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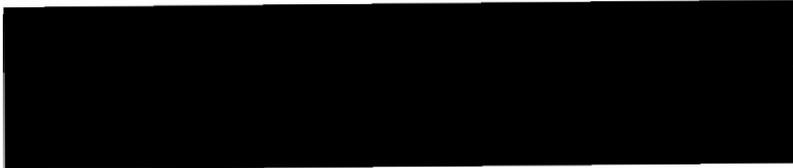
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U.S. Citizenship
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Services

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FILE: SRC 07 034 53130 Office: TEXAS SERVICE CENTER Date: NOV 25 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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "J. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The nature of the petitioner's business activity is medical services. It seeks to employ the beneficiary permanently in the United States as a medical assistant. The petition is accompanied by an unsigned and undated Form ETA 9089 Application for Permanent Employment Certification approved by the U.S. Department of Labor (DOL). 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 appeal was properly filed, timely and made 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.

As set forth in the director's denial dated January 25, 2007, an 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.

Beyond the decision of the director, the ETA Form 9089 Application for Permanent Employment Certification was not signed or dated by the petitioner, the beneficiary, or the petitioner contrary to the express requirements of the Form and DOL regulation, therefore the Application for Permanent Employment Certification is not valid and cannot be processed by Citizenship and Immigration Services (CIS).

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 shall be either 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 9089 Application for Permanent Employment Certification was accepted for processing by any office within the employment system of DOL. 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 9089 Application for Permanent Employment Certification as certified by DOL 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 9089 was accepted on December 8, 2005. The proffered wage as stated on the Form ETA 9089 is \$11.57 per hour (\$24,065.60 per year). The Form ETA 9089 states that the position requires two years of experience in the proffered position.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Evidence in the record includes copies of the following documents: an unsigned and undated original Form ETA 9089 Application for Permanent Employment Certification approved by DOL; the petitioner's medical license from the Medical Board of California; the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees that were accepted by the State of California and the petitioner's Employers Quarterly Federal Tax Form (Form-941) for the third and fourth quarters of 2002 and the last quarter of 2003; a letter from the petitioner dated January 16, 2007; a letter from the petitioner dated January 4, 2007;² the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2003 and 2004, and the first page of the Form 1120 tax return for 2005; 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 personal services corporation. On the petition, the petitioner claimed to have been established on October 25, 2006³ and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year begins on June 1st and ends on May 31st of each year. The net annual income and gross annual income stated on the petition were \$0.00 and \$0.00 respectively. On the ETA 9089, which was not signed or dated by the petitioner, the beneficiary, or the petitioner, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that the petitioner has submitted additional documentation that demonstrates the petitioner's ability to pay the proffered wage. According to the petitioner, the physician owner's personal assets demonstrate the petitioner's ability to pay the proffered wage.

Accompanying the appeal, the petitioner submits documents that are bank statements and U.S. Internal Revenue Service Form 1065 returns for two limited liability companies whose business activity is real estate rentals.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 9089 Application for Permanent Employment Certification establishes a priority date for any immigrant petition later based on the Form ETA 9089 Application for Permanent Employment Certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained

¹ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

² According to the petitioner all of the petitioner's staff members are employed as independent contractors on a per diem basis or on a temporary basis.

³ According to the petitioner's tax return the petitioner was incorporated on April 1, 1979.

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, 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 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

As already stated, the petitioner's has submitted California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees that were accepted by the State of California and the petitioner's Employers Quarterly Federal Tax Form (Form-941) for the third and fourth quarters of 2002 and the last quarter of 2003. Salaries and wages are stated on the first page of the petitioner's U.S. Internal Revenue Service Form 1020 for the year 2005 tax return.⁴ The quarterly wage reports do not reflect wages paid 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, 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 supported by federal case law. . *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 that 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.

No complete tax returns⁵ for the petitioner were submitted in this matter to demonstrate financial information concerning the petitioner's continuing ability to pay from the priority date in 2005. Since the proffered wage is \$24,065.00 per year, the petitioner did not submit sufficient evidence to demonstrate that it had sufficient net income to pay the proffered wage from any year.

⁴ In the amount of in the amount of \$12,154.00.

⁵ Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. The petitioner's tax return for 2003 stated net income of <\$22,169.00>. The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss. Since the petitioner's fiscal year begins on June 1st and ends on May 31st of each year, and since the priority date is December 8, 2005, the petitioner's tax return for 2004 covers the taxable year *before* the priority date. The petitioner's tax return for 2004 stated net income of \$21,615.00.

The petitioner's partial tax return for 2005 demonstrates the following financial information concerning the petitioner's ability to pay:

- In 2005, the Form 1120 stated net income of \$\$7,040.00.

Since the proffered wage is \$24,065.60 per year per year, the petitioner did not have sufficient net income to pay the proffered wage year 2005.

If the net income the petitioner demonstrates it had available during the period, 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.

No complete tax returns for the petitioner were submitted in this matter to demonstrate the petitioner's net current assets.

The petitioner asserts on appeal that there are other 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 the petitioner's ability to pay is determined.

According to the petitioner, the physician owner's personal assets demonstrate the petitioner's ability to pay the proffered wage. The petitioner submits on appeal documents that are bank statements, U.S. Internal Revenue Service Form 1065 returns for two limited liability companies whose business activity is real estate rentals. This submittal has no probative value in this matter. Contrary to the petitioner's submittal and assertion on appeal, 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. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated,

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).

“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.”

The petitioner failed to submit sufficient evidence of its ability to pay the proffered wage such as copies of annual reports, complete federal tax returns,⁸ or audited financial statements according to regulation for the period from the priority date of December 8, 2005 continuing to present. The unsupported statements of the petitioner on appeal or in a motion 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).

Although the petitioner has been in business since April 1, 1979 according to its tax returns, or established on October 25, 2006 according to the petition, the petitioner has failed to submit a complete tax return for 2005 or any audited financial statements since 2005.

Further, the petitioner has not submitted admissible cost of labor evidence from the priority date which in this case would be Internal Revenue Service Form 1099-MISC statements or canceled checks demonstrating compensation paid to independent contractors or temporary workers since the petitioner stated it has no employees. The first page of the petitioner's 2005 federal tax return shows only payment of \$12, 154.00 as salary and wages (Line 13) for that year, which is under the proffered wage. 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)).

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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

⁸ In the present matter, the petitioner has identified itself on IRS Form 1120 as a “personal services corporation.” Pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), the petitioner's “personal services corporation” status is a relevant factor to be considered in determining its ability to pay. A “personal services corporation” is a corporation where the “employee-owners” are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines “personal services” as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay. However, the petitioner has not offered to adjust his salary or any other compensation to pay the proffered wage.

Beyond the decision of the director, the petitioner's petition should have been rejected as improperly filed, and if the director had properly noted such error, the AAO would not have had jurisdiction over this appeal since the record does not contain a valid labor certification.⁹ The petitioner submitted a Form ETA 9089 Application for Permanent Employment Certification which was not signed or dated by the petitioner, the beneficiary, or the petitioner contrary to the express requirements of the Form ETA 9089 and regulation. *See* 20 C.F.R. §656.10(b)(3); 20 C.F.R. §656.17(a)(1).¹⁰ The Form 9089 is on its face not valid as submitted and inadmissible in this matter.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

⁹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

¹⁰ The employer who is the petitioner herein and the alien applicant who is the beneficiary herein must certify to the conditions of employment listed on the Application for Permanent Employment Certification under penalty of perjury under 18 U.S.C. 1621. Failure to attest to any of the conditions results in a denial of the application. Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. The regulation states in pertinent part: "DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent."