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U.S. Citizenship and Immigration Services

[redacted]

BG

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 00 146 53800

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, Director
Administrative Appeals Office

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

The petitioner, "CDB Services Inc." claims to be a long haul refrigerated trucking company. It seeks to permanently employ the beneficiary, [redacted] in the United States as a team driver supervisor. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had failed to establish that it had the continuing financial ability to pay the proffered wage and denied the petition accordingly. The director also concluded that the petitioner failed to demonstrate that it intended to have a qualified employment relationship with the alien beneficiary.

On appeal, counsel submits additional evidence and contends that a combination of the petitioner's and other affiliated companies' resources establishes the petitioner's continuing financial ability to pay the certified wage.

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) provides:

> *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. 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 [Citizenship and Immigration Services (CIS)].

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 Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 17, 1998. The proffered wage as stated on the Form ETA 750 is $24,400 per annum plus 30 cents per mile. On Form ETA 750B, signed by the beneficiary on February 15, 2000, the beneficiary does not claim to be employed by the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed March 20, 2000, the petitioner claims to have been established in 1988, have a gross annual income of almost seven million dollars, a net annual income of about $40,000, and to currently employ 235 workers.

In support of its continuing ability to pay the proffered wage, the petitioner initially offered a copy of its Form 1120, U.S. Corporation Income Tax Return for 1996. It is noted that on page 3 of the tax return the petitioner states that its business activity is "business services" and that its product or service is "paymaster," not long haul trucking. It is further noted that this tax return covers a fiscal year running from December 1, 1996 to November 30, 1997. It does not cover the period in which the priority date of February 10, 1998 was established, however it reflects that the petitioner reported net taxable income of $149,831 for the fiscal period ending November 30, 1997. It references almost seven million dollars in gross receipts or sales and $5,676,471 in salaries and wages paid. Schedule L of the tax return shows that the petitioner had $366,448 in current assets and $235,341 in current liabilities, resulting in $131,107 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as an alternative method of measuring a petitioner's ability to pay the proffered wage. Net current assets are the difference between current assets and current liabilities.[1] If a corporation's end-of-year 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 petitioner also offered copies of advertising for a limited partnership called "Baldwin Distribution Services, Ltd.," as well as a copy of an unaudited income statement covering the first eight months of 1999, ending August 31, 1999. It is unclear whether this statement belongs to the petitioning business or to Baldwin Distribution Services, Ltd.

On November 27, 2000, the director issued a notice of intent to deny the petition. The director discussed the flaws of the initial evidence submitted and advised the petitioner of the provisions of 8 C.F.R. § 204.5(g)(2), requiring a petitioner's financial evidence to consist of either federal tax returns, annual reports, or audited financial statements, or if the firm employs over 100 or more workers, the submission of a statement from the organization's financial officer. The director advised the petitioner of the deficiencies of the evidence thus far submitted and further informed the petitioner, that pursuant to information received from a Service report of investigation, it was learned that the petitioner had not reported any employees to the Texas Workforce Commission since the second quarter in 1998. The director questioned the petitioner's intent to remain a qualified U.S. employer. The director also suggested that a firm called "Anzus Management Services," appeared to be paying driver wages, but it wasn't clear what relationship existed between the petitioner and this firm. The director advised the petitioner that it must demonstrate its continuing ability to pay the proffered wage as of the visa priority date and that it must submit evidence showing that as the designated prospective U.S. employer, it is an entity whose relationship with the employee includes the ability to "hire, pay, fire, supervise or otherwise control" the work of such an employee.

In response, counsel submits copies of the petitioner's federal corporate income tax returns for 1997 and 1998. They cumulatively cover the fiscal period from December 1, 1997 to November 30, 1999. They contain the following information:

	1997	1998
Gross receipts or sales	$1,095,090	$1,747

[1] 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Salaries and Wages	$1,002,191	-0-
Net taxable income	- $ 19,783	-$ 169
Current Assets	$ 1,244	$6,862 (cash)
Current Liabilities	$ 1,929	-0-
Net Current Assets	- $ 685	$6,862

Counsel also offered copies of the petitioner's federal quarterly tax return for 1997 and the first two quarters of 1998. As indicated by the director in the intent to deny, as of the quarter ending June 1998, all pertinent categories on the return were marked "-0-." A copy of a 2000 Texas franchise tax report shows that the petitioner retained three officers; Dudley Baldwin, Charles Baldwin, and Kathy Baldwin. Counsel states that this shows that petitioner remains an active corporation in good standing. A copy of a May 1998 letter from the Texas Workforce Commission to Baldwin Distribution Services shows that a transfer of unemployment compensation accounts was made from the petitioner to Baldwin Distribution Services, "due to your acquisition on March 1, 1998."

Counsel further provides a copy of a contract for personnel services, executed in 1994, between Baldwin Distribution Services, Ltd., a trucking company, and the petitioner. It clearly provides that the petitioner will be the employer of all personnel supplied to Baldwin, providing direction and control, including payment of wages, and the right to hire, fire or reassign employees. The employees are described as eighty drivers, four dispatchers and three office personnel, with numbers to be adjusted by Baldwin's needs. That contract was for one year with automatic renewal from year to year, excepting written termination by either party. The contract was signed by Dudley Baldwin as President of the petitioner and as President of "Baldwin Transportation, Inc.," a general partner of Baldwin Distribution Services, Ltd.

An organizational chart, showing seven corporations or limited partnerships with Mr. Baldwin's varying degrees of ownership percentage, was submitted as part of the petitioner's response to the request for evidence. An accompanying letter, dated January 31, 2001, on a letterhead designated "Baldwin," is signed by Dudley Baldwin. Mr. Baldwin asserts that as president and substantial owner of the petitioning corporation, Baldwin Distribution Services, Ltd., and "Red Eagle Equipment, Ltd.," he can control the functions of any of the companies and urges CIS to look at the resources of all of the companies. He explains that various liability problems inherent in the trucking industry is the basis for the division of functions. He states that the petitioner's employees were acquired by the trucking companies due to a business decision taken after an approach to sell "Western Sand & Gravel" and "Borger Sand & Gravel" in late 1997 and that all of the drivers employed on the petitioner's payroll were transferred to the payroll of Baldwin Distribution Services, Ltd. It is unclear what Mr. Baldwin's involvement in these gravel firms was or how this relates to the petitioner's function as a business services firm, however he maintains that despite this transfer, the petitioner maintained its separate corporate entity as shown by the filing corporate tax returns and other reports, and can revive its operation. Mr. Baldwin states that he needs the services of the alien beneficiaries that the petitioner has requested and can "immediately put them on the payroll of [the petitioner]." He then explains that he hasn't needed the petitioner's services but that he has 99 trucks, which can use 145 drivers and team driver supervisors, but only 105 are on the payroll. No further evidence of this employee acquisition was presented. No explanation of the role of the Anzus company was offered.

In support of the assertion that the other Baldwin related companies' resources should be considered, counsel submits copies of 1998 and 1999 audited financial statements for Baldwin Distribution Services, Ltd. and Red Eagle Equipment Services, Ltd. An accountant's letter, dated January 31, 2001, is also provided in which it is

argued that due to Mr. Baldwin's control, the combined resources of these companies should also be considered in support of the ability to pay the proffered wage. Counsel's cover letter also asserts that *Full Gospel Church v. Thornburgh,* 730 F. Supp. 441, 449 (D.D.C. 1998) supports this method of determining the petitioner's ability to pay the proffered wage by relying on the affiliated companies resources. He further maintains that the additional employees' ability to generate income is justified by *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967).

The director denied the petition on July 9, 2001. The director determined that the evidence submitted did not establish that the petitioner, as a separate legal entity, had the continuing direct ability to pay the proffered wage beginning on the priority date. The director also noted that the role of the Anzus company, operated by one of the six alien beneficiaries (Peter D. Way) for whom the petitioner has filed I-140s, as a payroll firm for the Baldwin group of companies, was not explained, and raises the question of whether the petitioner's intention to remain the prospective U.S. employer of the beneficiary is bona fide. . The director further concluded that the petitioner's evidence had failed to convincingly demonstrate that it intended to retain such directional and employment authority over the alien beneficiary so as to be considered to be a qualifying prospective U.S. employer.

On appeal, besides documents previously submitted, counsel offers a copy of an additional statement, styled as an affidavit, dated September 4, 2001. It is signed by Lacye D. Comer, operations manager for Baldwin Distribution Services, Inc. She claims that one of the other six alien beneficiaries, upon whose behalf the petitioner has filed I-140s, works for Anzus, an independent contractor, that supplies drivers to Baldwin Distribution Services, Inc. She adds that "for legal and business reasons," the petitioner "temporarily transferred all of its drivers to Baldwin Distribution Services, Inc.," but that it has recently begun to hire employees directly. Copies of two employees' payroll records from March and June 2001 are offered in support of this assertion. Ms. Comer states that these employees were transferred from Baldwin Distribution Services, Inc.

On appeal, counsel also renews the claim that the petitioner can rely upon Baldwin Distribution or the other related companies for financial support. The AAO does not find this assertion convincing. *Full Gospel Church v. Thornburgh* involved the consideration of whether an alien was a "professional" within the meaning of 8 U.S.C. § 1101(a)(32). With reference to the ability to pay the proffered salary, the court noted that a parish church might rely upon the financial support of the parent nation-wide church. In this matter, although the AAO may consider the guidance suggested in that case, it is noted that the rationale of *Full Gospel* is not binding in this regard, in cases arising outside of its own jurisdiction. Moreover, it is questionable whether *Full Gospel's* rationale is still followed in its own jurisdiction. The same district court, in a case involving the determination of whether an alien could be classified as a special immigrant religious worker, more recently found, that as the parent church organization would not be paying the local religious workers' salaries, the assets of the parent church were irrelevant in evaluating a local church petitioner's ability to pay the proffered wage. *Avena v. INS,* 989 F. Supp. 1, 8 (D.D.C. 1997).

As noted by the director, the petitioner, as the designated prospective U.S. employer of the beneficiary, must establish its own continuing ability to pay the proffered salary. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

> The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

> The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.
>
> A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.
>
> In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

See also, Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). It is further noted that if the 1994 contract between the petitioner and Baldwin Distribution Services, Ltd., was offered as a viable example of the petitioner's relationship to one of the other Baldwin affiliated companies, it specifically exempted any legal obligation of Baldwin Distribution to pay any wages of employees supplied by the petitioner and characterized the petitioner's status as one of an independent contractor. Moreover, the characterization of the petitioner's ability to pay a proffered wage resting upon a pledge or guarantee of a future promise of payment by a separate corporation or enterprise is not supported by the evidence in the record and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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 this case, there is no evidence that the petitioning business directly employed the alien.

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, as asserted by counsel, 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient.

Counsel asserts on appeal that the petitioner demonstrated its ability to pay the proffered wage as of the priority date of February 10, 1998 because the petitioner's 1997 corporate tax return showed gross receipts or sales of $1,095,090. Counsel's contention is not persuasive. Simply stating that the petitioner's gross income

reached a certain level is not sufficient because it fails to account for expenses incurred in order to generate such income. 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 the Service should have considered income before expenses were paid rather than net income.

As shown by the petitioner's 1997 income tax return, neither the petitioner's net taxable income of -$19,783, nor its net current assets of -$685 was sufficient to cover the proffered wage of $24,400 per year. Similarly, its 1998 tax return also reflects that neither its net taxable income of -$169, nor its net current assets of $6,862 was sufficient to pay the certified wage. The fact that the petitioner abandoned its core operation as a business service and payroll/personnel firm during this period, albeit retaining its corporate status, does not affect this outcome. It remains that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner must establish its *continuing* ability to pay a proffered wage beginning at the priority date, through its federal tax returns, audited financial statements, or annual reports.

As a petitioner of multiple alien beneficiaries sharing the same 1998 priority dates, the petitioner would also be responsible for establishing its continuing ability to pay the cumulative certified wages for all the beneficiaries beginning on their respective priority dates. As set forth above, the petitioner's financial documentation fails to demonstrate that it had the continuing ability to pay the certified wages of its five other alien beneficiaries.

In the context of the financial information contained in the record, counsel asserts that *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) supports the petitioner's future prospects for success and establishes its ability to pay the proffered wage through hiring additional employees. *Matter of Sonegawa* involved a case in which the appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations and paid rent on both the old and new locations for five months. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, although the record is not well-developed enough to conclusively state that the petitioner cannot be considered a prospective U.S. employer, it is noted that the petitioner's addition of two employees in 2001, after apparently completely outsourcing its own business operation as a payroll and personnel supply firm, in part, to another company called Anzus, does not demonstrate the kind of unusual circumstances which prevailed in *Sonegawa* and does not merit positive consideration.

Upon review of the evidence contained in the record and upon further consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner failed to submit evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage as of the priority date in any of the relevant years.

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.