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FILE:

SRC 06 161 50388

Office: TEXAS SERVICE CENTER

Date:

JAN 22 2008

IN RE:

Petitioner:

Beneficiary:

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 preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a convenience store night 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 failed to establish its continuing financial ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner had the continuing financial ability to pay the proffered wage.

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).

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 1, 2003.² The proffered wage is stated as \$17.69 per hour, which amounts to \$36,795.20 per year.

The Immigrant Petition for Alien Worker (I-140) was filed on April 24, 2006. Part 5 of the petition indicates that the I-140 petitioner, [REDACTED], was established in January 1999, reports a gross annual income of \$81,814, a net annual income of \$41,514, and it claims to currently employ four workers. On the ETA 750 B, signed by the beneficiary on November 25, 2003, it does not indicate that the beneficiary has worked for the petitioner.

With the petition, and in response to the director's requests for evidence, the petitioner submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2003, 2004, and 2005. The returns show that the petitioner files its tax returns on a calendar year basis. The tax returns contain the following information:

Year	2003	2004	2005
Net Income ⁴	\$19,227	\$ 2,196	-\$15,509
Current Assets (Schedule L)	\$67,571	\$80,134	-0-
Current Liabilities (Schedule L)	\$ 3,831	\$ 4,097	none listed
Net Current Assets	\$63,740	\$76,037	-0-

As noted in the above table, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.⁵ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible readily available resource out of which a proffered wage may be paid. As reflected on a corporate tax return the company's year-end current assets and current liabilities are shown on Schedule L. Current assets are found on lines 1(d) through 6(d) and current liabilities are specified on lines 16(d) through 18(d). If the petitioner's year-end net current assets are equal to or greater

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

⁴ For the purpose of this analysis, net income signifies the amount claimed on line 21 of the Form 1120S (ordinary income).

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner, through counsel, additionally provided copies of the sole shareholder's personal income tax returns for 2003-2005, copies of the corporate petitioner's bank statements from Bank of America covering the period from 12/31/2003 to 9/30/2005 and copies of bank statements from American First National Bank covering the 11/01/2005 to 6/30/2006 period. A comparison with copies of bank statements from American First National Bank provided on appeal show this account to be held by a different entity than the I-140 petitioner. It is held in the name of [REDACTED]

The director denied the petition on September 27, 2006. She determined that although the petitioner's net current assets of \$63,740 and \$76,037 were sufficient to cover the beneficiary's proposed wage offer of \$36,795.20 in 2003 and 2004, respectively, in 2005, neither the petitioner's reported net income of -\$15,509, nor its net current assets of -0- were sufficient to demonstrate the ability to pay the proffered wage and establish the petitioner's continuing financial ability.

As to the petitioner's continuing ability to pay the proffered wage beginning on the priority date of December 1, 2003, it is noted that an issue is raised by counsel that was not disclosed in the underlying proceedings or addressed by the director. Counsel asserts on appeal that the director should have considered the petitioner's bank statements in denying the petition because the figures listed on the petitioner's Schedule L balance sheet of the 2005 tax return were misleading. Counsel claims that the corporate owner of the petitioner leased the store to [REDACTED] on August 30, 2005. Counsel describes this arrangement as a change in structure but not in ownership.

It is noted that a copy of a lease, executed on June 27, 2005, (not August 30, 2005) and provided on appeal, does not identify the leased premises, which were leased to [REDACTED] the lessee. The lessor is not the corporate petitioner but the sole shareholder signing the lease in his individual capacity. A copy of an individual tax return for 2005 filed by [REDACTED] however, and submitted on appeal, names the same business and business address on Schedule C, Profit or Loss from Business, as that belonging to the corporate petitioner of the I-140. A letter from [REDACTED] states that he leases the petitioning business from the owner, [REDACTED] and wishes to continue to offer employment to the beneficiary at the specified rate.

It is noted that the regulation at 8 C.F.R. § 204.5(c) does not provide for multiple or co-employers to seek to be classified as a prospective U.S. employer for the purpose of obtaining an employment-based visa for a designated beneficiary. Here, because the lease does not name the subject of the lease, is not executed between the corporate petitioner and the lessee, and does not demonstrate how the lessee could have assumed all of the rights, duties, obligations and assets of the petitioner, it is unclear how [REDACTED] could, under these circumstances, be considered the successor-in-interest to the corporate petitioner within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). That case provides that, the successor-in-interest must submit proof of the relevant change in ownership and of how the change in

ownership occurred. It must also demonstrate that it assumed all of the rights, duties, obligations, and assets of the original employer. It must further show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-in-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. If a successorship-in-interest is not demonstrated, then the new employer must seek its own alien labor certification if it wishes to sponsor a beneficiary for an employment-based visa.

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)). Based on the copy of the lease and Mr. Soh's letter submitted on appeal, it may not be assumed that Peter H. Soh is a successor-in-interest within the meaning of *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481. Evidence pertinent to the finances of Peter H. Soh have not been shown to be relevant and will not be further addressed

This office also notes that because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

It is noted that copies of the petitioner's bank statements for January through August 31, 2005 have been provided on appeal. Counsel contends on appeal, that petitioner did not realize that the figures on Schedule L would make it seem as if the business had no current assets and that the absence of these assets actually shows that [REDACTED] had leased those assets to [REDACTED] at the end of August 2005. Counsel asserts that the petitioner's bank balances, except for one month, were sufficient to cover the proffered wage for the period from January to August 2005.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. In this case, there is no indication that the petitioner has employed 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, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the 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. "[CIS] may reasonably

rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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.

It is noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. If a petitioner feels that its tax return does not fairly represent its financial profile for a given period, it may elect to submit, for example, an audited financial statement. In this matter counsel asserts that no assets listed on Schedule L supports the lease of such assets to [REDACTED]. As stated above, as no successorship-in-interest has been alleged or established, [REDACTED]'s assets will not be considered. The petitioner's 2005 tax return not only failed to list any end-of-year assets, it also failed to identify any end-of-year liabilities. Together with the designation on the tax return that the return represents the corporation's final return, it raises the question whether the petitioner continued to be a viable ongoing concern such that it would be considered to be offering a bona fide job opportunity.⁷ Although not necessary for a determination in this case, in future proceedings involving the petitioner, this issue should be further examined.⁸

Relevant to an ability to pay a certified wage, if an examination of a petitioner's net income or wages paid to a beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. As noted by the director in this case, the petitioner's net current assets of \$63,740 and \$76,037 in 2003 and 2004, respectively, were sufficient to pay the proffered wage of \$36,795.20. In 2005, its tax return revealed that it had no net current assets available to cover the proffered wage in that year. The regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay the proffered wage. In this case, the petitioner has not established its continuing financial ability to pay the salary offered.

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.

⁷ In *In the Matter of United Investment Group*, 19 I&N Dec. 248, (BIA 1984), a labor certification was found invalid because of a change in the sponsoring partnership.

⁸ Relevant online state corporation records indicate that the petitioner has no standing and that its franchise responsibility has ended. See <http://ecpa.cpa.state.tx.us/coa/Index.html>.