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U.S. Citizenship
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Services

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FILE: LIN 06 144 53303 Office: NEBRASKA SERVICE CENTER Date: **OCT 28 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 director, Nebraska Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a foreman. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2001 priority date of the visa petition. The director denied the petition accordingly.

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.

As set forth in the director's November 20, 2006 denial, the single 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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . 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 the [Citizenship and Immigration Service].

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).

In the instant matter, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$27.00 an hour, or \$56,160¹ per year. The Form ETA 750 states that the position requires

¹ The director stated that the proffered wage is \$49,920, a figure also written on the petitioner's ETA Form

two years of experience in the proffered job, or two years in the related occupation of construction worker or pipe layer. The ETA Form 750 also states that the beneficiary will supervise five employees.

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 relevant evidence in the record, including new evidence properly submitted on appeal.²

Relevant evidence submitted on appeal includes counsel's brief. Counsel also submits two declarations from [REDACTED] and [REDACTED]. Both individuals identify themselves as owners and officers of the petitioner. Both declarations state that [REDACTED] owns a construction company G.E. Construction Inc., that operates out of the petitioner's offices, and that both companies are affiliated and share resources and personnel. Both writers state that in determining the cash available to either company, the net income or assets of one company may be considered as available cash for the other company. Counsel also submits two documents from the Commonwealth of Massachusetts, dated January 18 2006. The documents are entitled "Annual Report for Domestic and Foreign Corporations." One document is for [REDACTED] Construction Corporation with EIN number of [REDACTED] and the other is for G.E. Construction Inc. with a number handwritten on the document of [REDACTED].

Finally counsel submits a copy of an unpublished AAO decision dated April 22, 1997 and notes that the AAO in the past has considered the income and assets of an affiliated entity when determining the petitioner's ability to pay the proffered wage.

The record also contains the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2001, 2002, and 2003, submitted with the initial I-140 petition. The petitioner also submitted two W-2 Wage and Tax Statements for the beneficiary for tax year 1998, the petitioner's W-2 Form for the beneficiary for tax years 1999 to 2002; and W-2 Forms for the beneficiary from the G.E. Construction Company for tax years 2002 and 2003.

In response to the director's RFE dated August 25, 2006, the petitioner submitted its Forms 1120S, for tax years 2004 and 2005; a state of Massachusetts document from the online secretary of State database that provides summary information on G.E. Construction Inc. and a name change for the petitioner in October 8 1997. Counsel also submitted the petitioner's bank statements from the Flagship Bank in Worcester, Massachusetts, for the period of January 2001 to December 2003 for the petitioner, as well as bank statements from Banknorth, N.A. for the G.E. Construction, Inc. for the period of January 2003 to December 2003. Finally counsel submits Forms

750. However, the AAO determined the proffered wage by calculating 2080 work hours multiplied by the hourly wage of \$27.00, or \$56,160.

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).

³ These numbers are also identified as the Employer Identification Numbers (EIN) on the federal tax returns for the two companies submitted to the record.

1120S, from G.E. Construction for tax years 2004 and 2005, as well as the beneficiary's W-2 Wage and Tax Statements from the G.E. Construction Inc. for tax years 2003 to 2005.

On appeal, counsel asserts that the director incorrectly failed to consider the tax returns, corporate documents and the W-2 Forms issued to the beneficiary by G.E. Construction, Inc. Counsel asserts that G.E. Construction is essentially the petitioner's affiliate, sharing the same control, ownership and resources. Counsel also states that the director failed to consider the petitioner's three years of bank account balances submitted to the record, and noted that 8 C.F.R. 204.5(g)(2), states that in appropriate cases additional evidence such as profit /loss statements, bank account records, or personnel records may be considered when determining the petitioner's ability to pay the proffered wage. Counsel notes that the director also based his decision on the allegation that the petitioner had submitted two prior petitions on behalf of the beneficiary that had been denied. Counsel notes that the petitioner filed one prior I-140 petition, that was denied for abandonment rather than based on a review of all the documentation submitted by the petitioner.

In his brief, counsel reiterates that the petitioner consists of two affiliated construction companies, [REDACTED] Construction Corporation and G.E. Construction Inc., and that both companies are operated by the same ownership at [REDACTED] in Leominster, Massachusetts. Counsel notes that the declaration of the two owners establishes that the two companies share staff and salary costs. Counsel refers to an unpublished AAO decision a copy of which counsel submits to the record, and states that CIS in the past has considered the income and assets of an affiliated entity in this context.

Counsel states that the proffered salary is \$49,920, and examines how the beneficiary's wages in 2001 and the petitioner's net income are sufficient to pay the proffered wage. Counsel notes that in tax year 2002, the petitioner showed a loss, however, the petitioner also opted to claim \$63,781 in depreciation deductions for that year. Counsel notes that the depreciation deduction was not mandatory, and that if the petitioner had not opted to take the deduction, the money would have been shown as income. Counsel also notes that the petitioner's bank statements from 2002 show an average balance of more than \$15,000 that was available to the petitioner as cash with which to pay the proffered wage. Counsel then asserts that in 2003 the petitioner returns show a net profit of \$76,001, a sum well above the proffered wage and that in 2004 and 2005 the petitioner's net income combined with the beneficiary's wages of \$24,114 in 2004 and \$24,381⁴ in 2005, clearly establish the petitioner's sustained ability to pay the proffered salary.

Finally counsel states that the fact the petitioner has maintained a successful business since 1997 is worth noting and that the beneficiary has been working for the petitioner for almost as long as the petition has been in the construction business.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on January 1, 1997, to have a gross annual income of \$566,000, a net annual income of \$42,000 and to currently employ eight workers. On the Form ETA 750, signed by the beneficiary on February 16, 2001, the beneficiary claimed to have worked for the petitioner since March 1997.

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

⁴ The AAO notes these wages were paid to the beneficiary by G.E. Construction.

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, 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).

On appeal, counsel states that the petitioner is one of two affiliated companies that share ownership, staff and salary costs. Counsel submits state of Massachusetts documents with regard to the ownership of the petitioner and G.E. Construction, and also submits a copy of an unpublished AAO decision. 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). The AAO further notes that the unpublished decision focused on the incorrect use of gross profits to establish the petitioner's ability to pay the proffered wage, and the absence of evidentiary documentation such as the petitioner's federal tax returns to establish the petitioner's net income. In this context, the director noted that the petitioner had neither established that the entity identified on a tax return was the petitioner, or was affiliated to the petitioner. In no manner could this statement be utilized as supporting the use of one corporation's assets to establish the ability of another corporation to pay a proffered wage.

The AAO also notes that the two businesses identified in the instant petition have distinct EIN numbers, and thus are distinct corporations. 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." Thus for purposes of these proceedings, the AAO will only consider the federal tax returns and the W-2 Forms provided by the petitioner in determining whether the petitioner has the ability to pay the proffered wage.

With the initial I-140 petition and on appeal, the petitioner submitted bank checking accounts statements for two distinct corporations to the record. The AAO will not discuss further the bank statements for G.E. Construction. With regard to the petitioner's bank statements, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, 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," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements for 2001 through 2003 somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's assertion that the petitioner's depreciation deductions in tax year 2002 can be utilized as a source of additional funds to establish the petitioner's ability to pay the proffered wage is also not persuasive. The

AAO will discuss further the role of depreciation deductions more fully when it examines the petitioner's net income.

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. The AAO notes that the petitioner submitted the beneficiary's W-2 Forms for tax years 1998, 1999, and 2000. However, the priority date for the instant petition is April 27, 2001, and these earlier documents are not dispositive of the petitioner's ability to continuously pay the proffered wage as of the priority date.

The petitioner submitted the beneficiary's W-2 Forms for tax years 2001, and 2002. The remainder of the W-2 forms found in the record were issued by G.E. Construction, a distinct corporation, and as such do not document the petitioner's wages or compensation paid to the beneficiary during tax years 2003, 2004 and 2005. The W-2 documents issued by the petitioner indicate that the petitioner paid the beneficiary \$31,266 in 2001, and \$1,873.40 in tax year 2002. Thus the petitioner cannot establish it had the ability to pay the proffered wage through the wages it paid to the beneficiary as of the 2001 priority date based on the beneficiary's wages. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage of \$56,160 as of the 2001 priority date and through tax year 2002, and also has to establish its ability to pay the entire proffered wage during tax years 2003 to 2005.

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, contrary to counsel's assertion, 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$56,160 per year from the priority date:

- In 2001, the Form 1120S stated a net income⁵ of \$41,504.
- In 2002, the Form 1120S stated a net income of -\$5,298.
- In 2003, the Form 1120S stated a net income of \$76,001.
- In 2004, the Form 1120S stated a net income of \$47,003.
- In 2005, the Form 1120S stated a net income of \$56,642.

Therefore, for the priority year 2001 the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage, while in tax years 2003 and 2005, the petitioner had sufficient net income to pay the entire proffered wage of \$56,160. However, in tax year 2002, the petitioner did not have sufficient net income to pay the difference between the beneficiary's wages and the proffered wage, and in 2004, the petitioner did not have enough net income to pay the entire proffered wage.

If the net income the petitioner demonstrates it had available during that 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, including real property that counsel asserts should be considered. 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. 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

⁵Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions or other adjustments shown on its Schedule K for tax years 2001 through 2005, the petitioner's net income is found on line 21, of the Form 1120S.

⁶According 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.

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 2002 were -\$17,440.
- The petitioner's net current assets during 2004 were \$14,778.

Therefore, from the date the Form ETA 750, was filed with the Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax years 2001, 2003, and 2005.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. On appeal, counsel states that the petitioner has been in business since 1997 and is a viable business. However, counsel provides no further evidentiary documentation to further substantiate his assertion. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.