

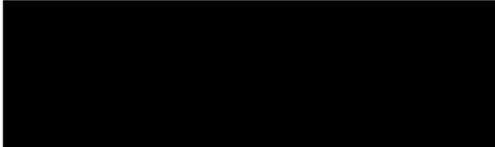
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U.S. Citizenship
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Services

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FILE: [REDACTED] SRC 03 097 54229

Office: TEXAS SERVICE CENTER

Date: DEC 18 2006

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:



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 on appeal. The appeal will be dismissed.

The petitioner is a wholesale distributor of telephones, phone cards and accessories business. It is organized as a limited liability company.¹ It seeks to employ the beneficiary² permanently in the United States as a merchandise manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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.

According to the petition, the petitioner's business was established in 2001, and, at the time the petition was prepared, employed 49 individuals.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

¹ According to the record of proceeding and the tax records submitted, TSI Prepaid LLC is a multi-member domestic limited liability company with two members, TSI Global Alliance Corporation and Centrix Management LLC, both of 1215 W. Newport Center Drive, Deerfield Beach, Florida.

² According to information accessed on March 15, 2005, from www.sunbiz.org, the registered agent and chief executive officer of the petitioner is [REDACTED]. 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). If this matter is pursued, the possibility of a family relationship between the [REDACTED] and [REDACTED] should be examined.

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001.³ The proffered wage as stated on the Form ETA 750 is \$1,290.00 per week (\$67,080.00 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from the petitioner that lists its subsidiary limited liability companies; a letter from ADP TotalSource (a professional employer organization) dated November 1, 2002; letters from Deloitte & Touche, accountants to various ADP TotalSource corporations dated February 1, 2001, May 4, 2001, August 3, 2001, November 2, 2001, and August 2, 2002; four Subscriber UCT-6 reports prepared by Automatic Data Processing for 2001 for TSI Communications, Inc.; wage reports by TSI Communications Inc. for the first quarters of 2002; wage reports for TSI Global Alliance Corp. for the 2nd quarter of 2002; a letter from ADP TotalSource III, Inc. dated November 1, 2002; seven business checking account statements for Arizona Prepaid Products LLC, of Tempe, Arizona; eight business checking account statements for Phone Card Depot Houston, LLC, of Houston, Texas; nine business checking account statements for Phone Card Depot Dallas, LLC, of Carrollton, Texas; nine business checking account statements for Sunshine Prepaid Distribution LLC, of Fort Lauderdale, Florida; nine business checking account statements for Carolina Prepaid LLC, of Fort Lauderdale, Florida; nine business checking account statements for Golden State Telecom LLC, of Woodland Hills, California; an income statement and statement of assets, liabilities and equity as of December 31, 2001, for TSI Prepaid

³ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

LLC; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on March 21, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of U.S. federal tax returns for 2001, 2002, and 2003 all with Schedules L.

In response to the request for evidence, counsel submitted copies of the following documents: the petitioner's U.S. Internal Revenue Service (IRS) Form 1065 tax returns for years 2001, 2002, and 2003.

The director denied the petition on April 5, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the following is evidence of the petitioner's ability to pay the proffered wage: its gross revenues, salaries and wages. Counsel cites an unpublished AAO decision for the contention that since, according to counsel, the petitioner has established itself in the marketplace, is growing rapidly, and supports a "significantly sized staff" that these factors evidence the ability to pay the proffered wage.

Counsel has submitted copies of the following documents to accompany the appeal statement: legal brief and, approximately 18 photos of the petitioner's business premises.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

The petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.⁴ An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel asserts that the petitioner's gross revenues are evidence of the petitioner's ability to pay the proffered wage. In determining the petitioner's ability to pay the proffered wage, CIS will 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

⁴ 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.

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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng* at 537.

The tax returns⁵ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$67,080.00 per year from the priority date of April 30, 2001:

- In 2001, the Form 1065 stated a loss⁶ of <\$345,206.00>.⁷
- In 2002, the Form 1065 stated a loss of <\$939,115.00>.
- In 2003, the Form 1065 stated a loss of <\$202,732.00>.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has net income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

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.⁸ The petitioner's year-end current assets and liabilities are shown on Schedule L of the return. A corporation's year-end current assets are shown on lines 1 through 6. The petitioner's year-end current liabilities are shown on lines 15, 16 and 17. 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.

Examining the Form 1065 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1065 return stated current assets of \$8,895,963.00 and \$9,331,492.00 in current liabilities. Therefore, the petitioner had <\$435,529.00> in net current assets. Since the proffered wage is \$67,080.00 per year, this sum is less than the proffered wage.

⁵The petitioner prepared its 2001 taxes for 2001 commencing upon May 17, 2001, that is the beginning date for the business entity, to the end of the year.

⁶ Internal Revenue Service Form 1065, line 22, "Ordinary Income (loss) from trade or business activities...."

⁷ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁸ 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 2002, petitioner's Form 1065 return stated current assets of \$7,899,410.00 and \$9,315,909.00 in current liabilities. Therefore, the petitioner had <\$1,416,499.00> in net current assets. Since the proffered wage is \$67,080.00 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1065 return stated current assets of \$6,516,605.00 and \$8,122,946.00 in current liabilities. Therefore, the petitioner had <\$1,606,341.00> in net current assets. Since the proffered wage is \$67,080.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

As stated above, counsel cites an unpublished AAO decision for the contention that since, according to counsel, the petitioner has established itself in the marketplace, is growing rapidly, and supports a "significantly sized staff" that these factors evidence the ability to pay the proffered wage. According to regulation,⁹ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel has not specified how the factors indicated will generate additional revenues, but it is clear from his statements that this eventuality would occur in the future. The ability to pay the proffered wage is not examined contingent upon some event in the future. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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, 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). The decision cited is a non-precedent decision.

Counsel asserts that the salaries and wages paid by the petitioner and the number of the staff is evidence of its ability to pay the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Further, counsel has not stated from what source the petitioner will pay the proffered wage since, as is evident above, the petitioner's net income losses and negative net current assets are not sources from which wage payments could be made.

According to the petitioner's letter dated January 21, 2003, the petitioner is the parent company "of several subsidiaries that are consolidated into it for financial reporting." Counsel introduces the commercial checking records of other organizations (Arizona Prepaid Products LLC, of Tempe, Arizona; Phone Card Depot Houston, LLC, of Houston, Texas; Phone Card Depot Dallas, LLC, of Carrollton, Texas; Sunshine Prepaid Distribution LLC, of Fort Lauderdale, Florida; Carolina Prepaid LLC, of Fort Lauderdale, Florida; Golden

⁹ 8 C.F.R. § 204.5(g)(2).

State Telecom LLC, of Woodland Hills, California) that share common ownership and control with the petitioner.

While these six separate limited liability companies are under common control, they do not appear on the Form 1065 income tax returns submitted in this matter. The petitioner is a separate entity with its own federal employer identification number. 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, members, or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Petitioner has submitted no legally binding agreements between the petitioner and the six other limited liability companies that would ensure that any of the companies for which checking account information was submitted would pay or guaranty the obligations of the petitioner as the employer of the beneficiary.

No bank account information was submitted for the petitioner. However, the Schedule "L" found with the tax returns is important. Schedule "L" is a balance sheet that shows both current assets and current liabilities for years 2001, 2002 and 2003. The net current assets figures for those years are <\$435,529.00>, <\$1,416,499.00> and <\$1,606,341.00> respectively. Contrary to counsel's contention, the petitioners' net current assets were diminishing each year along with losses totaling <\$1,487,053.00> for those three years.

Further, counsel's reliance on the balances in the checking accounts is still misplaced. 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. Bank statements show the amount in an account on a given date, and cannot show a sustainable ability to pay the proffered wage. No evidence was submitted to demonstrate that the funds reported on the bank statements somehow reflect additional available funds that were not reflected on its tax return.

Counsel has submitted an income statement and statement of assets, liabilities and equity as of December 31, 2001, for TSI Prepaid LLC as evidence of the ability to pay the proffered wage. The statements were marked 'confidential – For Internal Use only – unaudited.' Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Additionally, the AAO notes that the petitioner was incorporated in May 2001, but the priority date is April 2001. This casts doubt on the realistic nature of the job offer. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the three tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered

wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.