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

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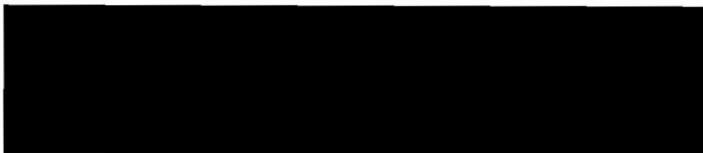
IN RE:

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 employment-based immigrant visa petition was denied by the Acting Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen.¹ Although the motion was untimely, there exists excusable reasons given for the delay and therefore it will be allowed.² The motion will be granted, the previous decision of the AAO will be affirmed, and, the petition will be denied.

The nature of the petitioner's business is a bakery. It seeks to employ the beneficiary³ permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor with a new ETA 750 prepared for the substituted beneficiary who is the beneficiary first above noted. 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. The director denied the petition accordingly.

The record demonstrated that the motion qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. 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.

As set forth in the director's denial dated August 24, 2004, and the AAO's decision dated March 21, 2006, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.

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

¹ The chronological progression of this matter is as follows: the I-140 petition was filed November 26, 2003; the director's decision to deny the petition was issued on August 24, 2004; the petitioner appealed the director's decision on September 21, 2004; the AAO affirmed the director's decision on March 21, 2006; and the petitioner filed a motion to reopen/reconsider the AAO's decision on August 18, 2006.

² See 8 C.F.R. § 103.5(a)(1)(i).

³ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996). The beneficiary is also known as Ms. [REDACTED].

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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 26, 2001.⁴ The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689.00 per year).

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2001 and 2002; a cover letter from former counsel dated November 25, 2003; a support letter from the petitioner dated November 24, 2003; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2000. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on November 24, 2003 the beneficiary did not claim to have worked for the petitioner. According to the Citizenship and Immigration Services (CIS) Form G-235 prepared and signed by the beneficiary on November 24, 2003, the beneficiary was unemployed from June 2000 to present time (i.e. November 24, 2003).

The director denied the petition on August 24, 2004, specifically finding that the petitioner had insufficient net income or net current assets to pay the proffered wage of \$24,689.00 per year.

On the appeal filed September 21, 2004, prior counsel asserted, *inter alia*, that the beneficiary would be taking the employment position of [REDACTED] who was employed by petitioner and who left its employment in April 2004.

Prior counsel stated on appeal that the wages paid by the petitioner to [REDACTED], together with the petitioner's net incomes evidenced by the tax returns submitted, was evidence of the petitioner's ability to pay the proffered wage.⁵

⁴ It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

⁵ This was the first instance in the proceedings that the petitioner had indicated that it required the beneficiary as a replacement for another employee. Generally, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). We note that in the subject motion this contention has not been mentioned.

In support of his assertions, prior counsel cited the case precedents of *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977) as well as *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

Prior counsel also cited an unpublished case decided by the AAO, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Accompanying the appeal, prior counsel submitted additional evidence that included the following documents: a letter from the petitioner dated September 14, 2004 and Form W-2 Wage and Tax statements for [REDACTED] issued by the petitioner for 2001, 2002 and 2003 that stated wages of \$18,750.00, \$37,235.00 and \$34,398.00.

On March 21, 2006, the AAO affirmed the director's decision. In summary, the AAO determined that the petitioner had not exhibited enough net income or net current assets to pay the proffered wage. Further it found that although prior counsel contended that the beneficiary would be taking the employment position of [REDACTED] who was employed by the petitioner and left its employment in April 2004, there was no substantiation or averment that [REDACTED]'s position and the proffered job were the same.

Counsel filed a motion to reopen the AAO's decision on August 18, 2006. In support of the motion, counsel has submitted a brief and additional evidence.

The regulation at 8 C.F.R. § 103.5(A)(2) states. In pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion qualifies as a motion to reopen because counsel provided new evidence relating to the petitioner's ability to pay the proffered wage.

In the legal brief submitted, counsel contends that in the opinion of the petitioner's tax attorney, there existed "substantial discretionary repayment of shareholder loans to the business in amounts more than necessary to support an additional employee drawing an annual salary of \$24,689.00."

Counsel states on motion that from June 2004 through 2005, the beneficiary was granted work authorization and the petitioner paid the beneficiary the "required salary" (but as will be discussed below, not the proffered wage).

As additional evidence, counsel submits the following documents: a curriculum vitae for attorney Anthony W. McLaughlin of Manassas, Virginia; a letter from attorney Anthony W. McLaughlin dated August 10, 2006; the resubmission of the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2001 and 2002; a statement dated August 14, 2006 from the petitioner; the beneficiary's personal federal income tax returns (Form 1040A) for 2004 and 2005 and two W-2 statements from the petitioner to the beneficiary for the year 2004 in the amount of \$12,000.00 and for 2005 in the amount of \$21,600.00; and a statement from the beneficiary dated August 16, 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 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). In evaluating whether a job offer is realistic, 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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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. Two W-2 statements were submitted from the petitioner to the beneficiary for the year 2004 in the amount of \$12,000.00 and for 2005 in the amount of \$21,600.00. The proffered wage is \$24,689.00 per year. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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. 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). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The record before the director closed on November 26, 2003. Therefore, the petitioner's 2002 tax returns are the most recent returns available. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120 stated net income (Line 28) of \$18,562.00.
- In 2002, the Form 1120 stated net income of \$2,060.00.

Since the proffered wage is \$24,689.00 per year per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2001 and 2002.

If the net income the petitioner demonstrates it had available during the period beginning on the priority date, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities.

Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 petitioner's net current assets during 2001 and 2002 were \$14,652.00 and \$13,925.00 respectively.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage. From the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the motion that there are another ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁷ copies of annual reports, federal tax returns, or audited financial statements are the means by which a petitioner's ability to pay is determined.

Counsel contends that in the opinion of the petitioner's tax attorney, there existed "substantial discretionary repayment of shareholder loans to the business in amounts more than necessary to support an additional employee drawing an annual salary of \$24,689.00."

According to counsel's letter dated August 15, 2006, the tax attorney's opinion letter concerns the petitioner's business tax returns for 2001, 2002 and 2003. However, the petitioner has not submitted a 2003 business tax return into the record of proceeding. 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 AAO notes that this is the first instance of this contention being made in this proceeding. There is no information to indicate that the shareholder loans (stated at \$12,092.00 in 2001 and \$16,787.00 in 2002) are current liabilities⁸ and it is not clear how a loan can be an asset before payment. Further, a petitioner must

⁶ 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.

⁷ 8 C.F.R. § 204.5(g)(2).

⁸ The tax attorney referenced Schedule L, lines 19 and 20 that related to items that are not current liabilities and they are not utilized as current liabilities in the ability to pay calculation set forth above to derive the net current assets figure for the years for which tax returns were provided.

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). 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.

The petitioner's tax attorney also stated generally that personal unsecured loans, officers salaries, and wage and salaries paid to the employees each "indicates discretionary cash expenditures made by the owners of the business ... [that] could have easily ... [been] reallocated to pay the salary of the ...[beneficiary]." No explanation is made to support this statement. While there is an affidavit dated August 14, 2006, made by [REDACTED] in evidence, it does not state that the owners and officers of the petitioner are willing to forego their compensation either as wages, salary or officers' compensation to pay the proffered wage. 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.

Contrary to petitioner's tax attorney assertion, 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.

Insofar as the tax attorney's opinion constitutes a financial report, counsel's reliance on unaudited financial records is misplaced. 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 must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 motion is granted, the previous decision of the AAO will be affirmed, and, the petition will remain denied.