

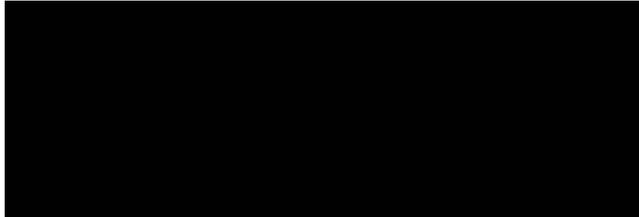
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:

WAC 03 012 52485

Office: CALIFORNIA SERVICE CENTER

Date: DEC 06 2006

IN RE:

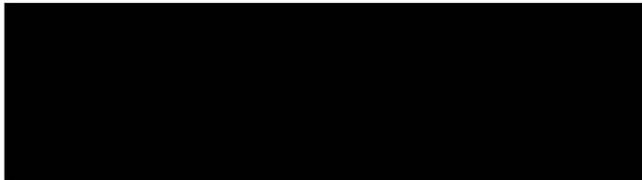
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be sustained.

The petitioner is a nursery. It seeks to employ the beneficiary permanently in the United States as a nursery laborer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. The director determined that according to the evidence submitted in the record of proceeding, the beneficiary's employment was transferred from the petitioner to another corporation, GLS, Inc., and that according to the petitioner, GLS, Inc. is not the successor-in-interest to the petitioner. The director denied the petition accordingly.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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 8C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 6, 2001. The proffered wage as stated on the Form ETA 750 is \$8.50 per hour (\$17,680 per year).

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor with correspondence.

Because the director determined, *inter alia*, the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on November 14, 2003, July 2, 2004, and, January 30, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested the petitioner's U.S. federal tax returns for 2001 2002 and 2003. Further, the director requested clarification whether or not another corporation, GLS Inc.,¹ was the new employer, and, the successor-in-interest to the petitioner.

As the Form ETA 750 stated that the petitioner employed the beneficiary since January 1999, the director requested that the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements for years 1999, 2000, 2001 and 2002. The director requested a job verification from the petitioner on its letterhead with the beneficiary's job title, duties, and dates of employment and number of hours worked.

The petitioner submitted a letter dated December 18, 2003, stating that the beneficiary had been a full time employee since January 1999.

In response to the director's inquiry requesting successor-in-interest evidence, the president of GLS Inc. [REDACTED] Stangeby, stated in a letter dated August 4, 2004, in pertinent part, as follows:

GLS, Inc. is not a Successor in Interest for [REDACTED] Inc. GLS is a company that assumed a portion of Baron Brothers Nursery's employees. All of those employees still work at the same workplace.

Since June 2000, [REDACTED] has always reported to the same workplace. The only change has been the name of the company on the paycheck. His employment has been uninterrupted.

Since the company GLS, INC. is paying the beneficiary for his employment and labor according to the above, this statement raised an issue whether GLS, Inc. has become the new employer of the beneficiary that the director was required to determine.

The director denied the petition on October 28, 2004, finding that according to the evidence submitted the beneficiary's employment was transferred from the petitioner to another corporation, GLS, Inc., and that according to petitioner, GLS, Inc. is not the successor-in-interest to the petitioner.

On appeal, counsel asserts that the totality of the circumstances demonstrates continuity in employment with the petitioner.

Counsel has submitted copies of the following documents to accompany the appeal statement: a copy of the director's decision; a letter from the petitioner dated November 15, 2004; a letter from GLS, Inc. dated November 22, 2004; approximately 8 pay statements showing year to date wage payments from the petitioner

¹ According to the records of the California Secretary of State office, GLS, Inc. Articles of Incorporation were filed on May 5, 2000. According to a statement made by counsel on appeal, the president of that corporation is the daughter of the owner of the petitioner.

to the beneficiary of \$11,655.50 in 2002, and, \$5,850.00 in 2004; approximately 16 color photographs showing the beneficiary at work in uniform for the petitioner; and, the petitioner's business license dated August 11, 2003.

In order for a "successor in interest" determination to be made, the following documentation should be submitted along with a new I-140 petition: a copy of the notice of approval for the initial Form I-140; a copy of the labor certification submitted with the initial Form I-140; documentation to establish the ability to pay the proffered wage - evidence of this ability must be either in the form of copies of annual reports, federal tax returns, or audited financial statements; a fully executed uncertified labor certification (Form ETA 750, Parts A & B) completed by the petitioner; documentation to show how the change of ownership occurred: buyout, merger, etc.; and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer. A successor in interest must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay the proffered wage. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981).

Since none of these necessary requirements have been met, and, the petitioner and GLS, Inc. contend that no change of ownership of the petitioner has occurred, for purposes of determining the ability to pay the proffered wage on and after the priority date. The AAO will look exclusively to the income and assets of the petitioner in the determination of the ability to pay the proffered wage. The president of GLS, Inc. has made self-contradictory statements on her letter dated August 4, 2004, that "GLS is a company that assumed a portion of Baron Brothers Nursery's employees" but that "[the beneficiary's] employment has been uninterrupted." There is insufficient evidence submitted to determine GLS Inc.'s role in this matter. We find that the petitioner is the employer of the beneficiary.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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.

Evidence was submitted to show that the petitioner employed the beneficiary since January 1999. The petitioner paid the beneficiary \$5,256.00 in 2003. GLS Inc. paid the beneficiary \$15,992.25 in 2003. Further, the petitioner submitted approximately 8 pay statements showing year to date wage payments from the petitioner to the beneficiary of \$11,655.50 in 2002, and, \$5,850.00 in 2004. No evidence was submitted that the petitioner paid the beneficiary the proffered wage. The petitioner is obligated to demonstrate that is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Id.* at 1084. 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* at 537.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$17,680.00 per year from the priority date of February 6, 2001:

- In 2001, the Form 1120S, Schedule K,² Line 3 of the return stated a loss of <\$91,493.00>.
- In 2002, the Form 1120S, Schedule K, Line 3 of the return stated a loss of <\$87,746.00>.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has net income to pay the proffered wage.

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$314,378.00 and \$1,157,077.00 in current liabilities. Therefore, the petitioner had <\$842,699.00> in net current assets. Since the proffered wage is \$17,680.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$910,245.00 and \$1,777,000.00 in current liabilities. Therefore, the petitioner had <\$866,755.00> in net current assets. Since the proffered wage is \$17,680.00 per year, this sum is less than the proffered wage.

² 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 Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

³ 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.

Therefore, for the period 2001 through 2002 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

In the totality of all the evidence it is a common practice for a petitioner's sole owner/stockholder in "S" corporations (or, in this case, joint stockholders) to take the corporation's income and compensate themselves with it, thus sheltering it from corporate additional taxation. So it is credible that the stockholders could have instead used some portion of that income/profit to pay the beneficiary the proffered wage had they needed to do so. In the petitioner's instance, it paid its profits by way of salaries with no compensation to officers stated in either year.⁴ The salary portion of the return varied greatly from year to year, \$764,294.00 in 2001 and \$1,016,076.00 in 2002. Clearly the amounts of salary increases are discretionary. Obviously, this is different than *wages* paid or other business expenses, which by their nature are not really discretionary. The amount of salary increases varied from 2001 to 2002 by 130%, and because of this significant difference it is credible to believe that the petitioner's salaries could have been modestly adjusted to pay the proffered wage, without considering the contributions of GLS, Inc.

The amount of salaries varied over the course of the pertinent years demonstrating that the amounts do not represent contractually obligated and fixed amounts of compensation. The totality of the circumstances supports the fact that the petitioner is a viable, profitable enterprise. The petitioner has been in business since 1986 (since 1979 according to the petition), and, it had 69 employees at the time of preparation of the petition. We note that the petitioner had gross earnings of \$6.1 million in 2001, and, \$7.7 million in 2002. By the evidence presented, the petitioner has proven its ability to pay the proffered wage.

The petitioner has demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

⁴ The Schedule K distributions to shareholders are negative.