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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 16 2007

SRC 06 151 52933

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 on appeal. The appeal will be dismissed.

The petitioner is a landscaper. It seeks to employ the beneficiary permanently in the United States as a tree surgeon. 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.

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 DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 12, 2001. The proffered wage as stated on the Form ETA 750 is $19.90 per hour for a 35-hour week, which equals $36,218 per year.

The Form I-140 petition in this matter was submitted on April 14, 2006. On the petition, the petitioner stated that it was established on April 11, 1995 and that it employs one worker. In the space in the petition reserved for the petitioner to report its gross annual income, the petitioner entered, "net assets over $700,000 in 2001." The petitioner reported that its net annual income was "$70,000+ (2003)."

On the Form ETA 750, Part B, signed by the beneficiary on April 9, 2001, the beneficiary did not claim to have worked for the petitioner. The Form I-140 visa petition indicates that the petitioner would employ the beneficiary in Huntington, New York.

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 (1) the joint 2001, 2002, 2003, 2004 and 2005 Form 1040 U.S. Individual Income Tax Returns of [redacted] (2) statements pertinent to the balance of the account of [redacted] Plan, (3) Uniform Residential Appraisal Reports pertinent to residential property apparently owned by [redacted] and (4) the 2003, 2004, and 2005 joint Form 1040 U.S. Individual Income Tax Returns of the beneficiary and his spouse. 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.

Schedules C attached to the beneficiary's tax returns show that the beneficiary was self-employed during 2003, 2004, and 2005. They do not demonstrate that he received any funds from the petitioner.

The director denied the petition on June 19, 2006. On appeal, counsel asserted that the evidence provided demonstrates 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. § 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.*

[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).

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. [redacted] 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 net of 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[2] 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 [redacted] The priority date is April 12, 2001.

The Form I-140 visa petition states that the petitioner's name is [redacted] Landscaping and Design. This suggests that the petitioner is the sole proprietorship of [redacted] In the decision of denial the director analyzed the petitioner's ability to pay the proffered wage as if this were the case. That is; the director considered the personal income and assets of [redacted] The director noted that the tax returns submitted do not support the proposition that the petitioner could have paid the proffered wage during 2001 and 2002. The director arrived at that conclusion by noting that if [redacted] had been obliged to pay the proffered wage out of his adjusted gross income during those years, what would have remained of

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

his adjusted gross income would have been insufficient for him to support himself and his family. This analysis would be correct if it were being applied to a sole proprietorship.

If the petitioner were the sole proprietorship of [redacted] however, then a Schedule C should have been appended to each of [redacted] personal income tax returns to show the revenue, expenses, and resulting net profit of the petitioner during each of the salient years. The net profit or loss would have been carried forward to Line 12, Business Income. The petitioner's tax returns include no Schedules C, and [redacted] shows no business income or loss on his Form 1040 returns. The petitioner is not, then, a sole proprietorship.

Reference to the New York Department of State website on August 27, 2007 <http://appsext8.dos.state.ny.us/corp_public/corpsearch.entity_search_entry>, however, shows that the petitioner, All American Landscaping & Design, the entity that proposes to employ the beneficiary, is a corporation, owned by [redacted] As the corporation was established during 1995 and remains active as of this writing, the petitioner was apparently a corporation at all salient times. The analysis of a corporation's ability to pay the proffered wage differs from that of 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). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, 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."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation'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. The personal income and assets of [redacted] may not be considered.

Because the record contains no evidence pertinent to the ability of the petitioner, the corporate entity that proposes to employ the beneficiary, to pay the proffered wage,[3] the petitioner has failed to demonstrate that it

[3] This office notes that the service center would typically be required to issue a request for evidence if the record merely contained insufficient evidence of the petitioner's ability to pay the proffered wage. In the instant case, however, where the petitioner implied that it was the sole proprietorship of [redacted], and the director did not discover otherwise, and the petitioner submitted [redacted] tax returns as evidence of its ability to pay the proffered wage, the director was entitled to rely on that evidence in issuing the decision of denial. Further, the decision was based on the finding that the petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, and this office's decision is based on that same finding, dismissal of the appeal, rather than remand or issuance of a request for evidence, is appropriate. If the petitioner wishes to present evidence that it, the petitioning corporation itself, has had the continuing ability to pay the proffered wage beginning on the priority date, the petitioner may present that evidence on motion.

had the ability to pay the proffered wage during 2001, 2002, 2003, 2004, and 2005.[4] Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

The approved Form ETA 750 labor certification indicates that the petitioner would employ the beneficiary in Old Bethpage, New York, which is in Nassau County. The Form I-140 visa petition states that the petitioner would employ the beneficiary in Huntington, New York, which is in Suffolk County.

Because the decision of denial did not address this issue, and the petitioner has not been accorded an opportunity to respond, today's decision is not based on this ground even in part. If the petitioner wishes to further pursue this matter, however, however, it should address the issue of whether a labor certification issued for employment in Nassau County, New York is valid for employment in Suffolk County.

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.

[4] The visa petition was submitted to CIS on April 14, 2006. On that date the petitioner's 2006 tax return was unavailable. On May 11, 2006 the director issued a Notice of Intent to Deny in this matter, requesting, *inter alia*, evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2006 tax return was still unavailable. For the purpose of today's decision, the petitioner is excused from showing its ability to pay the proffered wage during 2006 and later years.