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20 Mass, Rm. A3042
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U.S. Citizenship
and Immigration
Services

B36



FILE: [REDACTED]
SRC 02 228 51153

Office: TEXAS SERVICE CENTER Date: FEB 18 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a residential contractor. It seeks to employ the beneficiary as a painter. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because she determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a statement and indicates that a brief would be submitted within thirty days. To date, no additional documentation has been received; therefore, a decision will be determined based on the record, as it is currently constituted.

In pertinent part, 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) 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 30, 2001. The proffered salary as stated on the labor certification is \$14.70 per hour or \$30,576 per year.

With the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The petitioner's 2001 tax return reflected an ordinary income of -\$17,048 and net current assets of -\$4,658. The director considered this documentation insufficient and on February 6, 2003, she requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of April 30, 2001 and continuing to the present. The director specifically requested that the financial documentation be in the form of copies of annual reports, federal tax returns, or audited financial statements. The director also requested evidence of the wages paid to the beneficiary.

In response, counsel submitted two pages of the petitioner's 2001 tax return and a letter stating that the petitioner paid subcontractors \$140,630 in 2001. Counsel contends that the money paid to subcontractors could be used to pay the beneficiary. Counsel's letter also states that the petitioner compensated its owner a total of \$280,000 in 2001 and that a portion of that compensation could be used to pay the beneficiary's proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on April 22, 2003, denied the petition.

On appeal, counsel requests an additional sixty days to file a brief and states:

The facts show that [REDACTED] has been working as a subcontractor on construction jobs for [REDACTED] has paid numerous contractors (total spent on contractors during 2001 was \$140,630), and those contractors have employed workers. One of those contractors, to whom a 1099 was issued by [REDACTED] paid [REDACTED] as a subcontractor. Since [REDACTED] was the original source of the money used to pay the beneficiary as a subcontractor, this should establish the Petitioner's ability to pay.

Additionally, the owner of [REDACTED] drew out of his corporation the amount of \$280,000 in 2001. Even if [REDACTED] had not been paying for the services of the beneficiary in 2001, the disposable income available to the owner would have been adequate to show ability to pay the beneficiary (i.e. [math display="block">[\\$]280,000 \text{ (total income to company owner)} - [\\$]30,000 \text{ (salary to beneficiary)} = \\$250,000 \text{ (remainder of income available to owner after deducting for beneficiary's salary)}).

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2001 at a salary equal to or greater than the proffered wage. It is noted that no Form 1099, Miscellaneous Income, was submitted for the beneficiary for 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would

allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during 2001 were -\$4,658. The petitioner could not have paid the proffered wage in 2001 from its net current assets.

Counsel contends that the beneficiary worked for a subcontractor paid by the petitioner and that that subcontractor paid the beneficiary. Counsel has not, however, provided evidence of the wages paid to the subcontractor who paid the beneficiary, nor has counsel provided evidence that the subcontractor paid the beneficiary or what those wages were. 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 visa petition, as well as the petitioner's documents submitted to the record, suggests that the petitioner employed more than one subcontractor. The record contains no evidence directly relating the tax return figures for contract labor to painting services the beneficiary may have performed.

Moreover, there is no evidence that the position of the other independent subcontractors involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the proffered position. If those contractors performed other kinds of work, then the beneficiary could not replace them. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel also contends that the petitioner could have paid the beneficiary's proffered wages from the compensation of the owner of the petitioner. Again, 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. In addition, Citizenship and Immigration Services (CIS), formerly the Service or CIS may not "pierce the

¹ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 2001 tax return reflects an ordinary income of -\$17,048 and net current assets of -\$4,658. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2001.

Since this office has not received any additional evidence of the petitioner’s ability to pay the proffered wage, the petitioner has not overcome the director’s denial. As stated in 8 C.F.R. § 204.5(g)(2), the petitioner must establish its ability to pay the proffered wage from the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. In the instant case, the priority date is April 30, 2001, and the petitioner has not established its ability to pay the proffered wage in 2001 and continuing to present.

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.