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File: WAC-05-249-50247 Office: CALIFORNIA SERVICE CENTER Date: JAN 10 2008

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 (“director”), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is in the business of furniture manufacturing, and seeks to employ the beneficiary permanently in the United States as an industrial engineer. As required by statute, the petition filed was submitted with Form ETA 9089,¹ Application for Permanent Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s May 10, 2006 decision, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).²

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 professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(ii), 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 petitioner must establish that its ETA 9089 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 9089. The priority date is the date that Form ETA 9089 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of DOL. *See* 8 C.F.R. § 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 On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

² 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 9089 with DOL on August 4, 2005. The proffered wage as stated on Form ETA 9089 is \$28.20 per hour, which is equivalent to an annual salary of \$58,656 per year, based on 40 hour work week. The labor certification was approved on August 24, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on September 14, 2005. On the I-140, the petitioner listed the following information: date established: 2003; gross annual income: \$3,000,000; net annual income: \$100,000; current number of employees: 70.

On February 14, 2006, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit further evidence to support its claim that it could pay the beneficiary the proffered wage, as the financial statements that the petitioner had submitted were not acceptable. The RFE additionally requested that the petitioner submit quarterly wage reports filed with the state for the prior four quarters, and to provide all schedules and tables accompanying the tax returns. The petitioner responded. Following consideration of the petitioner's response, on May 10, 2006, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The W-2 Forms that the petitioner submitted showed that the wages paid to the beneficiary were less than the proffered wage; the petitioner did not submit federal tax returns; and the financial statements submitted were unaudited. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments 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. In the case at hand, the beneficiary listed on Form ETA 9089, signed on September 7, 2005, that he has been employed with the petitioner since October 24, 2003. The petitioner provided the beneficiary's 2005 Form W-2, which exhibited payment to the beneficiary in the amount of \$38,671.50 (or \$19,984.50 less than the proffered wage).

The petitioner additionally submitted copies of the beneficiary's 2006 paystubs, which showed that the beneficiary was paid \$15,200 for the year-to-date, as of April 19, 2006, and that he was paid at a weekly rate of \$1,000 a week from February 23, 2006 to April 19, 2006. Prior to that, he was paid \$900 per week from December 29, 2005³ to February 22, 2006, resulting in an annual salary less than the proffered wage.⁴

³ Several of the beneficiary's paystubs show that he was employed on a part-time basis for 32 hours a week. Counsel acknowledges on appeal that the petitioner is employing the beneficiary in part-time H-1B status. We note that for purposes of the labor certification 20 C.F.R. § 656.3 provides that employment means, "Permanent full-time work by an employee for an employer other than oneself," so that the petitioner would be required to employ the beneficiary on a full-time basis at the time that the beneficiary obtains permanent residence.

The paystubs issued would represent partial payment of the proffered wage, but the petitioner is unable to establish its ability to pay the proffered wage from the time of the priority date onward through prior wage payment to the beneficiary alone. The petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage for 2005, or \$19,984.50.

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 the present matter, the petitioner did not provide its federal tax returns, but instead counsel provided in response to the RFE that the petitioner had not filed its business tax returns since it was established in June 2003. The petitioner provided a copy of its filing with the Internal Revenue Service for an extension of time to file. Further, the Chief Financial Officer provided a statement that, "we have always generated sufficient cash flow to cover all employee wages and all other expenses . . . Our company was burglarized and vandalized on February 14, 2005. Our computer hard drives and back-up discs containing records of all the financial transactions of the Corporation were stolen." The CFO additionally provided, "since the crime was committed, we have been reconstructing our Financial Records in order to properly prepare and file Tax Returns."

Accordingly, the petitioner did not submit any federal tax returns, but did provide the petitioner's Quarterly Wage Reports for the quarters ending March 31, 2005, June 30, 2005, September 30, 2005, December 31, 2005, and March 31, 2006 as requested by the RFE. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The Quarterly Wage Reports do reflect wage payments to other employees, as well as to the beneficiary, however, the wage reports do not reflect payments to the beneficiary beyond what the record contains based on the beneficiary's 2005 W-2.

The petitioner additionally submitted unaudited financial statements, including a 2004 profit and loss statement, and balance sheet. The statements contain a statement, "the above unaudited balance sheet was prepared for Management for the Books and Accounts of the Company and is intended solely for Management's Internal Use."⁵ The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements

⁴ The petitioner estimates that by year-end 2006, it will have paid the beneficiary \$50,000 based on wages of \$1,000 per week for 30 hours of work.

⁵ As the petitioner asserts that its financial records were stolen, the validity of the unaudited financial statements may, therefore, also be in question. The petitioner did not provide any explanation as to whether the statements were produced prior to the theft of the records, or whether they were recreated following the theft. Further, pursuant to 8 C.F.R. § 204.5(g)(2), unaudited statements are not accepted forms of evidence.

must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence as they were produced pursuant to a compilation and are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner also submitted bank statements for the time period of January 2005 through May 31, 2006.⁶ Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As a fundamental point, the petitioner's tax returns are usually 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 provided, the statements show a wide variance in the amount that the petitioner had in its account ranging from a low balance of -\$28,790.28 (as of February 28, 2005) to a high balance of \$102,824.28 (as of December 30, 2005).

As we do not have the petitioner's tax returns, we are unable to assess whether the cash reflected in the petitioner's bank account represents assets beyond those that would be listed on the petitioner's Schedule L of its relevant tax filing, and further to assess the amount of assets in reference to the petitioner's outstanding liabilities.

On appeal, the petitioner provides that it can pay the proffered wage. In support, the petitioner's owner provided a statement that he has in the past, and would in the future use his own personal funds to cover the businesses expenses if required.

The petitioner is structured as an "LLC," or a limited liability corporation. Citizenship and Immigration Services (CIS) may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation'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.

The petitioner additionally provided copies of its building lease agreements, including a factory lease dated July 1, 2005 to June 30, 2006 with monthly base rent in the amount of \$8,000, a second factory lease with monthly base rent in the amount of \$4,600, and a five year store lease dated November 21, 2003, showing that the petitioner paid base rent in the amount of \$11,255.63, increasing to a monthly amount of \$12,668.31 at the end of the petitioner's lease.

While these documents would establish the petitioner's physical premises and rental obligations, the leases do not show the petitioner's ability to pay the beneficiary the proffered wage.

⁶ On appeal, the petitioner additionally listed that it submitted bank statements for the time period January 1, 2004 to December 2005, however, the record contains statements instead dated January 31, 2005 to December 30, 2005.

The petitioner additionally submitted a list of its customer sales for the time period January 2005 to May 2006, which showed the amounts billed to each customer. The petitioner also submitted copies of invoices from January 2005 to May 31, 2006, which listed the amounts billed to each customer. Some, but not all, of the invoices list amounts billed to the customer as well as the amounts paid by the customer, and the outstanding balances. The petitioner seeks through these documents to establish that the business is “vital and robust” and that it has sufficient cash to pay the balance of the proffered wage.

While the invoices and customer billing records would reflect the petitioner’s sales, without regulatory prescribed evidence of the petitioner’s ability to pay, such as an audited financial statement, or the petitioner’s federal tax returns, we cannot assess the petitioner’s net income against the petitioner’s outstanding liabilities. Further, customer invoices would reflect the petitioner’s gross income or gross sales, rather than its net income. 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.

The petitioner did not indicate that the theft of any financial records impacted the petitioner’s sales’ data, or whether these records were similarly recreated. Further, the petitioner did not provide any evidence to document that a theft of the petitioner’s records actually occurred, such as a criminal report filed with the police, or any documented insurance claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner provides that it has a “favorable enough ratio of total current assets to total current liabilities.” As the petitioner provided unaudited, and potentially recreated financial statements, and further submitted no federal tax returns, we cannot accurately assess the petitioner’s ratio of current assets to total current liabilities.

The petitioner asserts that the totality of its circumstances should be examined, and that the analysis should include its bank statements and personnel records.

In examining the totality of the petitioner’s circumstances, the petitioner has been in business for less than four years, the bank statements provided vary significantly, and we cannot assess the petitioner’s true financial condition as the petitioner has not submitted or filed any federal tax returns, and has not submitted any audited financial statements. Additionally, records reflect that the petitioner has employed the beneficiary on a part-time basis. It is questionable whether the petitioner intends to employ the beneficiary on a full-time basis in accordance with the certified labor certification. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

The petitioner did not provide any additional evidence to document that the petitioner can pay the beneficiary the proffered wage. Accordingly, based on the foregoing, the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and the petition was properly denied. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.