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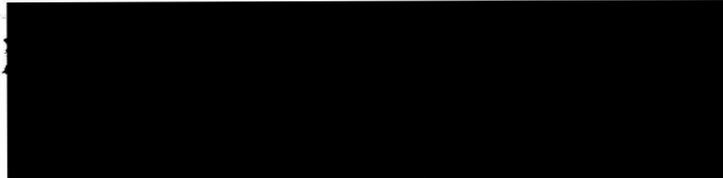
U.S. Department of Homeland Security
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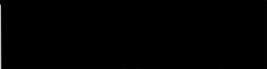
U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: AUG 09 2006

EAC 03 193 51484

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, Chief
Administrative Appeals Office

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

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a night manager. 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 contends that the petitioner's evidence established its 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.93 per hour, which amounts to \$37,294.40 per annum. On the Form ETA 750B, signed by the beneficiary on September 20, 2001, the beneficiary claims that she has been unemployed since 1998.

On Part 5 of the visa petition, filed on June 17, 2003,¹ it indicates that the petitioner was established in 1991, claims no employees, claims a gross annual income of \$143,013, and a net annual income of \$27,490. In support of its ability to pay the beneficiary's proposed wage offer of \$37,294.40 per year, the petitioner initially submitted a copy of its Form 1120-A, U.S. Corporation Short-Form Income for 2001. It reflects that the petitioner files its federal tax returns using a fiscal year running from June 1st to May 31st of the following year. Thus, the 2001 return covers the period from June 1st 2001 to May 31st, 2002. It indicates that the petitioner reported taxable income of \$24,442 before the net operating loss deduction.²

Part III of the tax return reflects that the petitioner had \$12,087 in current assets and no current liabilities, resulting in \$12,087 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.³ 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 and as a possibly available cash or cash-equivalent resource out of which a proffered wage may be paid. In this case, the corporation's year-end current assets and current liabilities are shown on Part III, Balance Sheets per Books, of the corporate tax return. Current assets are found on line(s) 1 through 6 and current liabilities are specified on line(s) 13 and 14. 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.

With the petition, the petitioner also provided a copy of the individual tax return of its owners, as well as copies of the petitioner's checking account statements from April-December 2001 (omitting August); January-December 2002 (omitting March and October); and the first four months of 2003. In his cover letter submitted with the petition, counsel asserts that the petitioner's depreciation expense should be added back to the net income and that the petitioner's retained earnings could be used to pay the proffered salary. Counsel also urges consideration of the owners' individual tax return, as well as the petitioner's monthly bank balances as showing resources that could cover the certified wage.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On September 30, 2003, the director instructed the petitioner to submit copies of the petitioner's federal tax return for 2002 or as an alternative, an annual report accompanied by audited or reviewed financial statements. She also instructed the petitioner to provide copies of the beneficiary's Wage and Tax Statement (W-2) if the petitioner employed her in 2001 and 2002 showing how much she was paid.

¹ A previous immigrant petition for an alien worker (I-140) for the same beneficiary had been filed on October 30, 2002 and had been denied on April 30, 2003 for lack of evidence of ability to pay.

² For the purpose of this review, ordinary income will be treated as net income.

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In response, the petitioner, through counsel, provided a copy of the petitioner's 2002 federal tax return. It shows that the petitioner reported taxable income of -\$14,914 before the net operating loss deduction. Part III of the return shows that the petitioner had \$33,088 in current assets and \$25,170 in current liabilities, resulting in \$7,918 in net current assets.

Counsel also provides copies of the beneficiary's individual income tax returns for 2001 and 2002, along with corresponding copies of W-2s, showing wages of \$24,904 and \$37,356, respectively, paid to the beneficiary by the petitioner in 2001 and 2002. The dates of the beneficiary's tax returns show that they were both prepared in November 2003 and the social security numbers are crossed out.

The director denied the petition on May 24, 2004. She noted that the bank statements did not show sufficient funds to cover the certified wage. The director also rejected consideration of the owners' income tax returns as the corporate petitioner is a separate legal entity from its owners. The director also determined that neither the petitioner's net income, nor its net current assets, in either 2001 or 2002, could cover the proffered wage of \$37,294.40.

The director then rejected consideration of the copies of the W-2s as representative of real earnings and employment of the beneficiary by the petitioner based on her finding that the beneficiary had consistently claimed "unemployed" on documents filed with CIS, such as the ETA750B, signed by the beneficiary on April 20, 2001 and the Application to Register Permanent Residence Status (Form I-485), whereby the beneficiary had represented herself as unemployed "from September 1997 to the present time" on the biographic questionnaire that she signed on September 8, 2002.

The director also found contradictions in the petitioner's documents where it was claimed that the petitioner did not have any employees. She noted that the petitioner had disclaimed any employees on the previously filed I-140, as well as the present case. One was signed in September 2002 and one was signed on June 2, 2003. No salaries and wages were claimed on either the petitioner's 2001 or 2002 corporate tax returns. Finally, the director noted that both the unsigned drafts of the beneficiary's individual tax returns for 2001 and 2002 were both prepared in November 2003 and that the social security numbers had been crossed out. The director concluded that the evidence failed to show that these documents were filed with the Internal Revenue Service (IRS) and that the discrepancies cast such doubt on their authenticity that they could not be considered in a review of the petitioner's ability to pay the proffered wage.

On appeal, counsel emphasizes that it would be appropriate to consider the individual sole shareholders personal assets in order to cover the proffered wage of \$37,294.48. Citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), and *Ohsawa America*, 1988-INA-240 (BALCA 1988), for the premise that personal assets of a funding source should be considered, counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA 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). Moreover, as noted by counsel, *Ranchito Coletero* deals with a sole proprietorship, not a corporate employer, which is the case here.

This petitioner is the named corporate employer on the preference petition. 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). Counsel cites *O'Conner v. Attorney General of the United States*, 1987 WL 18243 (D. Mass. Sept. 29, 1987), a case involving a sole proprietorship, as supporting the use of the owner's entire financial circumstances in determining the petitioner's ability to pay a proposed wage offer. As noted above, this case involves a corporate petitioner, not a sole proprietorship. In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). In a similar case involving a close corporation, the same court that rendered the earlier *O'Conner* decision, recognized that with a corporate petitioner, "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." *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

As to the petitioner's employment of the beneficiary, counsel claims that she began working for the petitioner in May 2001 and the W-2s and individual income tax returns represent her attempt to correct past errors. He asserts that her statements on other petitions and documents are not material to either the labor certification or the immigrant petition.

Counsel's contentions are not persuasive and do not constitute evidence as to the beneficiary's employment. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is noted that the petitioner's documents disclaiming any employees and corroboration as to where these wages might appear on the corresponding tax return has not been established. Moreover, in Part 6 of the I-140 petition, the petitioner claims that the certified job of night manager is a new position. Failure to resolve doubt and inconsistencies cast on any aspect of the petitioner's raises an issue as to the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The AAO does not find that the director acted erroneously in rejecting consideration of the documents purporting to represent the beneficiary's earnings and employment in this matter.

In such a case CIS next may examine and "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.

As noted above, if an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, as noted above, CIS will review a petitioner's net current assets.

In this case, as noted by the director, neither of the two corporate tax returns showed that the petitioner had sufficient net income or net current assets to pay the certified wage of \$37,294.40 during 2001 or 2002. In 2001,

neither the petitioner's net income of \$24,442, nor its net current assets of \$12,087 was enough to cover proffered wage and demonstrate the petitioner's ability to pay. Similarly, in 2002, neither the net income of \$14,914, nor the petitioner's net current assets of \$7,918 was sufficient to cover the certified wage.

It is noted that the copies of bank statements offered to the record do not constitute of the three fundamental 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. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L or Part III of a corporate tax return. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements would constitute additional funds not included on a corresponding tax return.

Based on the evidence contained in the record and after consideration of the 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.

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.