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MAR 15 2007

File: [Redacted]
LIN-04-164-50254

Office: NEBRASKA SERVICE CENTER Date:

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 Acting Director, Nebraska Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to operate an import/export business, which sells leather goods, fashions, and jewelry, and seeks to employ the beneficiary permanently in the United States as a manager, advertising (Marketing and Advertising Manager). As required by statute, 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 September 13, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

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 an immigrant visa and classify the beneficiary as a professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” 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:

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).

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.

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 for the position of a manager, advertising is \$84,427.00 per year.² The labor certification was approved on November 14, 2003, and the petitioner filed the I-140 Petition on the beneficiary's behalf on May 3, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: established: 1992; gross annual income: \$351,721; net annual income: \$234,043; and current number of employees: 4.

On April 28, 2005, the director issued a Request for Evidence ("RFE"). The director requested that the petitioner submit: evidence of the beneficiary's education, including the beneficiary's degree and evaluation; evidence that the beneficiary had the required work experience and met the special requirements for the position; evidence that the petitioner had the ability to pay the proffered wage, including bank statements, personnel records, Forms 1099, and the beneficiary's W-2 Forms; and to submit copies of the petitioner's Quarterly Federal Tax Forms, Forms 941, and state unemployment compensation report form.

On July 25, 2005, the petitioner responded and submitted the petitioner's 2001, 2002, and 2003 tax returns; the petitioner's 2004 bank statements; and an affidavit regarding the owner's personal assets. We note that the petitioner did not provide any Forms 1099, or Forms 941 Quarterly Wage Statements as requested. The petitioner responded that the beneficiary was not currently working for the petitioner and, therefore, the beneficiary did not have any W-2 Forms from the petitioner.³ Following review, the director determined that the evidence submitted in response to the RFE was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and denied the petition on September 13, 2005. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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.

On Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner has not submitted any W-2 Forms to document wages paid. The petitioner's owner in a letter provides that, "I did not submit records of the beneficiary's W-2s or all amounts

² The petitioner initially listed on the Form ETA 750 an annual wage of \$45,000. DOL required that the wage be changed to \$84,427.00 per year prior to certification.

³ We note that the petitioner submitted a copy of the beneficiary's resume, which provides that he has been employed with the petitioner since 1998. The beneficiary's resume does not list an end date for his employment with the petitioner, so that he still appears to be employed with the petitioner, or was at the time of filing.

paid to the beneficiary because he is not currently employed with us. I project to officially employ the beneficiary in January 15th of 2006 [sic].”⁴ Since the petitioner has not provided any documentation regarding wages paid to the beneficiary, the petitioner, therefore, cannot establish its ability to pay the beneficiary based on prior wage payment to 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 that period, CIS will next examine the net income figure reflected on the petitioner’s federal income tax return. 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 court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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.

The petitioner’s tax returns reflect that it is structured as 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. The tax returns submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	-\$42,250 ^{5,6}

⁴ As noted above, the beneficiary’s resume lists that he has been employed with the petitioner since 1998. However, no W-2 statements were submitted. 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.

⁵ We note that the petitioner submitted documentation to show that the petitioner requested an extension until September 15, 2005 to file its 2004 tax return.

⁶ The record reflects a number of different addresses for the petitioner. The reason for the differing addresses is unclear. On the petitioner’s 2003 tax return, the petitioner’s business address is listed as: [REDACTED] tax return lists an address of: 515 Michael Manor, Glenview, IL; the 2001 tax return lists: [REDACTED], which appears to be the address of the accountants that prepare the petitioner’s tax returns; Form I-140 lists an address of: [REDACTED] Form ETA 750 lists an address of: [REDACTED] (amended to read 515 Michael Manor, Glenview, IL); the petitioner’s 2005 bank statements list an address of 3850 Linneman Street.

2002	-\$37,341
2001	\$79,349

From the above net income, the petitioner did not have sufficient net income in any year to demonstrate its ability to pay the proffered wage.

Next, we will examine the petitioner's continuing ability to pay the required wage under a second test based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The net current were as follows:

<u>Year</u>	<u>Net Current Assets</u>
2003	\$50,822
2002	\$6,872
2001	\$18,250

As demonstrated above, the petitioner did not have sufficient net current assets to pay the proffered wage in any year either.

On appeal, counsel contends that the petitioner can pay the proffered wage based on evidence of the owner's personal financial resources, including bank accounts, insurance, real estate, and business holdings. Further, counsel contends that "Mr. [REDACTED] is the president, 100% owner and 100% shareholder of the corporation; therefore, can use this [sic] assets as evidence of ability to pay the proffered wage. In addition, he can give a loan to the petitioner/company because he is not separate from the petitioner."

Additionally, we note that the nature of the petitioner's business is unclear. The petitioner's 2002 and 2003 tax returns list on Schedule K "coin operated laundromat" as its principal business activity. The 2002 tax return provides for amortization for 5 Laundromat Centers from the date of February 19, 2002, and additionally lists loan closing costs as of February 19, 2002. In contrast, the petitioner's 2001 tax return lists on Schedule K that its principal business activity is the import/export and sale of products. Further, the 2001 tax return reflects \$0 in gross receipts. Instead, the petitioner's net income in 2001 is derived from capital gains listed on Form 4797 under Sale of Business Property. Further, the petitioner indicates that its main business activity is as a restaurant on its Illinois Department of Revenue 1120 filed in 2001, and 2003. It is unclear from the tax returns whether the petitioner operates more than one business under the petitioner's name, or whether the petitioner sold his import/export business, and/or restaurant to purchase the laundromats. A change of business would result in a change of the beneficiary's job offer. 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. See *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

⁷According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner here is structured as a C corporation, not as a sole proprietor, and therefore, personal assets of the petitioner's sole shareholder would not be considered. In the case of a corporation, CIS may not "pierce the corporate veil" and look to the assets of the owner to satisfy the petitioner's ability to 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. Therefore, while the petitioner's owner may have individual assets, those assets are not relevant in the case at hand. Assets of the shareholders (or of other enterprises or corporations) cannot be considered in determining the petitioner's ability to pay the proffered wage.

Counsel also resubmitted the petitioner's bank statements. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Further, if we were to examine the bank statements submitted, nothing contained therein leads us to conclude that the petitioner can demonstrate its ability to pay the proffered wage. The petitioner submitted bank statements for July 2004 to June 2005.

The statements reflect a high balance of \$15,746.44 as of July 30, 2004, and a low balance of \$133.70 as of February 28, 2005 with significant variance in the other months. Based on the short time period submitted and significant variances in balance amounts, we would not conclude that the documentation exhibits the petitioner's ability to pay from the priority date until the beneficiary obtains permanent residence. Additionally, cash assets in the petitioner's bank account should already have been accounted for as cash on the petitioner's Schedule L and included in net current assets analysis above.

Counsel additionally contends that the petitioner had a line of credit available in the amount of \$100,000 from which the petitioner can pay the proffered wage. Counsel submitted a document entitled "Application overview" for the petitioner's credit application dated October 12, 2005. 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 the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. Further, the application is dated as of October 2005. The petitioner's application for a line of credit in 2005 does not establish the petitioner's ability to pay the proffered wage in 2001. 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 (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).

Further, based on the tax returns, which reflect that the petitioner's business is a coin operated Laundromat, it is questionable that the petitioner would require the services of an advertising manager for an import/export company. The tax returns suggest that the petitioner has sold his import/export business and now operates a Laundromat. This discrepancy raises serious questions regarding the validity of the job offer. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Based on the foregoing the petitioner is unable to demonstrate its continued ability to pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence. 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.