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FILE: WAC-03-181-50649 Office: CALIFORNIA SERVICE CENTER Date: **MAR 24 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:



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, Director
Administrative Appeals Office

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

The petitioner produces hay. It seeks to employ the beneficiary permanently in the United States as a field crop supervisor. 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, counsel submits a brief and previously submitted evidence.

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 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 March 29, 2001. The proffered wage as stated on the Form ETA 750 is \$11.93 per hour, which amounts to \$24,814.40 annually based on a 40 hour work week¹. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since March 2001.

On the petition, the petitioner indicated that it was established in 1978 and employed 2 workers. In support of the petition, the petitioner submitted an unsigned letter from its owner, [REDACTED] (Mr. [REDACTED]) stating that it paid the beneficiary \$16,993.67 in 2002 as well as housing fees valued at \$6,000 and the beneficiary's legal fees totaling \$1,400, the beneficiary's telephone, cell phone, and utility bills. Mr. [REDACTED] also stated that the petitioner secured a farm-operating line of credit in the amount of \$250,000 for 2003. In corroboration of those assertions, the petitioner submitted a copy of a W-2 form issued by the petitioner to the beneficiary in 2002; a letter from the [REDACTED] of Nevada dated April 30, 2003 stating that "[the petitioner] has an agricultural revolving line of credit with our bank for a moderate 6 digit figure. Budget expenses tied to this revolving line include annual farm labor expenses in the mid 5 digit figures"; a letter from [REDACTED] of [REDACTED] in Nevada

¹ The director's decision determined the annual proffered wage rate to be \$24,804, which corresponds to an hourly rate of \$11.925. The hourly rate is somewhat obscured so it is difficult to determine if the hourly rate is \$11.93 or \$11.95. However, correspondence stamped by DOL reflects that the amendment resulted in a rate change to \$11.93, the time and a half rate corresponds to the \$11.93 hourly rate, and the weekly rate listed by the petitioner on the visa petition also corresponds to an \$11.93 hourly rate, which annualizes to \$24,814.40.

claiming that “the property at 15th & [REDACTED] Eureka, Nevada would rent for a minimum of \$500.00 per month”; what appears to be a listing of fuel usage at a post office box and electricity usage by the petitioner in February 2003; the petitioner’s Form 1065, U.S. Return of Partnership Income in 2001; Mr. [REDACTED] 2001 individual income tax return; and a Form 1120S for [REDACTED] for 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, on April 7, 2004, the director requested additional evidence pertinent to that ability. 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 through 2003. The director also requested W-2 forms issued by the petitioner to the beneficiary from 2001 through 2003.

In response, the petitioner submitted Forms 1065, U.S. Returns of Partnership Income for 2001 through 2003; a letter from us bank showing that Mr. [REDACTED] held a current loan balance of \$166,300 on January 10, 2001; promissory notes from the [REDACTED] of Nevada reflecting that the petitioner held loans in the amount of \$315,000 on May 2, 2001, \$348,438 on March 26, 2002, and \$250,000 on March 13, 2002; W-2 forms issued to the beneficiary from the petitioner reflecting wages earned in the amount of \$14,400 in 2001, \$16,993.67 in 2002, and \$18,000 in 2003; Mr. [REDACTED] phone bills submitted to a post office box address from 2001 through 2003; and the petitioner’s quarterly tax returns. Mr. [REDACTED] also submitted a letter stating that the petitioner’s line of credit was used to pay the beneficiary’s salary and its income will grow as “all major expense and acquisition investments have been completed.” Mr. [REDACTED] also stated that in addition to the beneficiary’s salary, he also received living expenses totaling \$11,000 annually.

The tax returns reflect the following information for the following years:

| | <u>2001</u> | <u>2002</u> | <u>2003</u> |
|-------------------------|-------------|-------------|-------------|
| Net income ² | -\$14,658 | -\$1,341 | \$102,675 |
| Current Assets | \$0 | \$56,531 | \$1,740 |
| Current Liabilities | \$233,613 | \$340,802 | \$58,385 |
| Net current assets | -\$233,613 | -\$284,271 | -\$56,645 |

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 June 28, 2004, denied the petition.

On appeal, counsel asserts that the director erred by failing to consider the petitioner’s lines of credit, which would be sufficient to pay the difference between wages actually paid to the beneficiary and the proffered wage, and that the petitioner “has more than sufficient assets to satisfy the repayment of these lines of credit, or the banks would not have extended the credits.” Counsel also asserts that the director erred by failing to consider the evidence submitted to show that the petitioner financed the beneficiary’s living expenses. The petitioner resubmits previously submitted evidence.

According to the tax returns in the record of proceeding, 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,

² Ordinary income (loss) from trade or business activities as reported on Line 22.

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.³ An investor's liability is limited to his or her initial investment. As the owners and others only are obliged to pay a certain portion of those debts should they come due, 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.

Thus, the evidence pertaining to the assets of other companies owned by the petitioner's owner and Mr. Moyle is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 demonstrated that it paid \$14,400 in 2001, \$16,993.67 in 2002, and \$18,000 in 2003 in wage compensation to the beneficiary. Thus, it must demonstrate that it can pay the difference between wages actually paid and the proffered wage, which is \$10,414.40, \$7,820.73, and \$6,814.40 in 2001, 2002, and 2003, respectively.

The AAO will not consider living expenses or legal fees paid on the beneficiary's behalf as additional income because such expenses were not included on the Form ETA 750A Items 18 and 20. The failure to include these additional benefits and income would result in a different recruitment process for the proffered position. Since that material item was not before DOL's certification process, the AAO will not include it as a term in these proceedings⁴. Additionally, including such items now would impermissibly represent a material change to the terms of the proffered position. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Finally, even if the AAO could accept evidence of expenses paid on the beneficiary's behalf as additional compensation, the AAO concurs with the director that the evidence of expenses paid to the beneficiary was insufficient. The bills are all for a post office box and do not have an identifiable nexus to the beneficiary's residence, there is no evidence that the beneficiary resides at 15th & [REDACTED], Eureka, Nevada or who paid the rent there⁵, and no evidence of legal fees paid despite Mr. [REDACTED]'s assertion in the letter submitted with the petition.

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

³ 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.

⁴ CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

⁵ The beneficiary's address listed on the visa petition is a post office box.

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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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, counsel's argument 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.⁶ 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 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 out of those net current assets.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that unused funds from its line of credit were available at the time of filing the petition. Instead, the correspondence and promissory notes only state balances without any indication of available funds or historical transactions. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49

⁶ 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.

(Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The petitioner demonstrated that it paid the beneficiary \$14,400 in 2001, \$16,993.67 in 2002, and \$18,000 in 2003, which is \$10,414.40, \$7,820.73, and \$6,814.40 less than the proffered wage in those years, respectively. In 2001 and 2002, the petitioner's negative net income and negative net current assets cannot demonstrate its ability to pay the difference between the wages paid to the beneficiary and the proffered wage in those years. In 2003, however, the petitioner's net income is greater than the difference between the wages paid to the beneficiary and the proffered wage in that year, and thus demonstrates its ability to pay the proffered wage in that year only.

Mr. [REDACTED] claims that the petitioner's income will increase as "all major expense and acquisition investments have been completed," but provides no further explanation or evidence concerning this statement. The record of proceeding does not contain evidence about the petitioner's expansion activities or unusual expenses within an historical context of profitable years. *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. 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 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.