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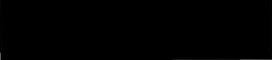
U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: JUL 11 2006

SRC 04 050 51483

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, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner appears to have retained professional assistance in preparing the petition for submission. The record, however, does not contain a Form G-28 Entry of Appearance executed by the petitioner. As such the record does not demonstrate that the company or individual who prepared the petition is qualified to represent the petitioner or that the petitioner has agreed to be represented. All representations will be considered, but the decision in this matter will be furnished only to the petitioner.

The petitioner is a golf course maintenance service. It seeks to employ the beneficiary permanently in the United States as a Supervisor/Maintenance Mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor 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, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 6, 2002. The proffered wage as stated on the Form ETA 750 is \$18.40 per hour, which equals \$38,272 per year.

On the petition, the petitioner stated that it was established during 1985 and that it employs four workers. The petition states that the petitioner's gross annual income is \$250,000 and that its net annual income is \$350,000.¹ On the Form ETA 750, Part B, signed by the beneficiary on August 7, 2002, the beneficiary did

¹ Because the petitioner cannot have a gross income greater than its net income this office believes that one of those figures was entered erroneously. In any event, evidence subsequently submitted sufficiently demonstrates the amount of

not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Tequesta, Florida.

In support of the petition, the petitioner submitted no evidence that it is able to pay the wage proffered to the beneficiary for performance of the proffered position. Therefore, on March 26, 2004, the Texas Service Center requested, *inter alia*, evidence pertinent to that ability. The service center also specifically requested the petitioner's 2001, 2002, and 2003 tax returns and Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during those same years.

In response, the petitioner submitted two pages of the petitioner's 1999 Form 1120, U.S. Corporation Income Tax Return and apparently complete copies of its 2000, 2001, and 2002 Form 1120, U.S. Corporation Income Tax Returns.

The petitioner's tax returns show that it is a corporation, that it incorporated on November 1, 1985, and that it reports taxes pursuant to cash basis accounting and a fiscal year running from November 1 of the nominal year to October 31 of the following year.

The fiscal year 1999 corporate return shows that during that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$4,249. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The fiscal year 2000 corporate return shows that during that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$7,067. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The fiscal year 2001 corporate return shows that during that year the petitioner declared a loss of \$12,309 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The priority date of the petition, however, is December 6, 2002. Although the service center requested copies of the petitioner's 2001 and 2002 returns, the priority date fell within the petitioner's 2002 fiscal year and evidence pertinent to the petitioner's financial condition during previous fiscal years is not directly relevant to its continuing ability to pay the proffered wage beginning on the priority date. Further, although the service center requested the petitioner's 2003 tax return on March 26, 2004, the petitioner's fiscal year 2003 had not yet ended and its 2003 tax return, therefore, was unavailable. The petitioner is excused from providing that requested form in response to the request for evidence.

The fiscal year 2002 corporate return shows that during that year the petitioner declared a loss of \$7,649 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

the petitioner's gross receipts and net income.

The petitioner also provided the beneficiary's 1994, 1995, 1996, 2001, and 2002 individual income tax returns and the W-2 forms showing wages the petitioner paid to the beneficiary during 1996, 1997, 1998, 1999, 2000, 2001, and 2002.² The petitioner did not explain why it did not provide the 2003 W-2 form that the service center requested on March 26, 2004.

The beneficiary's W-2 forms state that the petitioner paid the beneficiary gross wages of \$15,740.33, \$17,595.35, \$18,055.35, \$19,883.84, \$20,415.33, \$20,740.35, and \$10,454.94 during 1996, 1997, 1998, 1999, 2000, 2001, and 2002, respectively. The beneficiary's personal tax returns are not directly relevant to any issue before this office. The 2002 W-2 form, however, is pertinent to the petitioner's ability to pay the proffered wage during the salient years.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on April 27, 2004, denied the petition.

On appeal, the petitioner submits copies of the first two pages of the petitioner's owner's 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Returns and a statement dated May 25, 2004 from its owner.

The petitioner's owner notes that the W-2 forms attached to the petitioner's owner's income tax returns show that the petitioner's owner received social security wages of \$64,854.56, \$67,451, and \$72,575 during 2001, 2002, and 2003, respectively, and urges that those amounts, or at least some part of them, were available to pay the proffered wage during those years. The petitioner's owner also states that the petitioner could reduce his compensation as necessary to pay the proffered wage.

The petitioner, however, 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). 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 ordinarily 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).

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 employed and paid the beneficiary during the years from 1996 to 2002.³

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

² This office notes that the Form ETA 750B required the beneficiary to "List all jobs held during the last three (3) years" and "any other jobs related to the [proffered position]." On that form, which the beneficiary signed on August 7, 2002, the beneficiary did not state that he had ever worked for the petitioner. The beneficiary now claims to have worked for the petitioner during the years from 1996 to 2002. No explanation of that discrepancy was submitted.

³ This office will treat the failure of the petitioner and beneficiary to state on the Form ETA 750B that the petitioner employed the beneficiary during those years as an inadvertent omission.

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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 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 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 net of 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 typically⁴ 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 \$38,272 per year. The priority date is December 6, 2002, which fell within the petitioner's 2002 fiscal year.

The analysis of the petitioner's ability to pay the proffered wage is complicated by the fact that the petitioner reports taxes pursuant to a fiscal year, whereas the wages shown on the beneficiary's W-2 forms are based on a calendar year.

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The 2002 W-2 form shows that the petitioner paid the beneficiary \$10,454.94 during that calendar year. Because the petitioner's 2002 fiscal year ran from November 1, 2002 to October 31, 2003, only approximately one-sixth of that amount, or \$1,742.49, was earned during the petitioner's 2002 fiscal year. Because the petitioner did not submit the requested 2003 W-2 form the record contains no evidence of any other wages paid to the beneficiary during the petitioner's 2002 fiscal year. Having demonstrated that it paid the beneficiary \$1,742.49 during its 2002 fiscal year, the petitioner is obliged to show the ability to pay the \$36,529.51 balance of the proffered wage.

During fiscal year 2002 the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets.

The petitioner's owner has indicated, however, that the petitioner was able to reduce his compensation as necessary to pay the proffered wage.

As was noted above, CIS (legacy INS) may not "pierce the corporate veil" and look to the assets of the corporation's owner or owners to satisfy the corporation's ability to pay the proffered wage. However, in the present case, CIS is basing its determination solely on the merits of the petitioning corporation. Specifically, CIS is basing its determination on the contention that the petitioner can pay the wage because it has the financial flexibility to set the annual compensation of its sole owner based on the profitability of the corporation.

During its 1999 fiscal year the petitioner paid owner compensation of \$88,577.⁵ The petitioner's owner's 2000 personal tax return was neither requested nor provided.

During its 2000 fiscal year the petitioner paid its owner compensation of \$77,244. The petitioner's owner declared adjusted gross income of \$86,737 during the 2001 calendar year.⁶

During its 2001 fiscal year the petitioner paid its owner compensation of \$66,744. During 2002 the petitioner's owner declared adjusted gross income of \$112,767.

During its 2002 fiscal year the petitioner paid its owner compensation of \$77,599. During 2003 the petitioner's owner declared adjusted gross income of \$100,919.

⁵ This office notes that the priority date is December 6, 2002, which fell within the petitioner's 2002 fiscal year. The petitioner's 1999, 2000, and 2001 returns, therefore, would not ordinarily be directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In this case, however, the figures for those years serve to illustrate the contention regarding the compensation of the petitioner's owner.

⁶ Because the petitioner's fiscal year runs from November 1 of the nominal year to October 31 of the following year the petitioner's 2000 fiscal year corresponds more closely to the 2001 calendar year than the 2000 calendar year.

The returns show that the petitioner exercises a large degree of financial flexibility in compensating its owner, which lends credence to the contention that the petitioner is a viable enterprise and it compensates its sole officer only after satisfying the corporation's other expenses.

Further, of the petitioner's owner's adjusted gross income during 2001 \$16,024 was interest income. The petitioner's owner had \$14,108 in interest income during 2002 and \$18,574 during 2003. Those figures indicate that the petitioner's owner had a large principal amount during those years. This adds additional credibility to the assertion that the petitioner could have reduced its owner's compensation as necessary to pay the proffered wage.

Based on the facts of the instant case, this office finds that the job offer is realistic and that the petitioner has shown the continuing ability to pay the proffered salary of \$38,272 since the priority date. The AAO will consider the totality of the circumstances pertinent to a petitioner's continuing ability to pay the proffered wage beginning on the priority date. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.