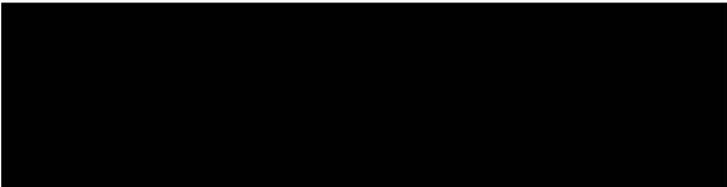




U.S. Citizenship
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B6

File: [Redacted] Office: VERMONT SERVICE CENTER Date: APR 12 2007
EAC-05-065-51956

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:
[Redacted]

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 immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a repair shop, and seeks to employ the beneficiary permanently in the United States as a welder/combination. The petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's July 28, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it can pay the beneficiary the proffered wage.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job 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).

The regulation 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.

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

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$18.97 per hour, with an overtime rate of \$28.46 per hour. The regular hourly wage would be equivalent to \$39,457.60 per year, based on a schedule of 40 hours per week. The labor certification was approved on January 6, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on December 27, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: March 27, 1998; gross annual income: \$353,849; net annual income: not listed; and current number of employees: 6.

On March 11, 2005, the director issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay from April 30, 2001 to the present, including the petitioner's 2002, 2003, and 2004 federal tax returns, as well as of the beneficiary's Forms W-2. The petitioner responded to the RFE. Following review, the director denied the petition on July 28, 2005. Counsel appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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. On Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary listed that he was employed with the petitioner from February 1999 to the present (date of signature). The petitioner did not submit any W-2 statements, but did provide in response to the RFE that the petitioner had employed the beneficiary from February 18, 2005 onward.² In support, the petitioner provided paystubs, which exhibit that [REDACTED] paid the beneficiary \$9,384 year-to-date as of June 2, 2005. On appeal, the petitioner provided further 2005 paystubs showing that the [REDACTED] had employed and paid the beneficiary \$16,098, year-to-date as of August 18, 2005.

The petitioner submitted a letter, which provided that "as of January 2003 my Company has changed its name from [REDACTED] to [REDACTED] with the same owner." The letter further provided that [REDACTED] was located at the same address as the petitioner, and performed the same type of work, but that it had a new and different tax identification number than the petitioner. The petitioner did not provide any incorporation documentation, certificate of name change, doing business as, or fictitious name, but provided only a notice from the Department of the Treasury regarding the federal tax identification number for the petitioner and for [REDACTED]. Each company has a different tax identification number, so that the corporate change appears to be more than solely a name change. Wages paid, and financial information related to one company, cannot be used to satisfy the petitioner's need to demonstrate that it can pay the proffered wage. 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 or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

² The petitioner provided a letter, which stated that the beneficiary only began employment with the petitioner in February 2005, as prior to that date the beneficiary "did not have Employment Authorization and could not legally work." This statement conflicts with the beneficiary's listed ETA 750B representation that he has been employed with the petitioner since February 1999. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Further, [REDACTED] has not demonstrated that it is the successor-in-interest to the initial petitioner. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The letter from the owner of [REDACTED] is insufficient to demonstrate that [REDACTED] is the successor-in-interest to the petitioner.

Therefore, the wages paid to the beneficiary in 2005 would not be considered as evidence of the petitioner's ability to pay the proffered wage for that year. The petitioner would need to demonstrate that it could pay the full proffered wage for the years 2001, 2002, 2003, 2004, and 2005.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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). 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 petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2001	\$15,990 ³

³ The petitioner provided its 2001 tax return, which listed the company in the petitioner's name of BBL Bodies, Inc. The petitioner did not provide its federal tax returns for any other year, despite the RFE request, or on appeal. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate its continuing ability to pay. Based on date of filing the I-140 Petition, the petitioner's 2002, and 2003 tax returns should have been available. Additionally, the petitioner's 2004 tax return should have been available at the time of the petitioner's response to the RFE.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years, even if the wages paid to the beneficiary were added to the petitioner's net income.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18, or, if filed on Form 1120-A, on Part III. 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, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2001	-\$90,129

The petitioner cannot establish its ability to pay the beneficiary the proffered wage based on its net current assets either.

On appeal, the only new evidence that counsel submitted on the petitioner's behalf were paystubs issued to the beneficiary for the time period June 3, 2005 through August 18, 2005 exhibiting payment by [REDACTED] and not the petitioner. The paystubs reflect that [REDACTED] paid the beneficiary at a rate of \$18.00 per hour, which counsel contends is 94.89% of the proffered wage. Counsel further contends that the 2005 paystubs would not reflect the beneficiary's annual wages, as the paystubs submitted only cover three months or part of the year, but shows that the petitioner is currently paying an amount close to the proffered wage.

While it is not necessary for the petitioner to pay the proffered wage until the beneficiary adjusts his status to permanent residence, as noted above, wages previously paid to the beneficiary are considered in establishing whether the petitioner can demonstrate the ability to pay the proffered wage. The petitioner must demonstrate this ability from the time of the priority date, here, April 30, 2001, until the beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2).

In the case at hand, the petitioner provided its tax return for 2001. Both the petitioner's net income and net current assets are deficient and cannot be used to demonstrate the petitioner's ability to pay the proffered wage. For the years 2002, 2003, and 2004, the petitioner has failed to provide its federal tax returns, despite the RFE request, or other regulatory prescribed evidence in the form of an audited financial statement or annual report. Counsel did not provide any explanation why the petitioner could not provide such information in response to the RFE. Similarly, counsel failed to provide any regulatory prescribed evidence for these years on appeal. The evidence provided for 2005, paystubs, exhibits payment to the beneficiary by an entity whose affiliation to the petitioner has not been properly established, and is insufficient to show that the petitioner can pay the full proffered wage of \$39,457.60 per year.

⁴According 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.

Accordingly, based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.