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

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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 25 2006

EAC 03 136 54312

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, Chief
Administrative Appeals Office

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

The petitioner is in the removal of asbestos business. It seeks to employ the beneficiary permanently in the United States as an asbestos handler. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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 priority date of the visa petition, and, that no evidence was submitted to establish that the beneficiary had the required training as stated in the labor certification. The director denied the petition accordingly.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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. 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).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is $23.15 per hour[1] ($48,152.00 per year). The Form ETA 750 states that the position requires one month of training.[2]

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[1] It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the

On appeal, counsel submits an explanatory letter and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; and, the beneficiary's asbestos handling certificates.

It is apparent from the record of proceeding, that the beneficiary works from the union local on job assignments for various companies at multiple locations.

Because the director determined, *inter alia,* the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on April 30, 2003, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested evidence in the form of copies of U.S. federal tax returns for 2000 and 2001.

Concurrently with the above request, the director requested evidence to establish that the beneficiary had the required training as stated in the labor certification.

In response to the request for evidence, counsel submitted a request for a time extension to submit documents, but no evidence.

The director denied the petition on January 14, 2004, finding that no evidence was submitted to establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, that similarly, no evidence was submitted to establish that the beneficiary had the required training as stated in the labor certification.

On appeal, counsel submits an explanatory letter as well as additional evidence that are copies of the following documents: a letter from [redacted] business manager for [redacted] New York, NY, dated January 24, 2005; a pay statement from Pinnacle Environmental Corp. to the beneficiary; a print-out from the Internet concerning [redacted], a letter dated September from Catholic Migration Services of Queens, New York; a Form I-797 Y in the matter; a letter from the petitioner dated August 27, 2003; two undated statements from [redacted] Hazardous Waste Laborers; a portion of the Post newspaper classified advertisements; the beneficiary's Asbestos Abatement Worker Refresher certificates, and related work and safety training certificates; dues statements paid by the beneficiary to his union; and, the beneficiary's personal income tax returns for years 2001 and 2002 with attached W-2 Wage and Tax statements.[3]

Counsel's statement on appeal contends that the documents submitted on appeal (i.e. personal tax returns, employment related training and licensing certificates as well as the statements from the beneficiary's union

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employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." However, according to a letter from [redacted] business manager for [redacted] Hazardous Laborers, New York, NY, dated January 24, 2005, the established wage rate for this worker and job is $25.50 per hour.

[2] The experience section of the labor certification was blank.

[3] The 2001 and 2002 W-2 statements are from other companies than the petitioner.

local" establishes that the beneficiary " ... has more than the needed time (i.e. one month) experience required for this type of job to be performed." We agree.

Counsel also states that although counsel could not secure from the petitioner financial data, financial records or tax returns, since the government considers the petitioner a multimillion dollar company with many locations, the petitioner has the ability to pay the **proffered** wage. Counsel submits a print-out from the Internet concerning [redacted] as an indicator of the size of the petitioner. [redacted] is not the petitioner in this matter. [redacted] has a different address and federal employer identification number than the petitioner. I[redacted] has no legal obligation to employ the beneficiary by the evidence submitted. It is a separate corporation.

Contrary to counsel's assertion, Citizenship and Immigration Services (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, "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." There is no evidence that the two mentioned corporations are related.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. There is no evidence that petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. 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 v. Thornburgh*, *Supra* at 537. *See also Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

No tax returns were submitted in this matter

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. A[redacted] member work history for the beneficiary was submitted into

the record of proceeding, and, in that record, there is no record of compensation paid to the beneficiary by the petitioner.

Counsel asserts in his explanatory letters in the record of proceeding that the letter from the petitioner is evidence of the petitioner's ability to pay the proffered wage. According to regulation,[4] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel submits on appeal a letter from the petitioner on [redacted] stationery "stating that this corporation has been in business for over 17 years and currently employs 500 people." No independent objective evidence was submitted on appeal substantiating that fact. 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 petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.

[4] 8 C.F.R. § 204.5(g)(2).