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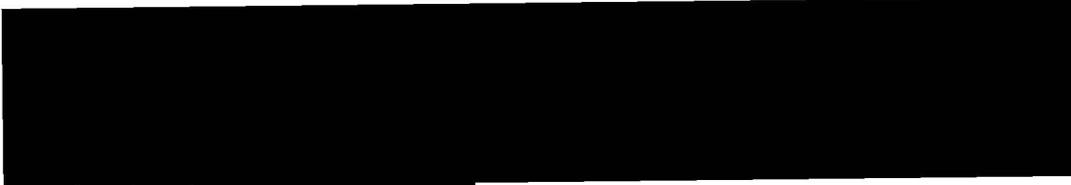
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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FILE:

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Office: CALIFORNIA SERVICE CENTER

Date: MAY 09 2006

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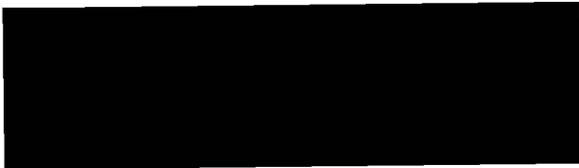
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 additional 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 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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 April 23, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$12 per hour, which equals \$24,960 per year.

¹ Although the current beneficiary is not the beneficiary named on the Form ETA 750, the current beneficiary was correctly substituted.

On the petition, the petitioner stated that it was established during December 1997 and that it employs 237 workers. The petition states that the petitioner's gross annual income is \$13,538,591.98. The blank provided for the petitioner's net income was left blank. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did 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 San Diego, California.

In support of the petition, counsel submitted a copy of a letter, dated October 12, 2001, from the petitioner's executive vice president. The executive vice president's letter states that during 2000 the petitioner had gross income of \$11,161,754.18 and net income of \$810,963.57. The letter also states that the petitioner then had 204 employees and that it has the ability to pay the proffered wage.

On December 23, 2003 the California Service Center issued a request for evidence in this matter. The service center requested, *inter alia*, that the petitioner submit 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. The service center specifically requested that the evidence cover the years 2000 to 2003.²

In response, counsel submitted (1) two pages of a 2000 Form 1120, U.S. Corporation Income Tax Return, (2) four pages of a 2001 Form 1120, U.S. Corporation Income Tax Return, (3) a letter, dated February 18, 2004, from the petitioner's executive vice president, and (4) a letter, dated March 15, 2004, from counsel.

The tax returns submitted are those of Pleasant Care Corporation of 2258 Foothill Boulevard in La Canada, California. Those returns show that Pleasant Care Corporation is a corporation, that it incorporated on May 22, 1989, and that it prepares its taxes pursuant to accrual convention and a fiscal year running from July 1 of the nominal year to June 30 of the following year.

The 2000 return shows that Pleasant Care Corporation of La Canada, California show that it had gross receipts of \$195,769,399 and declared a net loss of \$13,083 as its taxable income before net operating loss deductions and special deductions during that fiscal year. Because the corresponding Schedule L was not provided, the petitioner's year-end net current assets could not be computed.

The 2001 return shows that during that year Pleasant Care Corporation had gross receipts of \$205,102,214 and that it declared a net loss of \$944,418 during that fiscal year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's executive vice president's letter of February 18, 2004 states that the petitioner has 237 employees and the ability to pay the proffered wage.

Counsel's letter of March 15, 2004 states that the petitioner, whose 2002 fiscal year ended on June 30, 2003, had not yet prepared its 2002 returns. Counsel provided no evidence of that assertion. Without an extension, and assuming that the petitioner reports its taxes pursuant to the same fiscal year as Pleasant Care

² Because the priority date is April 23, 2001 evidence pertinent to the petitioner's finances during previous years, 2000 for instance, would not be directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date if it reported taxes pursuant to the calendar year. Because the petitioner's 2000 fiscal year ended on June 30, 2001, however, its 2000 tax return is relevant to that ability during a period after the priority date.

Corporation, that return would have been due on October 15, 2003. Counsel submitted no evidence that the petitioner, or Pleasant Care Corporation, had sought an extension of time to file its 2002 income tax return.

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 September 16, 2004, denied the petition.

On appeal, counsel submits (1) a 2003 W-2 form, (2) five pay stubs, (3) complete copies of the 2001 and 2002 tax returns of Pleasant Care Corporation of 2258 Foothill Boulevard in La Canada, California, and (4) her own letter of October 14, 2004.

The 2003 W-2 form shows that PCC Health Services, of La Canada, California, paid the beneficiary \$54,397.87 during that year.

The pay stubs submitted show that Atlas Care Enterprises, Incorporated, dba Pleasant Care – San Diego, of the same address as the petitioner, paid the beneficiary amounts ranging from \$2,493.28 to \$2,944.22 during the five two-week pay periods from July 1, 2004 to September 15, 2004.

The 2002 tax return shows that Pleasant Care Corporation of 2258 Foothill Boulevard in La Canada, California declared a loss of \$1,088,410 as its taxable income before net operating loss deductions and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In her October 14, 2004 letter counsel argues that the 2003 W-2 form shows that the petitioner was then paying the beneficiary the proffered wage "at a different location." Counsel submitted no evidence to demonstrate that PCC Health Services, of La Canada, California is identical to the petitioner, Pleasant Care Nursing and Rehabilitation Center of San Diego.

Counsel further argues that the pay stubs submitted show that the petitioner continues to pay the proffered wage to the beneficiary. Counsel cites a May 4, 2004 memorandum from the Associate Director for Operations of CIS for the proposition that the petitioner has, therefore, demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Counsel provides no evidence to demonstrate that Atlas Care Enterprises, Incorporated, dba Pleasant Care – San Diego, of the same address as the petitioner, is identical to the petitioner, Pleasant Care Nursing and Rehabilitation Center of San Diego. A web search of a public database shows that the two are affiliates. That both are corporations, however, implies that neither is merely a trade name of the petitioner.

The petitioner is a corporation.³ 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

³ Public records indicate that the petitioner's name, Pleasant Care Nursing and Rehabilitation Service, -- San Diego, is a trade name of Pleasant Care Corporation in La Canada.

corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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 of companies not shown to be identical to the petitioner will not be considered.

Counsel has not demonstrated that PCC Health Services, also of 2258 Foothill Boulevard in La Canada, California, is identical to the petitioner. The W-2 forms that PCC Health Services Care Corporation issued to the beneficiary will not be considered in determining whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.⁴

Notwithstanding that it uses the same mailing address as the petitioner, counsel has not demonstrated that Atlas Care Enterprises, Incorporated dba Pleasant Care – San Diego, the company that issued paychecks and pay stubs to the beneficiary, is identical to the petitioner, Pleasant Care Nursing and Rehabilitation Center – San Diego. Those paychecks and pay stubs will not be considered in determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date.⁵

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 did not establish that it employed and paid the beneficiary.

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).

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.

⁴ Even if those W-2 forms had been issued by the petitioner, they would only show the ability to pay the proffered wage during 2003, and not during 2001 or 2002.

⁵ Even if the petitioner had issued those paychecks and pay stubs, they would not demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Those stubs and checks show that the petitioner paid \$13,414.24 during 2004. They do not show that the petitioner paid \$24,960 to the beneficiary during 2004, nor during any other year.

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 the 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.

The proffered wage is \$24,960 per year. The priority date is April 23, 2001.

Although counsel submitted no evidence to demonstrate that the petitioner and Pleasant Care Corporation are identical, information from the California Secretary of State confirms that relationship. Pleasant Care Nursing and Rehabilitation Center – San Diego, is a trade name of Pleasant Care Corporation. The tax returns of Pleasant Care Corporation are therefore relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During its 2000 fiscal year 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 income during that year. Because the petitioner did not provide a copy of its Schedule L this office cannot calculate the petitioner's end of fiscal year 2000 net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets.

During its 2001 fiscal year 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 income 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 its net current assets during that year.

During its 2002 fiscal year 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 income 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 its net current assets during that year.

The record also contains two letters, dated October 12, 2001 and February 18, 2004, from the petitioner's executive vice president. Those letters state that on those dates the petitioner had 204 and 237 employees, respectively, and that it is able to pay the proffered wage. Although the record contains no other evidence of the number of workers the petitioner employs, this office notes that it paid salaries of \$89,910,252, \$87,342,024, and \$85,442,945 during its 2000, 2001, and 2002 fiscal years, respectively. Those amounts are consistent with a business of considerable magnitude.

Further, the petitioner's gross receipts were \$195,759,399, \$205,102,214, and \$201,858,560 during those same years, respectively. Again, those amounts are consistent with a business of considerable magnitude.

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner's gross income has been close to \$200 million during each of the salient years. The petitioner paid salary and wages of nearly \$90 million during each of those years. Thus, assessing the totality of circumstances in this individual case, this office concludes that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

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.