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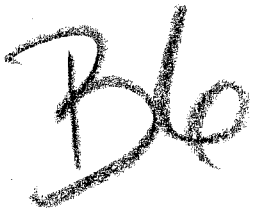
U.S. Citizenship and Immigration Services



[redacted]

FILE: EAC 02 245 50950 Office: VERMONT SERVICE CENTER Date: MAY 18 2005

IN RE: Petitioner: [redacted]
Beneficiary:

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

The petitioner is a cleaning, clothing repair, and alteration firm. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

On appeal, counsel submits additional evidence in support of the petitioner's financial ability to pay the proposed wage offer.

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, 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 April 19, 2001. The proffered wage as stated on the Form ETA 750 is $14.17 per hour, which amounts to $29,473.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since April 1997.

On Part 5 the petition, the petitioner claims to have been established in 1997, to have a gross annual income of approximately $319,465 and to currently employ nine workers. In support of its continuing ability to pay the proffered salary, the petitioner provided a copy of its 2000 Form 1120, U.S. Corporation Income Tax Return. It shows that the petitioner files its taxes using a fiscal year running from October 1, 2000 to September 30, 2001. On the 2000 return, the petitioner declared net taxable income of $48 before the net operating loss (NOL) deduction. Schedule L of the tax return shows that the petitioner had $127 in current assets and $6,457 in current liabilities, resulting in -$6,330 in net current assets. Besides net income, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as an alternative method of examining its ability to pay the certified wage. Net current assets are the difference between the petitioner's

current assets and current liabilities.[1] A corporation's year-end current assets are shown on line(s) 1 through 6 of Schedule L of the federal tax return. The current liabilities are shown on line(s) 16 through 18 of Schedule L. If a corporation's year-end 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 supplied copies of the beneficiary's Wage and Tax Statements (W-2s) for 1999, 2000 and 2001. They show that the petitioner paid her $13,682.49, $10,720.62, and $15,789.32 in wages in each of those respective years. The petitioner additionally submitted a copy of a letter, dated April 1, 2002, from its owner, Bryan Moran. Mr. Moran states that the petitioner has the ability to pay the beneficiary the proffered wage.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on April 18, 2003, the director requested additional evidence pertinent to that ability in order to demonstrate the petitioner's financial ability to pay the proposed wage offer of $29,473.60. The director also specifically requested that the petitioner provide a copy of its 2001 federal tax return and a copy of the beneficiary's Wage and Tax Statement (W-2) for 2002 if it employed the beneficiary during that period.

In response, the petitioner offered a copy of the beneficiary's 2002 W-2. It reflects that the petitioner paid her $11,713.50 in wages. The petitioner also supplied a copy of its 2001 corporate tax return, which covers the period between October 1, 2001 and September 30, 2002. It shows that the petitioner reported -$8,965 in net taxable income before the NOL deduction. Schedule L reflects that the petitioner had $1,006 in current assets and $2,500 in current liabilities, resulting in -$1,494 in net current assets.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage, and, on August 18, 2003, denied the petition.

On appeal, counsel submits another letter from Mr. Moran. He states:

> I will personally grantee [sic] [the beneficiary] wages to $29,474. By my own salary and my credit line account number [redacted] with JP Morgan Chase Bank.
>
> Having [the beneficiary] in my employ full time would be a huge asset to my business as the services she could offer are not available in my area.

The assertion that the Mr. Moran's individual assets are an available source to be considered is not persuasive in this case. The petitioner is a corporation. 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 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). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18,

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[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.

2003) also considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, 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 who have no legal obligation to pay the wage." Moreover, there is no provision in employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, a personal guarantee is a future pledge of payment 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).

Further, although Mr. Moran's is confident that the provision of the beneficiary's services to his business will be a huge asset, this hypothesis does not outweigh the evidence in the record, which shows that despite her employment, the petitioner's net taxable income and net current assets either reflected losses or an extremely modest return in 2000 and 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have 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 record consistently shows that the beneficiary has been employed at levels substantially lower than the proffered wage. To the extent that either the petitioner's net taxable income or its net current assets can cover the difference between the actual wages paid and the full proffered salary, those amounts will be given consideration in examining the petitioner's ability to pay the certified salary.

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 also examine the net taxable 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). 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 set forth above, in 2001, the beneficiary's wages were $13,684.28 less than the certified salary of $29,473.60. In 2001, her W-2 shows that her wages were $17,760 less than the certified wage. Although an exact comparison cannot be made due to the petitioner's use of a designated fiscal year on its corporate tax returns, it is clear that neither its net taxable income of $48, nor its net current assets of -$6,330, as shown on its 2000 tax return, could cover any shortfall between actual wages paid and the proffered wage. Similarly, its 2001 tax return also shows that neither its net taxable income of -$8,965, nor its net current assets of -$1,494 could pay any shortfall.

In view of the foregoing and following a review of the evidence contained in the record, the petitioner has failed to persuasively establish its continuing financial ability to pay the proffered wage as of the priority date of April 19, 2001 and continuing until the present.

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.