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

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[redacted]

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

WAC 06 067 50421

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, Chief
Administrative Appeals Office

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

The petitioner is an assisted living facility. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 and denied the petition accordingly.

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. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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.

8 C.F.R. § 204.5(g)(2) states:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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 24, 2001. The proffered wage as stated on the Form ETA 750 is $16.36 per hour, which equals $34,028.80 per year.

The Form I-140 petition in this matter was submitted on December 23, 2005. On the petition, the petitioner stated that it was established during 2004 and that it employs 138 workers. The petition states that the petitioner's gross annual income is $1,453,912. 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 5, 2001, the beneficiary claimed to have worked as the petitioner's receptionist/activity director since February 2000. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Los Angeles, California.

The AAO reviews *de novo* issues raised 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 (1) a certificate of amendment, dated August 11, 2003, to the articles of incorporation of AIB Corporation, (2) a document related to conversion of a corporation to a limited liability company (LLC) on July 19, 2004, (3) web content containing a news release dated September 22, 2003, (4) the 2001 and 2002 Form 1120, U.S. Corporation Income Tax Return of Fountain View, Inc. & Subsidiaries, (5) the 2003 Form 1120, U.S. Corporation Income Tax Return of Skilled Healthcare Group, Incorporated & Subsidiaries, (6) an employee services agreement effective January 1, 2004, (7) the 2006 annual report of Skilled Healthcare Group, Incorporated, including its audited financial statements for 2004 and 2005, (8) a release pertinent to the earnings of Skilled Healthcare Group, Incorporated during the first quarter of 2006, including unaudited income statements for that quarter and for the first quarter of 2005, (9) 2001 2002, 2003, 2004, and 2005 Form W-2 Wage and Tax Statements, (10) an Earnings Statement dated June 9, 2006, (11) a letter dated November 11, 2005 from the vice president of Skilled Healthcare Group, Incorporated, and (12) a letter dated June 7, 2006 from counsel. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The September 22, 2003 news release states, in pertinent part,

> Fountain View Inc. today announced that effective immediately the name of the parent company has changed to Skilled Healthcare Group. The subsidiaries under this umbrella company are Skilled Healthcare, LLC (formerly Fountain View, Inc.), Hallmark Rehabilitation (formerly Locomotion Therapy), and Skilled Care Pharmacy (remains unchanged).

Some of the documents in the record pertain to the identity of the petitioner itself. The August 11, 2003 amendment to AIB Incorporated's articles of incorporation is a change of name on that date to Hancock Park Senior Assisted Living, Incorporated. The July 19, 2004 document shows that on that day Hancock Park Senior Assisted Living, Incorporated reorganized as Hancock Park Senior Assisted Living, LLC, the petitioner in this case.

The 2001 and 2002 tax returns show that AIB Corporation was a subsidiary of Fountain View Incorporated (Fountain View) during that year. The 2003 tax return shows that Hancock Park Senior Assisted Living, Incorporated was a subsidiary of Skilled Healthcare Group Incorporated during that year,

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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).

The employee service agreement is between Southwest Payroll Services as provider and Skilled Healthcare LLC as recipient. Southwest agreed to employ, administer, and pay personnel, which it would then provide to Skilled Healthcare LLC for contracted fees.

The 2001, 2002, and 2003 W-2 forms submitted show that Summit Care Corporation paid the beneficiary $11,930.04, $11,775.09, and $17,697.96 during those years, respectively. The 2004 and 2005 W-2 forms submitted show that Southwest Payroll paid the beneficiary $18,804.29 $19,664.12 during those years, respectively. The June 9, 2006 Earnings Statement shows that Southwest Payroll Services LLC had paid the beneficiary year-to-date wages of $9,957.38.

The November 11, 2005 letter from Skilled Healthcare's vice president states that the petitioner has 138 employees and had $1,453,912 in revenue during 2004. That letter also states that "FY2004 Total Consolidated Revenues" were $413,485,749 during that same year. The letter indicates that the writer hoped that it would be regarded as evidence of the petitioner's ability to pay the proffered wage.

In his June 7, 2006 letter counsel stated[2] that the petitioner and 29 other healthcare facilities are owned by a parent company, Skilled Healthcare, and that all of those separate companies file a consolidated tax return. Counsel also stated that Southwest Payroll Services LLC pays the payroll for all 7,000 employees of those companies. Counsel reiterated that the petitioner, Hancock Park Senior Assisted Living LLC, has 138 employees and a gross income in excess of $1.4 million, but provided no evidence in support of those assertions. Counsel also cited the total assets and gross receipts of the petitioner's parent company as evidence of its continuing ability to pay the proffered wage.

The tax returns provided report the performance of the petitioner's parent company, and its subsidiaries, including the petitioner, during the various years, but without segregating the petitioner's performance. The annual report of Skilled Healthcare Group, Incorporated reports on the performance of that company and its subsidiaries, including the petitioner, but does not segregate the petitioner's performance.

The director denied the petition on June 21, 2006.

On appeal, counsel cited the petitioner's parent company's total wage expense, its total revenues, its total assets, and its profit during 2002 as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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.

[2] Although counsel's statements are not evidence, *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980), they are included in this portion of today's decision for clarity's sake.

§ 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 record contains evidence that Summit Care Corporation paid wages to the beneficiary during 2001, 2002, and 2003. Southwest Payroll paid wages to the beneficiary during 2004 and 2005. The wages paid by those other companies, however, is not probative of the ability of the petitioner, Hancock Park Senior Assisted Living, LLC, to pay any wages during any of those years and will not be included in the analysis of the petitioner's ability to pay the proffered wage.

The petitioner did not establish that it paid any wages to the beneficiary during any of the salient years. Even if the wages shown on the various W-2 forms were deemed to have been paid to by the petitioner, however, they would not demonstrate the ability to pay any portion of the wage proffered in this matter.

The beneficiary stated, on April 5, 2001, that she had been the beneficiary's receptionist/activity director since February 2000. The record does not demonstrate that she subsequently worked for the petitioner in any other position. Assuming that the petitioner needs a receptionist/activity director, the funds paid to its receptionist/activity director were not available to pay to a bookkeeper. The amounts paid to the beneficiary during the salient years, even if they had been paid from the petitioner's funds, would not represent funds available to compensate the proffered position.

For both of the above reasons, the amounts paid to the beneficiary will not be included in the analysis of the petitioner's ability to pay the proffered wage during the salient years.

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 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 $34,028.80 per year. The priority date is April 24, 2001. The petition was submitted on December 23, 2005 when the petitioner's 2005 tax return was unavailable, and no evidence pertinent to 2005 or subsequent years was later requested. The petitioner is obliged to show its ability to pay the proffered wage during 2001, 2002, 2003, and 2004.

The director's analysis in the decision of denial considered the performance of the petitioner's parent company, Skilled Healthcare, formerly known as Fountain View, and determined that it had not shown the ability to pay the proffered wage during one particular year, 2001. The director's analysis would be appropriate if the petitioner in this matter were Skilled Healthcare. The petitioner, however, is Hancock Park Senior Assisted Living LLC. Although Skilled Healthcare is the sole owner of the petitioner, and may derive income from it, they are not identical.

The petitioner is a LLC. Just as a corporation is a separate legal entity, distinct from its owners or shareholders, *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958), so is an LLC separate and distinct from its members. The debts and obligations of a corporation or LLC are not the debts and obligations of its members or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "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."

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

As the members and others are not obliged to pay the petitioner's debts, the income and assets of the members and others and their ability, if they wished, to pay the company's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

By its terms, 8 C.F.R. § 204.5(g)(2) requires that, in a typical instance, a petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In the instant case, the petitioner does not have its own tax returns and may not its own annual reports or audited financial statements. Given that circumstance, this office would be inclined to excuse the petitioner's failure to provide the evidence specifically required by 8 C.F.R. § 204.5(g)(2). The petitioner was still obliged, however, to provide reliable evidence that the petitioner itself, the specific entity that filed the Form I-140 petition, has the ability to pay the proffered wage. The petitioner submitted no evidence pertinent to its own finances. As such, it has not demonstrated its ability to pay the proffered wage out of its own funds.

Pursuant to 8 C.F.R. § 204.5(g)(2), an exception exists to the obligation of the petitioner to prove its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, audited financial statements or similar contemporaneous documentary evidence. That regulation provides that,

> In a case where the prospective United States employer employs 100 or more workers, the director **may** accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

[Emphasis provided.]

Such a letter exists in the instant case. The November 11, 2005 letter from the petitioner's vice president indicates that the petitioner employs 138 workers. The director apparently chose not to consider that letter to be sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, as he was entitled to do pursuant to the terms of 8 C.F.R. § 204.5(g)(2).

The director may have declined to consider the letter to be sufficient because, although it states that the petitioner employs 138 workers, no evidence was provided in support of that statement. The director may also have noted that the petitioner's parent company's 2001 tax return, the only tax return then in the record, shows that the parent company declared a loss of almost $9 million as its taxable income before net operating loss deduction and special deductions during that year. In any event, the record contained sufficient reason for the director to disregard the request that the November 11, 2005 letter be considered sufficient proof of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner did not submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during any of the salient years from 2001 to 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner was correctly denied on this basis, which has not been overcome on appeal.

The record suggests additional issues that were not addressed in the decision of denial.

The instant visa category provides that an employer may petition for an alien worker it wishes to employ. Those workers who are employed at the petitioner's facilities, however, are the employees of Southwest Payroll Services. The record indicates that the petitioner itself has no employees, but only contract labor. This suggests that the petitioner itself does not intend to employ the beneficiary either, but to have Southwest Payroll Services employ her and contract her services to the petitioner. In that event, Southwest Payroll Services must obtain a labor certification, petition for its prospective employee, and meet all the other requirements of the visa category including demonstrating its continuing ability to pay the proffered wage beginning on the priority date. The petition should have been denied for the additional reason that the petitioner is not the intending employer.

Further, the Form ETA 750 was filed in the name of Hancock Park Retirement Hotel on April 24, 2001. The Form I-140 states that the petitioner came into existence during 2004. Under these circumstances, the instant petitioner, in order to rely on the approved labor certification, is obliged to show that it is Hancock Park Retirement Hotel's true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It 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 intended employer.

In the instant case, the record demonstrates that the petitioner, Hancock Park Senior Assisted Living, LLC is the successor of Hancock Park Senior Assisted Living, Incorporated. The record further demonstrates that Hancock Park Senior Assisted Living, Incorporated was the successor of AIB Incorporated. The relationship of those companies to Hancock Park Retirement Hotel is unknown to this office. The petition should have been denied on this additional basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.