U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 15 2007

WAC 02 087 54824

IN RE: Petitioner: [redacted]
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:

[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 Director, California Service Center, revoked approval of the instant preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a billing service. It seeks to employ the beneficiary permanently in the United States as a systems programmer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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. The director also determined that no *bona fide* job offer was open to U.S. workers in this case. The director revoked approval of the petition for both reasons.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *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 $23.50 per hour, which equals $48,880 per year.

The Form I-140 petition in this matter was submitted on January 14, 2002. On the petition, the petitioner stated that it was established during 1985 and that it employs 75 workers. The petition states that the petitioner's gross annual income is $2.5 million. The space reserved for the petitioner to report its net annual income was left blank. On the Form ETA 750, Part B, signed by the beneficiary on April 20, 2001, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Chatsworth, California.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

In the instant case the record contains the petitioner's 2000, 2002, and 2003 Form 1120S, U.S. Income Tax Return for an S Corporation and the 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner. The record does not contain any other evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on February 20, 1985, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2000 the petitioner reported a loss of $1,324 as its Schedule K, Line 23 Income. At the end of that year the petitioner's current liabilities exceeded its current assets. This office notes, however, that because the priority date of the instant petition is April 27, 2001, evidence pertinent to prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2002 the petitioner reported Schedule K, Line 23 Income of $92,461. At the end of that year the petitioner had current assets of $198,531 and current liabilities of $153,360, which yields net current assets of $45,171.

During 2003 the petitioner reported a loss of $17,140 as its Schedule K, Line 23 Income. At the end of that year the petitioner's current liabilities exceeded its current assets.

The director originally approved the petition on May 29, 2002. Subsequently, on June 16, 2005, the director issued a notice of intent to revoke in this matter. The director stated that the petitioner had not demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The director also stated that the evidence demonstrates that the petitioner violated DOL laws and regulations in that it did not conduct a search for a U.S. worker to fill the proffered position.

In response counsel requested additional time during which to submit pertinent evidence or a brief. Counsel provided no argument in support of that motion except to state that he was gathering evidence.

The director revoked approval of the petition on August 5, 2005. In that decision the director denied the motion for an extension of time during which to respond to the notice of intent to revoke, finding that sufficient time had been allotted. The director found that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, and denied the petition on that basis.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

As to the petitioner's compliance with DOL requirements, the director stated,

> At the time of the interview, the beneficiary indicates [sic] that the petitioner, Fernando Santos, is the uncle of the beneficiary. The USCIS and California Service Center cannot ignore that the petitioner had pre-intentions in hiring the beneficiary without following the laws and regulations mandated by the Department of Labor.

The director found that, as the petitioner had hired his nephew, the job offer was apparently not open to U.S. workers as required by law and regulation, and revoked approval of the petition on this additional basis.

On appeal, as to the issue of the petitioner's ability to pay the proffered wage, counsel noted that the petitioner, a subchapter S corporation, is a pass-through entity, and stated that the petitioner's owner's personal income "represents the income of the [petitioner], . . . is essentially the income of the [petitioner]," and should therefore be considered available to pay additional wages.

As to the finding pertinent to the validity of the job offer and the petitioner's compliance with DOL regulations, counsel stated that Citizenship and Immigration Services (CIS) does not have the authority to make that determination. Counsel further argued, in the alternative, that the evidence does not support the finding that the petitioner is the beneficiary's uncle.

Counsel also argued that the request for an extension of time during which to respond to the notice of intent to revoke should have been granted because counsel did not receive the notice in a timely manner. Counsel noted that the attorney's copy of the notice of intent to revoke was sent to an incorrect address. Counsel asserted that because the attorney's copy was misdirected and counsel's late receipt was the result of CIS error, the request for an extension should have been granted and revoking approval of the petition without allowing adequate time for a response was error.

The evidence supports counsel's assertion that the attorney's copy of the notice of intent to revoke was misdirected. This office notes, however, that the assertion that counsel received the notice of intent to revoke late was not included in the motion for an extension of time to respond. The request for an extension of time to respond to the notice of intent to revoke was supported by no evidence, nor even an assertion, of any extenuating circumstances. The decision to deny the motion for an extension was correct, based on the argument, or, actually, lack of any argument, presented in its support.

Further, the sole purpose of a notice of intent to revoke is to accord the petitioner an opportunity to respond to adverse evidence. The petitioner has been accorded that opportunity on appeal. Even if the denial of the motion were error, it would have been rendered harmless.

This office disagrees with counsel's assertion that CIS does not have authority to determine whether DOL regulations were complied with in the instant case. Further examination of that issue is unnecessary, however, as this office agrees with counsel's contention that the evidence in the instant case does not support the finding that no *bona fide* employment opportunity was available to U.S. workers in the instant case.

The decision stated that the petitioner is Fernando Santos, who is the uncle of the beneficiary. The decision states that information was gleaned from an interview of the beneficiary. In fact, the petitioner in the instant case is [redacted]. It is 100% owned by [redacted]. No relationship between the beneficiary and the petitioner, or the petitioner's owner, appears in the record. The record does not contain evidence of any interview in which [redacted] was discussed. Other than the statement in the decision of denial, the record contains no indication that such a person exists. The finding that the petitioner is the beneficiary's uncle, and the decision to revoke on the basis of the lack of a *bona fide* job offer, is not supported by the record.

The remaining issue is whether the petitioner demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

The petitioner is a corporation. 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 are not available to it and 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). Counsel appears to argue that this distinction does not apply to a subchapter S corporation because its income is passed through to its owner or owners, rather than being taxed at the corporate level. The distinction between subchapter S corporations, which are pass-through entities, and subchapter S corporations, which are taxed at the corporate level, is entirely inapposite to the determination of whether the petitioner has demonstrated the ability to pay the proffered wage.

That the petitioner is a subchapter S corporation, a pass-through entity, means that various types of income passed through to the owner or owners of the subchapter S corporation retain their character as ordinary income, short-term capital gain, long-term capital gain, etc., and are taxed differently when declared by the owner or owners pursuant to the intricacies of the tax code. It does not mean that the owner or owners of the corporation are obliged to pay the debts and obligations of the corporation out of their own income and assets, except to the extent of their capital contribution to the corporation. The income and assets of the petitioner's owners are not necessarily available to the petitioner to pay wages.[2]

Counsel argues that, in the case of an S corporation, or at least in the instant case, the owner's assets are, in fact, available to the petitioner for its disposition. Although historically the petitioner's owner may have routinely invested in the petitioner as necessary to fund its operations in the past, and may declare the present intention to continue to do so as necessary, he is not obliged to continue to do so at such time as this arrangement becomes unprofitable to him. The petitioner is not entitled to its owner's funds as a matter of law.

Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). This office shall not consider the petitioner's owner's income and assets further.

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[2] That is, the petitioner's owners' income and assets are available to the petitioner only to the extent that they choose to make them available.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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 remained realistic. 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

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. 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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 that 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 minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[3] shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is $48,880 per year. The priority date is April 27, 2001

In a request for evidence issued on March 15, 2002 the California Service Center requested a copy of the petitioner's 2001 tax return. In response counsel submitted a copy of a Form 7004 application for extension of time to file that return. In the notice of intent to revoke issued on June 16, 2005 the director noted that the petitioner had failed to provide evidence of its continuing ability to pay the proffered wage beginning on the priority date and requested additional evidence. The petitioner did not then submit a copy of its 2001 tax return nor explain that omission, nor did it submit any other reliable evidence pertinent to its ability to pay the proffered wage during 2001. The petitioner did not demonstrate its ability to pay the proffered wage during 2001.

During 2002 the petitioner reported net Schedule K, Line 23 Income[4] of $92,461. That amount is sufficient to pay the annual amount of the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2002.

During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative 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 during that year. The petitioner provided no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petition in this matter was submitted on January 14, 2002. On that date the petitioner's 2004 tax return was unavailable. On March 15, 2002 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2004 tax return was still unavailable. On June 16, 2005, however, when the director requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the petitioner's 2004 tax return should have been available.

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[3] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

[4] The Schedule K, Line 23 Income of a subchapter S corporate petitioner or other petitioner reporting taxes on a Form 1120S, U.S. Income Tax Return for an S Corporation is considered to be its net income for the purpose of demonstrating its ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

The petitioner should then have provided its 2004 tax return but did not, and did not provide reason for that omission. The petitioner failed to show its ability to pay the proffered wage during 2004.

The petitioner's 2005 tax return was unavailable when the petition was submitted, when the request for evidence was issued, and when the notice of intent to revoke was issued. For the purpose of today's decision, the petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2005 and later years.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. Approval of the petition was correctly revoked on this basis, which has not been overcome on appeal.

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.