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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2007
WAC 05 072 51655

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

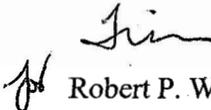
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical clinic. It seeks to employ the beneficiary permanently in the United States as a medical assistant. As required by statute, 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.

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 Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 15, 2002. The proffered wage as stated on the Form ETA 750 is \$9.39 per hour, which equals \$19,531.20 per year.

The Form I-140 petition in this matter was submitted on December 30, 2004. On the petition, the petitioner stated that it was established on September 1, 1999 and that it employs two workers. The petition states that the petitioner's gross annual income is \$233,855. The space reserved for the petitioner to report its net annual income was left blank. On the Form ETA 750, Part B, signed by the beneficiary on February 6, 2002, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Glendale, California.

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.

The record in the instant case contains the following: (1) a portion of the 2001 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner, Dr. [REDACTED] and the owner's spouse, (2) the 2002, 2003, and 2004 tax returns of Dr. [REDACTED] and his spouse, (3) the 2005 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner filing separately, (4) printouts pertinent to the bank balance, checks written, and credit card transactions of an unidentified account holder, (5) three letters dated November 22, 2006, and (6) printouts of web content from various sites.

The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date that was filed before or with the appeal.

Schedules C attached to the 2002 through 2005 tax returns show that Dr. [REDACTED] owned the petitioning medical practice¹ during those years. The tax returns show that from 2001 to 2004 the petitioner's owner and his spouse had one dependent.

The partial 2001 tax return submitted did not include a Schedule C, Profit or Loss from Business for the petitioning business. Whether the petitioning medical practice earned a profit during that year is therefore unknown.² During that year the petitioner and his spouse reported adjusted gross income of \$75,474. This office notes, however, that because the priority date is February 15, 2002, evidence pertinent to the finances of the petitioner and the petitioner's owner during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2002 the petitioning medical practice returned a profit of \$5,615. The adjusted gross income of the petitioner's owner and his spouse during that year, including the petitioner's profit, was \$142,950.

During 2003 the petitioning medical practice returned a profit of \$354. The adjusted gross income of the petitioner's owner and his spouse during that year, including the petitioner's profit, was \$27,652.

During 2004 the petitioning medical practice returned a profit of \$325. The adjusted gross income of the petitioner's owner and his spouse during that year, including the petitioner's profit, was \$48,189.

During 2005 the petitioning medical practice returned a profit of \$80,915. The adjusted gross income of the petitioner's owner during that year, including the petitioner's profit, was \$75,198.

¹ Dr. [REDACTED]'s spouse is also a medical doctor. Another Schedule C showing the profit returned by her medical practice is attached to each of the tax returns, except the 2005 return in which the petitioner's owner filed separately.

² The Form 1040 U.S. Individual Income Tax Return reports, at Line 12, business income of \$56,624. Because the petitioner's spouse also reports the results of her business on Schedule C, however, how much, if any, of that amount came from the petitioning business is unknown to this office.

One of the November 22, 2006 letters is from the petitioner's owner in his capacity as the owner of the petitioning business and states that his house and other valuables are worth over \$2 million and indicates that he has investments in non-medical business, including [REDACTED] and [REDACTED] Group. This office notes that Hye Medical is apparently a medical business.

Another of those letters is from the petitioner's owner in his capacity as owner of [REDACTED] and states that he completely funded that business, which was founded during 2003, with \$165,000. The third November 22, 2006 letter is from the president of [REDACTED] and indicates that the petitioner's owner is one of the founders of Global Energy, into which he invested \$85,000 during 2003.

A printout of web content pertinent to Global Energy is attached to that third letter. It describes the business of Global Energy but contains no evidence that it is profitable. Other printouts show that the petitioner's owner is the owner of the petitioning company, is medical director of a Cardiac Renewal Center in Glendale, California, and has a telephone listing at [REDACTED] in Los Angeles.

The director denied the petition on June 8, 2005. On appeal, counsel asserted that the petitioner's owner's personal income and assets should have been accorded more consideration in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In a subsequent undated submission³ counsel argued that the failure of the service center to request evidence pertinent to the petitioner's owner's personal finances was reversible error. Counsel notes that the petitioner's owner's November 26, 2006 letter indicates the nature of his other holdings. Counsel asserts that the evidence of those holdings and the evidence previously submitted constitute sufficient evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

When the director issued the decision of denial the record was complete. It contained evidence pertinent to each of the salient years since the priority date. Under those circumstances the director was not obliged to request additional evidence. The petitioner was obliged to volunteer any evidence that, notwithstanding that his tax returns do not demonstrate the ability to pay the proffered wage, his assets are sufficient to pay the proffered wage.

In any event, the petitioner had another opportunity to present evidence of the ability to pay the proffered wage on appeal and did, in fact, submit some evidence pertinent to the petitioner's owner's personal assets. That evidence will be considered below.

Counsel's reliance on the bank statements in this case is misplaced. First, as was noted above, the bank statements provided contain no indication that they are related either to the petitioner or the petitioner's owner. Second, bank accounts 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

³ On the Form I-290B appeal, filed July 7, 2005, counsel indicated that he would submit a brief or additional evidence within 30 days. On November 17, 2006 this office inquired via facsimile transmission whether counsel had submitted additional evidence or argument as promised. Counsel responded that he had not, but provided the undated submission. Although this office is not bound to consider such untimely submissions it will, in this case, exercise its discretion to consider the argument submitted.

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. Third, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁴ Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on the petitioner's owner's tax returns.

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 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 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). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner, however, is a sole proprietorship. Counsel is correct that the petitioner's owner's personal income and assets are relevant to the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined

⁴ 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 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.

with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that he could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner's owner's income and the value of his assets will, however, be considered only to the extent that they have been demonstrated to exist and to be readily available for expenditure. In this case, the evidence demonstrates that the petitioner's owner has interests in various enterprises into which he invested considerable sums, but no evidence that those enterprises are now producing reliable profit, or evidence of their current value, or evidence that their value is readily available to pay the proffered wage in this case. The petitioner's owner has not been demonstrated to have any personal assets available to pay the proffered wage.

The proffered wage is \$19,531.20 per year. The priority date is February 15, 2002.

During 2002 the petitioner's owner declared adjusted gross income, including the petitioner's profit, of \$142,950. If the petitioner's owner had been obliged to pay the proffered wage out of his own adjusted gross income he would have been left with \$123,418 with which to support himself and his family. No evidence pertinent to the petitioner's owner's personal expenses was requested or submitted. This office finds, however, that the petitioner's owner could have paid the proffered wage during 2002 out of his own income and assets and retained an amount sufficient to support himself and his family. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner's owner declared adjusted gross income of \$27,652. If the petitioner's owner had been obliged to pay the proffered wage out of his own adjusted gross income during that year he would have been left with \$8,120.80 with which to support himself and his family. To believe that the petitioner's owner could have supported himself and his family for a year on that amount is unreasonable. The petitioner is unable, therefore, to show the ability to pay the proffered wage during 2003 out of its owner's adjusted gross income. The petitioner submitted no other timely, reliable evidence of funds at its disposal with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner's owner declared adjusted gross income of \$48,189. If the petitioner's owner had been obliged to pay the proffered wage out of his own adjusted gross income during that year he would have been left with \$28,657.80 with which to support himself and his family. Evidence pertinent to the petitioner's owner's recurring monthly expenses was neither requested nor submitted. Under these circumstances this office finds that the petitioner has not demonstrated that the petitioner's owner could have paid the proffered wage out of his own income and continued to support his family. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2003 out of its owner's adjusted gross income. The petitioner submitted no other timely, reliable evidence of funds at its disposal with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

During 2005 the petitioner's owner declared adjusted gross income of \$75,198. If the petitioner's owner had been obliged to pay the proffered wage out of his own adjusted gross income during that year he would have

been left with \$55,666.90 with which to support himself.⁵ Although the record contains no evidence pertinent to the petitioner's owner's recurring monthly expenses this office finds that the petitioner's owner could be reasonably expected to support himself for a year with that amount. The petitioner has shown the ability to pay the proffered wage during 2005

The petitioner failed to demonstrate the ability to pay the proffered wage during 2003 and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis which has not been overcome on appeal.

The record suggests an additional issue that was not raised in the decision of denial.

The April 14, 2005 letter from the petitioner stated that he was then in the process of incorporating his medical practice. This suggests that ownership of the petitioning medical practice may have transferred since the Form ETA 750 Labor Certification Petition was submitted. A change from sole proprietorship to corporate ownership is a change in ownership, notwithstanding that the resulting corporation has the same ultimate owner as the sole proprietorship. The resulting corporation is a new company and a new owner of the business.

When an existing, approved Form ETA 750 is to be used by a petitioner, corporate or otherwise, other than the company to which it was issued, the substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In the instant case the evidence does not demonstrate that the corporation, if the petitioner is now under corporate ownership, assumed all of the rights, duties, obligations, and assets of the sole proprietorship.

This issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it. Today's decision, therefore, will not rely on that additional basis for denial, even in part. If the petitioner attempts to overcome today's decision with a motion, however, it should address this issue. The present petitioner would be obliged to show either that its ownership is unchanged or that the substituted petitioner is the true successor of the original petitioner. If a change in ownership has occurred the present petitioner would also be obliged to demonstrate that both entities had the ability to pay the proffered wage during the respective periods when they owned the business.

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.

⁵ During that year the petitioner's owner filed separately and declared no dependents. The record does not indicate, therefore, that the petitioner's owner was responsible for supporting his wife or child.