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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: EAC 04 242 50916 Office: VERMONT SERVICE CENTER Date: FEB 03 2006

IN RE: Petitioner:
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:

[redacted]

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, Vermont 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 variety store. It seeks to employ the beneficiary permanently in the United States as a district sales manager. 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 entity that would employ the beneficiary was not identified in the record and that the petitioner had not, therefore, 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.

On appeal, counsel submits a brief.

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(l) *Skilled workers, professionals, and other workers,* states, in pertinent part,

> (1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(3) as a skilled workers, professional, or other (unskilled) worker.

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 that seeks to employ the alien worker must demonstrate its 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $50,000 per year.

On the petition, the petitioner stated that it was established on June 1, 1994 and that it employs 12 workers. The petition states that the petitioner's gross annual income is $1,915,616 and that its net annual income is $190,000. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The address given as that of the petitioner on both the Form ETA 750 labor certification and the Form I-140 visa petition is 57 Summer Street, North Easton, Massachusetts. The Form ETA 750 indicates that the beneficiary will report to that North Easton location but will be responsible for stores in Massachusetts, Vermont, and New Hampshire. The Form I 140 states that the beneficiary will manage eight One Dollar Stores in Vermont, Massachusetts, and New Hampshire.

In support of the petition, counsel submitted the 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation of Bano, Incorporated, and of Ishra, Incorporated, and the 2001 Form 1120-A, U.S. Corporation Short-Form Income Tax Returns of Arusa, Incorporated, Bushra, Incorporated, and Sumaiya, Incorporated. None of those corporations is located at [redacted] North Easton, Massachusetts.

Counsel provided the 2002 Form 1120, U.S. Corporation Income Tax Return of Basha, Incorporated Sumaiya, Incorporated, and Bushra, Incorporated; the 2002 Form 1120S, U.S. Income Tax Return for an S Corporation of Bano, Incorporated, Nabila, Incorporated, Raeesa, Incorporated, and Ishra, Incorporated; and the 2002 Form 1120-A, U.S. Corporation Short-Form Income Tax Return of Arusa, Incorporated,

The mailing address given for all of those corporations in their respective tax returns is 451 River Road in Eagle Bridge, New York. Elsewhere in the record, that address is identified as being that of the petitioner's accounting service.

Counsel also provided monthly bank statements pertinent to accounts of Ahsan Incorporated, Arusa Incorporated, Bano Incorporated, Basha Incorporated, Bushra Incorporated, Ishra Incorporated, Nabila Incorporated, Raeesa Incorporated, and Sumaiya Incorporated. Those bank statements indicate that Arusa, Bano, Basha, Bushra, Ishra, Nabila, Raeesa, and Sumaiya are located in Middlebury, Vermont; Leominster, Massachusetts; Middlebury, Vermont, North Attleboro, Massachusetts; Brockton, Massachusetts; North Easton, Massachusetts; West Lebanon, New Hampshire; and Dartmouth, Massachusetts; respectively. The address of the store operated by Ahsan is not stated on its bank statements.

The director determined that the evidence submitted did not establish which of the various corporations was petitioning to employ the beneficiary. The director also noted that, in any event, none of the corporations for whom tax returns were submitted were able to demonstrate their continuing ability to pay the proffered wage beginning on the priority date based on those returns.[1] The director denied the petition on January 4, 2005.

On appeal, counsel submits a brief. Counsel states that the beneficiary would oversee the operations of the various stores owned by the various corporations. Counsel further implies that the proffered wage will be divided among the various corporations whose stores the beneficiary will oversee. Counsel argues, therefore,

[1] The director also noted that some of the corporations for whom returns were submitted had already petitioned for other alien workers. A petitioner is obliged, if it is petitioning for more than one beneficiary, to demonstrate its ability to pay the proffered wages of all of the beneficiaries it seeks to employ. If a specific company had been identified as the prospective employer in this case, and that specific company also sought to employ other alien workers, then that prospective employer would be obliged to demonstrate its ability to pay the proffered wages of all of the beneficiaries for whom it petitioned. As appears below, that scenario is not present here, and the issue of multiple beneficiaries need not be addressed further.

that pursuant to Generally Accepted Accounting Principles (GAAP) promulgated by the Financial Accounting Standards Board (FASB) allocation of that entire expense to a specific corporation would be improper.

The purpose of the GAAP of the FASB is to standardize financial reporting so that companies' income will be neither overstated nor understated. The purpose of the present inquiry is to determine whether the petitioner, the particular corporation or other U.S. employer that is petitioning for the beneficiary, has the continuing ability to pay the proffered wage beginning on the priority date. The GAAP of the FASB is not controlling on that issue.

Counsel argues that all of the corporations for whom tax returns were submitted do business under the properly registered trade name One Dollar Market, and that no attempt was made to disguise the identity of the various entities. Counsel argues that, therefore, the petition should not have been denied based on the involvement of multiple corporations. Counsel's argument fails to address the related basis for denial of the petition.

The regulation at 8 C.F.R. § 204.5(l), set out above, makes no provision for several corporations to pool their resources to hire an alien employee. Notwithstanding that the various corporations for whom tax returns were submitted are under common ownership and use the same name in doing business, they are organized as separate corporations, the file separate tax returns, and they have separate employer identification numbers. They may not apply in concert for the beneficiary and show the ability to pay the proffered wage by pooling their resources.[2]

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).

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 a given 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.

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[2] A different question would be posed if the various corporations were held by a parent entity, which sought to hire the beneficiary to run the various stores, and the parent company, the specific entity seeking to hire the beneficiary, had demonstrated its ability to pay the proffered wage consistent with the requirements of 8 C.F.R. § 204.5(g)(2). That scenario is not presented in the instant case, where no specific entity that seeks to hire the beneficiary is unidentified.

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).

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.

The petitioner's net income is not the only statistic that may be used to show the petitioner's 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, the petitioner's year-end cash and those assets expected to be consumed or 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 $50,000. The priority date is April 27, 2001.

In the instant case, the petitioner, the individual entity who would employ the beneficiary, is not clearly identified. The petition cannot, therefore, be approved. Further, because the petitioner is unidentified, this office cannot determine that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date. For this additional reason the petition cannot be approved.

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.