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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

JUL 31 2007

SRC 05 198 50342

IN RE:

Petitioner:

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, Texas 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 retail store. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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 DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 12, 2001. The proffered wage as stated on the Form ETA 750 is \$2,901.58 per month, which equals \$34,818.96 per year.

The Form I-140 petition in this matter was submitted on June 28, 2005. On the petition, the petitioner stated that it was established on May 16, 1996. The space reserved for the petitioner to report the number of workers it employs was left blank. On the Form ETA 750, Part B, signed by the beneficiary on February 14, 2001, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Conroe, Texas.

The AAO reviews *de novo* issues raised 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.¹

In the instant case the record contains (1) the petitioner's 2001, 2002, 2003 and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) monthly statements pertinent to the petitioner's bank account, (3) individual tax returns and other documents pertinent to the financial condition of one of the petitioner's shareholders and corporations that he owns, and (4) security agreements and amortization schedules pertinent to loans by commercial lenders to the petitioner's shareholders. 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.

The petitioner's tax returns show that it is a corporation, that it incorporated on May 16, 1996, and that it reports taxes pursuant to the calendar year and a hybrid of cash and accrual convention accounting.

During 2001 the petitioner reported ordinary business income of \$72,329. At the end of that year the petitioner had current assets of \$237,795 and current liabilities of \$195,162, which yields net current assets of \$42,633.

During 2002 the petitioner reported ordinary business income of \$12,511. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner reported ordinary business income of \$20,107. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner reported ordinary business income of \$22,667. At the end of that year the petitioner's current liabilities exceeded its current assets.

The director denied the petition on February 14, 2006.

On appeal, counsel asserted that the petitioner's depreciation deduction should be added back to its net income to show the funds available to pay the proffered wage.

Counsel also notes that nothing is suspicious about the petitioner claiming the greatest deductions possible so as to decrease its tax liability as much as is legally permitted. Counsel appeared to imply, thereby, that the petitioner's tax returns are an inaccurate index of its ability to pay additional wages, and should be adjusted to more accurately reflect that ability. Counsel provided calculations that purport to show that, if the petitioner had used straight-line depreciation rather than accelerated depreciation, its taxable income would have been much higher.

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

Further, counsel asserts that the petitioner's Schedule L, Line 17 Mortgages, Notes, Bonds Payable in Less Than One Year are not actually a current liability, and although claimed as one on the petitioner's tax returns, should not be treated as one for the purpose of determining the petitioner's ability to pay the proffered wage out of its net current assets. Counsel asserts that those amounts, although obtained by the petitioner's owners from institutional lenders, represent, in effect, loans to the company from shareholders. Counsel asserts, "Under state law shareholder loans generally have a lower priority in terms of liquidation of assets [and as] such . . . should not be listed as current liabilities."

In a previous letter dated November 8, 2005 the petitioner's former counsel argued that the income and assets of the shareholder for whom personal information was provided demonstrate that the petitioner is able to pay the proffered wage. Counsel cited cases from the Department of Labor's Board of Alien Labor Certification Appeals (BALCA), *Ranchito Coletero*, 2002-INA-105 (BALCA 2004), and *In the Matter of Ohsawa America*, 1988-INA-240 (BALCA 1988) for various propositions including that the income and assets of the petitioner's owners should be considered.

Counsel cited *O'Connor v. Attorney General of U.S.*, Not Reported in F. Supp. 1987 WL 18243 (D. Mass., 1987), also for the proposition that the assets of the petitioner's owner are an appropriate consideration in this matter.

In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Further, the court made clear in *O'Connor*, the case cited by counsel, that it found that the income and assets of the petitioner's owner was an appropriate consideration **because the petitioner in that case was a sole proprietorship, rather than a corporation**. Even if *O'Connor* were binding precedent in this matter it would not support the petitioner's position.

The DOL precedent cases counsel cited are also not binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all of its employees in the administration of the Act, BALCA decisions are not similarly binding. If counsel's intention was to argue that the reasoning of that case is convincing and should be extended to the instant case, this office disagrees, as is explained below.

Counsel's citation of unpublished, non-precedent decisions of this office is without effect. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

Counsel's argument pertinent to *Ranchito Coletero, Id.* is unconvincing. The petitioner in that case was, again, a sole proprietorship. The owners of sole proprietorships are not merely permitted but obliged to pay the debts and obligations of their companies out of their own income and assets.

The instant 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). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, “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.”

As the owners, stockholders, and others are not obliged to pay the petitioner’s debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation’s debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

The assertion that the petitioner’s tax returns are a poor index of its ability to pay the proffered wage is inapposite. That assertion neither demonstrates the petitioner’s ability to pay the proffered wage nor relieves the petitioner of the obligation of proving it. The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. The petitioner has submitted neither annual reports nor audited financial statements and must, therefore, rely upon its tax returns.

Counsel asserted that his computations demonstrate that the petitioner’s depreciation deduction during the salient years would have been less if it had opted for straight-line depreciation. Whether that is true is unclear from the data provided. Although the petitioner, using accelerated depreciation, deducts more for depreciation of recently acquired assets, assets acquired during previous years, which are now largely depreciated pursuant to accelerated depreciation, would have yielded greater depreciation deductions during the salient years pursuant to straight-line depreciation.

The record contains no indication, other than counsel’s assurance, that the petitioner would have declared greater income pursuant to straight-line depreciation, given that it was consistent from year to year. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

Counsel also argued, apparently in the alternative, that rather than merely recalculating the petitioner’s depreciation deductions pursuant to straight-line depreciation, the petitioner’s depreciation deductions, in their entirety, should be added back to its income during the salient years in the determination of the petitioner’s ability to pay additional wages. That argument is similarly unconvincing.

This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the

value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Counsel appears to assert, in this alternative argument, that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel's attempt to recharacterize some of the petitioner's current liabilities to non-current is unconvincing. A current liability is one due to be paid within the petitioner's operating cycle, typically one year. By listing loans as current liabilities the petitioner represented that it expected to be obliged to pay them within a year.

Counsel now claims that those liabilities will not be due within a year and need not be paid in the short-term. The petitioner is obliged, however, to demonstrate its ability to pay the proffered wage with its tax returns as they were submitted to IRS. It is obliged to rely upon the same version of its returns upon which its tax liability is based, rather than counsel's amended version. The petitioner may not now recharacterize its current liabilities as necessary to render the instant petition approvable. Counsel's amendments to the petitioner's tax returns, which amended versions were apparently never submitted to IRS, will not be considered.

Counsel's assertion pertinent to priority of payments in the event of liquidation is not germane. The issue in this matter is whether the petitioner's net current assets are sufficient to pay the proffered wage, not the priority of payments in the event of liquidation.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements 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 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.²

² 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

Third, 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 its 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. 612 (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).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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.

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.

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.

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 minus 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 typically³ 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 \$34,818.96 per year. The priority date is March 12, 2001.

During 2001 the petitioner reported ordinary business income of \$72,329. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner reported ordinary business income of \$12,511. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no other reliable evidence of its ability to pay the proffered wage during 2002. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

During 2003 the petitioner reported ordinary business income of \$20,107. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no other reliable evidence of its ability to pay the proffered wage during 2003. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

During 2004 the petitioner reported ordinary business income of \$22,667. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no other reliable evidence of its ability to pay the proffered wage during 2004. The petitioner has not demonstrated its ability to pay the proffered wage during 2004.

The petition in this matter was submitted on June 28, 2005. On that date the petitioner's 2005 tax return was unavailable. No evidence pertinent to 2005 was subsequently requested. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

³ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 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 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.