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U.S. Citizenship
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Services

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FILE:

EAC 04 048 51442

Office: VERMONT SERVICE CENTER

Date: DEC 28 2006

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:

SELF-REPRESENTED

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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record contains a Form G-28 Notice of Entry of Appearance executed by the petitioner's president recognizing an attorney as the petitioner's counsel in this matter. On appeal, however, the petitioner's president indicated that the petitioner is self-represented in this matter. All representations will be considered, but the decision in this matter will be provided only to the petitioner.

The petitioner is an information technology, consulting, and accounting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 15, 2001. The proffered wage as stated on the Form ETA 750 is \$80,000 per year.¹

¹ The Form ETA 750 also states that the proffered position requires no education, no training, and two years

The Form I-140 petition in this matter was submitted on December 5, 2003. On the petition, the petitioner stated that it was established on 1977 and that it employs 20 workers. The petition states that the petitioner's gross annual income is \$1.4 million but did not state its net annual income in the space provided.

The Form ETA 750 relied upon was originally submitted for [REDACTED]. The instant beneficiary was substituted for him. On the Form ETA 750, Part B, signed by the beneficiary on October 23, 2003, the beneficiary claimed to have worked for the petitioner since November 2001. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Forest Hills, New York.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.²

In the instant case the record contains (1) copies of the petitioner's 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) a 2001 W-2 form issued by the petitioner to [REDACTED] (3) 2002, 2003, and 2004 W-2 Wage and Tax Statements issued by the petitioner to the beneficiary, (4) copies of direct deposit notices and pay stubs, (5) copies of the petitioner's bank statements,⁴ (6) a letter dated October 27, 2003 from the attorney who was then the petitioner's counsel of record, (8) a letter dated September 9, 2004 from the petitioner's then attorney, (9) a letter dated September 9, 2004 from the petitioner's owner, (10) reviewed 2001, 2002, and 2003 financial statements of [REDACTED] (11) monthly statements pertinent to the checking account of [REDACTED] and (12) a letter dated February 16, 2005 from an accountant.

of experience in the job offered or any computer-related profession. Although this office finds questionable the assertion that, absent any experience or training, two years in any computer-related profession could qualify one to work as a software engineer, that assertion was not questioned by the DOL or the service center, and this office will not make it an issue in today's decision.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ Counsel indicates that this is the W-2 form of the original beneficiary in this matter, [REDACTED] but does not explain the name discrepancy. Whether or not the person shown on that W-2 form was the original beneficiary in this case, however, is not relevant to any material issue in this case.

⁴ Some of the bank statements in this matter are in the name of [REDACTED]. Others are in the name of Soft Tech Source. The W-2 forms submitted state that they were issued by [REDACTED] with Employer ID (EID) number [REDACTED]. The tax returns submitted show that they were submitted to IRS by [REDACTED] also with EID number [REDACTED]. This office finds that the names [REDACTED] and [REDACTED] are different offices or divisions within the same tax-purpose entity. However, the service center would have been entitled, if it had wished, to require additional evidence on that point.

The record does not contain any other timely-submitted evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on August 11, 1992, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2001 the petitioner declared a loss of \$65,121. That return shows that at the end of that year the petitioner had current assets of \$95,386 and no current liabilities, which yields net current assets of \$95,386.

During 2002 the petitioner declared a loss of \$100,290. That return shows that at the end of that year the petitioner had negative current assets and no current liabilities, which yields negative net current assets.

During 2003 the petitioner declared ordinary income of \$12,490. That return shows that at the end of that year the petitioner had negative current assets and no current liabilities, which yields negative net current assets.

The 2001 W-2 forms issued to [REDACTED] show that the petitioner paid him \$79,800 during that year. The 2002, 2003, and 2004 W-2 forms issued to the beneficiary show that the petitioner paid her \$15,833.30, \$37,999.92, and \$94,999.80 during those years, respectively. The direct deposit notices and pay stubs submitted show that the petitioner paid the beneficiary gross wages of \$3,166.66 each month in July and August 2003.

In his October 27, 2003 letter the petitioner's then counsel cited the petitioner's gross receipts, its salary and wage expense, its compensation of officers, and its bank balances during the salient years as indices of its continuing ability to pay the proffered wage beginning on the priority date. Counsel further stated, "The fact that the petitioner realized loss [sic] during 2001 should not be regarded in negative light, [sic] as this is a result of usual and allowable business deductions."

In his September 9, 2004 letter counsel again cited the petitioner's gross receipts, its salary and wage expense, and bank balances during the salient years as indices of its continuing ability to pay the proffered wage beginning on the priority date. Counsel also stated,

Further, please note that the petitioner, [REDACTED] who is the President of the [petitioner] also owns another corporation called [REDACTED] [REDACTED] is the sole proprietorship [sic] of both companies and wishes to submit the bank statement record of [REDACTED]. Attached hereto please find a statement from [REDACTED] idencing the same.

[Emphasis in the original.]

This office notes that the petitioner is not a sole proprietorship but a subchapter S corporation. The significance of that distinction to the instant case is explained below.

The September 9, 2004 letter from the petitioner's owner confirms that he owns 13 dialysis centers in the Jackson Tennessee area that employ 135 people.

The February 16, 2005 accountant's letter questions the validity of the petitioner's net current assets as an index of its ability to pay additional wages. The accountant asserts that the amount of cash in a taxpayer's bank account, which the accountant equates with cash flow, is the most reliable index of its ability to pay additional wages.

The accountant also stated that the figures shown for end-of-year cash on Schedule L, at Line 1(d) of the petitioner's tax returns were incorrect. The accountant added figures from the petitioner's two bank accounts for various months and asserted that those represent the true value of the petitioner's available end-of-year cash.

The director denied the petition on December 29, 2004. On appeal, the petitioner relied on the arguments interposed by the accountant as establishing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Reliance on the petitioner's gross receipts and total wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁵ or otherwise increased its net income,⁶ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's reliance on the bank statements in this case is similarly misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁷

⁵ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁶ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

⁷ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance

Third, the record contains insufficient evidence to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

The petitioner's reliance on the reviewed financial statements submitted is, again, 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. The accountant's report that accompanied those financial statements makes clear that they are unaudited. As that report also makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

The petitioner urged that its Form 1120S, Line 7, Compensation of Officers need not have been paid to its officers, but could have been retained to pay the proffered wage. The petitioner provided no evidence, however, to support the supposition that its officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

The assertion that the petitioner's losses during 2001 were the result of legitimate deductions is inapposite. This office does not question the nature of the petitioner's expenses, but merely notes that during certain years they exceeded the petitioner's revenue.

Evidence of other income and assets of the petitioner's owner is not relevant to any material issue in this case. The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). A corporation's owners and shareholders are not obliged to pay the debts of the corporation, and the assets of its shareholders or of other enterprises or corporations cannot, therefore, 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). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner, whether individual(s), a corporation(s), or some other entity or entities, cannot correctly be included as a fund available to the petitioner to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job

showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

offer is realistic. See *Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay 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. (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it paid the beneficiary \$15,833.30, \$37,999.92, and \$94,999.80 during 2002, 2003, and 2004, respectively. The petitioner must show the ability to pay the balance of the proffered wage during those years.

This office will also consider amounts paid to other named employees, if those amounts are shown to have been available to pay to the beneficiary. That is, the amount paid to a named employee during a given year might be shown to be available to pay the beneficiary's wages if the petitioner shows that it would have replaced that other employee with the beneficiary if it had been permitted to hire him or her.

In the instant case the beneficiary has demonstrated that it paid [REDACTED] \$79,800 during 2001. Whether [REDACTED] was performing the duties of the proffered position, however, is unclear. If he was not, then his contribution to the company could not have been replaced by hiring the beneficiary. Whether [REDACTED] was willing to be replaced by the beneficiary, or whether the petitioner could have replaced him involuntarily, is unclear. In order to show that the 2001 wages paid to [REDACTED] could have been paid to the instant beneficiary the petitioner would have been obliged to demonstrate that it was able to release [REDACTED] at will and replace him with the beneficiary.

Further, the underlying purpose of the instant visa category is to provide U.S. employers with alien workers to fill positions they would otherwise be unable to fill. If the petitioner proposed to replace a current worker with an alien out of preference, this would run contrary to the underlying purpose of the instant visa petition category. No amount of the wages paid to [REDACTED] will be considered in assessing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2). Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁸ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$80,000 per year. The priority date is May 15, 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 and is obliged to show the ability to pay the entire proffered wage during that year. However, the petitioner declared a loss during that year. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year, however, the petitioner had net current assets of \$95,386. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner has demonstrated that it paid the beneficiary wages of \$15,833.30 during 2002 and is obliged to show the ability to pay the \$64,166.70 balance of the proffered wage during that year. During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has provided no reliable evidence of any other funds available to it during 2002 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner has demonstrated that it paid the beneficiary wages of \$37,999.92 during 2003 and is obliged to show the ability to pay the \$42,000.08 balance of the proffered wage during that year. During 2003 the petitioner declared ordinary income of \$12,490. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has provided no reliable evidence of any other funds available to it during 2003 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

⁸ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner provided no copies of annual reports, federal tax returns, or audited financial statements pertinent to 2004, but provided a W-2 form showing that it paid the beneficiary \$94,999.80 during that year, an amount greater than the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002 and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.