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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 28 2006

SRC 06 149 52012

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.

Kevin S. Perkins for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The nature of the petitioner's business is garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a market research analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. The procedural history in this case is documented by 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 denial dated September 14, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 the granting of 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, 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. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on June 15, 1999.[1] The proffered wage as stated on the Form ETA 750 is $73,200.00 per year.

[1] It has been approximately nine years since the Application for Alien Employment Certification 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 employer] guarantee that, if a labor certification is granted, the wage paid to the alien when

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from counsel dated August 15, 2006; letters from the petitioner dated March 7, 2005, and August 15, 2006; the beneficiary's U.S. Internal Revenue Service Form 1040 tax returns along with W-2 Wage and Tax Statements for 1999, 2000, 2001, 2002, 2003, 2004 and 2005 issued by the petitioner to the beneficiary; eight estimates made in 2006; an owner of the petitioner, [redacted]'s personal U.S. Internal Revenue Service Form 1040 tax return for 1999 that on Schedule E, Part II, line 31states a loss of <$80,505.00>[3] as carried over from Schedule K of the petitioner's return; approximately 10 personal savings account statements of the beneficiary and his spouse over a period of seven years (1999 to 2005); the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2000, 2001, 2002, 2003, and 2004; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997 and to currently employ 28 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on June 12, 1999, the beneficiary did claim to have worked for the petitioner since December 1998.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes petitioner's U.S. Internal Revenue Service Form 1120S 2005 tax return. Further counsel has submitted approximately 78 copies of the petitioner's bank statements from January 14, 2000 to June 13, 2006 as evidence of its ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. 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,

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the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

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

[3] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

Counsel submitted W-2 Wage and Tax statements from the petitioner to the beneficiary for years 1999, 2000, 2001, 2002, 2003, 2004 and 2005. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is $73,200.00 per year, the petitioner must establish that it can pay the beneficiary the differences between wages actually paid to the beneficiary and the proffered wage, which for the years above stated are as follows:

Differences between Wages actually paid to the Beneficiary and the Proffered Wage

- 1999 $56,100.00
- 2000 $55,000.00
- 2001 $66,075.00
- 2002 $54,625.00
- 2003 $56,400.00
- 2004 $55,600.00
- 2005 $60,400.00

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's Form 1120S[4] tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

[4] No corporate tax return was submitted for 1999. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the

- No corporate tax return was submitted for 1999. In 1999, the petitioner owner's personal Form 1040 tax return (Schedule E) stated a loss carried over from the petitioner's tax return for the same year of <$80,505.00>.
- In 2000, the Form 1120S stated net income (Schedule K, Line 23) of $8,626.00.
- In 2001, the Form 1120S stated net income (Schedule K, Line 23) of $3,915.00.
- In 2002, the Form 1120S stated net income (Schedule K, Line 23) of <$55,034.00>.
- In 2003, the Form 1120S stated net income (Schedule K, Line 23) of <$28,576.00>.
- In 2004, the Form 1120S stated net income (Schedule K, Line 17.e) of $31,636.00.
- In 2005, the Form 1120S stated net income (Schedule K, Line 17.e) of $39,977.00.

Since the proffered wage is $73,200.00 per year, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 1999, 2000, 2001, 2002, 2003, 2004 and 2005.

If the net income the petitioner demonstrates it had available during the 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets were for the years for which the petitioner's tax returns were submitted were as follows:

- 1999 (No corporate tax return submitted.)
- 2000 <$ 36,972.00>
- 2003 <$253,415.00>
- 2004 <$227,539.00>

Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005).

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- 2001 <$ 85,509.00>
- 2002 <$190,994.00>
- 2005 <$240,303.00>

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director "solely" denied the petition because the petitioner did not respond adequately to the director's request for evidence. In the request for evidence dated May 25, 2006, the director requested the petitioner's 2005 U.S. federal income tax return (received on appeal) or in the alternative an audited financial statement (not submitted). The director also requested the beneficiary's W-2 statements from 2002 to 2005 (the 2005 W-2 statement was not submitted).

The director requested the first page of the petitioner's bank statements showing beginning and ending balances from 200o to May 1, 2006 which evidence was not submitted until the appeal. Since the bank statements were reasonably available for submission in response to the director's request for evidence,[6] the bank statements submitted upon appeal will not be accepted. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the bank statements in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the bank statements evidence submitted on appeal.

Even if this office would accept the bank statements on appeal, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Since the 2005 income tax return was 'on extension' at the time of the petitioner's response to the director's request for evidence, it will be accepted into evidence.

Further, counsel states that the director committed error by not considering all the evidence the petitioner submitted in particular the petitioner's "Estimate of Machinery." Counsel had submitted by his letter dated

[6] Counsel stated the reason for not submitting the statements was because of "the administrative delay of the bank." We note that these are monthly bank statements addressed to the petitioner. No explanation was provided why the petitioner did not already have these documents.

August 15, 2006, eight estimates made in 2006. The estimates are submitted as invoices from City Sewing Machine Co. to the petitioner which name is listed in a "bill to" block on each estimate. The estimates do not indicate that the petitioner actually purchased or owned the machinery. The eight estimates are not submitted as machinery and equipment appraisals and counsel has not provided a foundation for their valuations.

Counsel states on appeal that the petitioner's unencumbered ownership of its "hard assets" (i.e. machinery, equipment, fixtures) evidences the ability to pay the proffered wage and in combination with other assets is evidence of the ability to pay. As already stated, "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory, and, prepaid expenses. As will be discussed, net current assets after including liabilities were less than the proffered wage for all years examined for which corporate tax returns were submitted (2000, 2001, 2002, 2003, 2004 and 2005). No corporate tax return was submitted for year 1999.

Further it is duplicative of the petitioner's finances to combine net current assets with the petitioner's total assets that include machinery, equipment, and fixtures. We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

Nevertheless, counsel contends that the total value or valuation of the machinery and equipment based upon the estimates (which is $258,550.00) may be subtracted by the amount of $362,000.00. The figure $362,000 is a derived figure calculated by counsel in an additive fashion by adding the proffered wage amount for each year between 2000 and 2005 together with calendar prorated wage amounts for years 1999 and 2006 and then multiplying by 95%. Counsel has not supported his calculation method by asserting regulation or case precedent. Since by its letter dated March 7, 2005, the petitioner stated that it wished to employ the beneficiary at "a minimum annual salary of $73,200.00" which is the proffered wage established by the labor certification, counsel's assertion is in error. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Therefore, counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel has submitted [redacted]'s personal U.S. Internal Revenue Service Form 1040 tax return for 1999 as well as some of the personal bank statements of [redacted]r as evidence of the petitioner's ability to pay the proffered wage. Contrary to counsel's assertion, 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."

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.