tax Statements) for 2004;
- Manuden Farms, Inc.'s quarterly reports for the year 2004 documenting that it paid the beneficiary \$24,262 in wages; and,
- Schedule K-1 for the petitioner's and Manuden Farms, Inc.'s tax returns showing both were wholly-owned by [REDACTED] and [REDACTED] husband and wife.

The director denied the petition on February 8, 2005, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director found that the petitioner, being a corporation, was a separate and distinct entity from its owners and from other corporations. Citing *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), the director found the evidence failed to show that the petitioner and Manuden Farms were affiliated for purposes of determining ability to pay the proffered wage. The director found the petitioner's Form 1120S for 2002 and 2003 showed insufficient net income or net current assets to pay the proffered wage.

On appeal, counsel submits:

- Manuden Farms, Inc.'s W-2 (Wage and Tax Statement) issued to the beneficiary for the years 2002–2004 showing wages paid annually in excess of the proffered wage; and,
- A brief.

Counsel cites *Matter of Church of Scientology International*, 19 I&N Dec. 593 (March 1988) in support of the assertion that ownership affiliation creates a direct or indirect right to possess assets, no matter the legal structure of the holding entity. Counsel asserts that by owning and controlling both Manuden Farms, Inc., and the petitioner, the petitioner's owners control and manage both organizations and that, therefore, the director should impute the assets and income of Manuden Farms, Inc. to the petitioner to establish the latter's ability to pay the proffered wage.

At the outset, we find that counsel correctly notes that the director has cited cases on affiliated corporations that only involved petitions for L-1 classification rather than for classification under § 203(b)(3) of the Act. Those cases cannot change the fact, however, that the petitioner is a corporation, which 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. It may be the petitioners practice to look to Manuden Farms, Inc. to pay the beneficiary's wages. However, it was the petitioner rather than Manuden Farms, Inc., that sought labor certification of the proffered position, and it was the petitioner, not Manuden Farms, Inc., that seeks classification

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.

of the beneficiary under § 203(b)(3) of the Act. Nothing in the record indicates that Manuden Farms, Inc., claims to substitute itself for the petitioner, as it might have by showing it is the petitioner's successor in interest. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage from the priority date or thereafter, but rather the documents appear to demonstrate that the beneficiary worked for Manuden Farms, Inc.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner² 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$20,500 per year from the priority date.

In 2002, the Form 1120S stated a net loss³ of \$(17,691).

In 2003, the Form 1120S stated net loss of \$(21,922).

² While the W-2s show wages in excess the proffered wage, they list Manuden Farms, Inc. as the employer.

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net income to pay the 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. We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.⁴ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the years 2002 and 2003, were \$537 and \$(3,595) respectively.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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.

⁴ 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.