



U.S. Citizenship
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FILE: [REDACTED]
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CALIFORNIA SERVICE CENTER

Date: JUN 17 2005

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

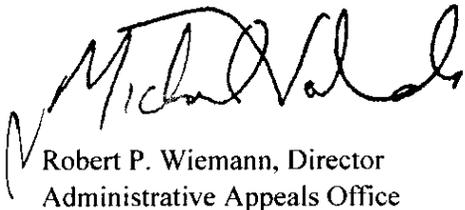
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a garment supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 granting 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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 23, 2001. The proffered wage as stated on the Form ETA 750 is \$28.02 per hour, which equals \$58,281.60 per year.

On the petition, the petitioner stated that it was established on September 4, 1987 and that it employs 25 workers. The petition states that the petitioner's gross annual income is \$641,377. The space reserved for the petitioner to report its net annual income was left blank. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in San Francisco, California.

In support of the petition, counsel submitted a copy of the 2001 Form 1120S, U.S. Income Tax Return for an S Corporation of [REDACTED]. That return shows that the [REDACTED] reported taxes pursuant to the calendar year and that during 2001 it reported a loss of \$8,076 as its ordinary income. The corresponding Schedule L shows that at the end of that year [REDACTED] had current assets of \$52,801 and current liabilities of \$33,800, which yields net current assets of \$19,001.

On February 26, 2003 the California Service Center issued a Request for Evidence. The subject of that Request for Evidence, however, was the beneficiary's claim of qualifying employment. That Request for Evidence and the evidence submitted in response are not directly relevant, therefore, to the basis of the subsequent decision of denial.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on September 13, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a copy [REDACTED] 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return is for the period from January 1, 2002 to July 15, 2002, when the corporation apparently ceased to exist. That return shows that during that year [REDACTED] declared a loss of \$12,017 as its ordinary income. The corresponding Schedule L shows that at the end of that period [REDACTED] had no current assets and no current liabilities, which yields net current assets of \$0.

Counsel also submitted a letter, dated December 5, 2003, in which he stated that the petitioner's name has changed from [REDACTED] to [REDACTED]. Counsel provided various documents to show that the petitioner's own [REDACTED] now owns [REDACTED] but none to show how the change in ownership occurred and not to show that [REDACTED] or [REDACTED] acquired the rights, duties, obligations, and assets [REDACTED].

As to the petitioner's ability to pay the proffered wage after July 15, 2002, counsel submitted a copy of the petitioner's owner's Form 1040 U.S. Individual Income Tax Return. A Schedule C submitted with that return shows that the petitioner's owner now owns [REDACTED] a sewing company, as a sole proprietorship. The Schedule C also shows that the petitioner suffered a loss of \$19,922 during 2002. The petitioner's owner's adjusted gross income during 2002, including the petitioner's loss, was \$45,374.

Counsel also submitted the petitioner's California Form DE-6 Quarterly Wage Reports for the last quarter of 2002 and the first three quarters of 2003. Those returns show that the petitioner employed between 24 and 29 workers and paid total wages ranging from \$84,005.81 to \$118,791.34 during those quarters, but do not show that it employed the beneficiary during any of those quarters.

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 January 27, 2004, denied the petition.

On appeal, counsel urges that the evidence submitted shows that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date. Counsel implies that the petitioner's total wage expense as demonstrated by the California Form DE-6 quarterly wage reports submitted also demonstrates the petitioner's ability to pay the proffered wage.

Further, counsel states that the petitioner's owner could contribute money to the petitioner as necessary to pay the proffered wage.

Counsel also submits a letter, dated February 23, 2004 from an accountant. The accountant states that during 2002 [REDACTED], a sole proprietorship. The accountant states that the owner, [REDACTED] assumed all of the assets and liabilities of the corporation, but does not state any basis for that statement or submit any evidence in support of it.

The accountant also states that hiring the beneficiary as its supervisor would increase the profitability of the petitioner through better cost control. The accountant states that the amount thus saved would be more than sufficient to pay the proffered wage. The accountant does not state who previously managed the petitioner nor provide any evidence in support of his assertion that the beneficiary will do the job better, nor does the accountant provide any calculation or other basis that this office might analyze to determine whether his conclusion is reasonably supported by evidence.

The accountant also states that, by hiring the beneficiary the petitioner can increase the quality of the goods it produces, thus attracting additional business. The accountant states that the additional revenue thus generated would be more than sufficient to cover the proffered wage. Again, the accountant provides no basis for those two conclusions. The accountant's conclusions, if accepted as fact, might be sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The accountant, however, has offered no evidence to support his conclusion that, if hired by the petitioner, the beneficiary will generate sufficient revenue to offset the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid 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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

The determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date is complicated by the fact that the petitioner's ownership changed during the pendency of the petition. Prior to July 15, 2002 a corporation owned the petitioning business. After that date, the business became a sole proprietorship, owned by an individual. The successor-at-interest petitioner is obliged to 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-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. See *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

From the priority date until July 15, 2002, therefore, the petitioner's ability to pay the proffered wage will be assessed pursuant to policies applicable to corporations. The petitioner's ability to pay the proffered wage after July 15, 2002 will be determined pursuant to policies applicable to sole proprietorships.

The owner of a sole proprietorship is obliged to pay the debts and obligations of the business out of his own income and assets, as necessary. Counsel is correct, therefore, that in the case of a sole proprietorship the income and assets of the owner can be considered in determining the ability of the petitioner to pay the proffered wage.

The petitioner is obliged, however, to demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Until July 15, 2002 the petitioner was a corporation. Unlike a sole proprietorship, a corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). 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). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner shall not be considered, therefore, in the determination of the petitioner's ability to pay the proffered wage between the March 23, 2001 priority date and July 15, 2002.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

A corporate petitioner's net income is not the only statistic that may be used to show its ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$58,281.60 per year. The priority date is March 23, 2001.

During 2001 the petitioner, [REDACTED] declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of profits during that year. At the end of that year the petitioner had net current assets of \$19,001. That amount is insufficient to pay the proffered

wage. The petitioner has submitted no reliable evidence of any other funds available to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 prior to July 15, the petitioner continued to be held as a corporation. The petitioner's 2002 corporate return, which covers the period from January 1, 2002 to July 15, 2002, shows that during that period [REDACTED] declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage during that period out of its profits. At the end of that year the petitioner had no net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during that period with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during the period from January 1, 2002 to July 15, 2002.

After July 15, 2002, the petitioning business was held as a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of her own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that she could have paid the petitioner's existing business expenses as well as pay the proffered wage. In addition, and notwithstanding counsel's argument to the contrary, she must show that she could sustain herself and her dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

On July 15, 2002, five and one half months of the calendar year remained. If the newly formed sole proprietorship had been obliged to pay the proffered wage during the period from that date to the end of the year, it would have incurred an obligation of \$26,809.54.¹

The petitioner's owner's individual income tax return shows that she had one dependent during 2002 and declared adjusted gross income of \$45,374. If obliged to pay the salient portion of the proffered wage out of her adjusted gross income during that year the petitioner's owner would have had \$18,564.46² remaining with which to support her household. Evidence pertinent to the petitioner's owner's budget was neither requested nor provided. Under these circumstances, this office cannot conclude that the petitioner's owner would have been unable to support her household on \$18,924.46 during 2002. The petitioner has sufficiently demonstrated the ability of the petitioner's owner to pay the proffered wage during the period from July 15, 2002 to December 31, 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and during the period from January 1, 2002 to July 15, 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

¹ Five and one-half months divided by twelve months equals .46, which is the portion of the year remaining after July 15, 2002. The proffered wage, \$58,281.60, multiplied by .46 equals \$26,809.54. Thus, if the substituted beneficiary, the sole proprietorship, had employed the beneficiary beginning on the date of its inception, it would have incurred that additional wage expense during 2002.

² \$45,374 minus \$26,809.54 equals \$18,564.46.

That the petitioner changed from a corporation to a sole proprietorship during the pendency of this petition raises an issue not addressed in the decision of denial, specifically, whether the substituted petitioner is truly a successor-at-interest to [REDACTED] the original petitioner in this case, within the meaning of *Matter of Dial Auto Repair Shop, Inc. supra*. Pursuant to *Dial Auto Repair Shop* the substituted petitioner must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer.

The petitioner submitted no evidence to show how the change of ownership, from corporate ownership to sole proprietorship, occurred.³ The petition should have been denied for this additional reason.

The petitioner, through counsel, submits a letter from an accountant stating that the owner of [REDACTED] the substituted petitioner, assumed all of the assets and liabilities of the corporation, but submits no evidence to support that assertion.

Whether the substituted petitioner assumed all of the rights, duties, obligations, and assets of the predecessor corporation is an issue to be decided by CIS based on clear and convincing evidence. It is not an issue to be decided by the petitioner's accountant. The accountant was free to provide the evidence upon which he based his opinion. This office would then have considered the evidence and the accountant's opinion, together, to see whether they were sufficient to demonstrate that the substituted petitioner is a true successor-at-interest within the meaning of *Dial Auto Repair Shop*. Neither the petitioner, counsel, nor the accountant, however, submitted any such evidence. Absent such evidence, the substituted petitioner has not clearly and convincingly demonstrated that it is the original petitioner's true successor-at-interest. The petitioner should have been denied for this additional reason.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ Nothing in the record negates the possibility that the substituted petitioner acquired the original petitioner's assets pursuant to the original petitioner's bankruptcy, for instance.