



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 06 099 50853

Office: TEXAS SERVICE CENTER Date: **APR 09 2007**

IN RE: Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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 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 petitioner is a painting and pressure-cleaning firm. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, ETA Form 9089, Application for Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and contends that it has demonstrated its continuing financial ability to pay the proffered wage.

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 other 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 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.

Eligibility in this case rests upon the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, ETA Form 9089 was accepted for processing on August 23, 2005. The proffered wage is \$10.04 per hour, which amounts to \$20,883.20 year. On Part K of the Form ETA 9089, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed on February 7, 2006, indicates that the petitioner was established on December 23, 2004 as a corporation, has a gross annual income of \$1,294,700 and currently employs thirty-four workers.

The record shows that the petitioner is organized as a corporation and filed the I-140 petition as a corporation. It was formerly structured as a sole proprietorship, in which it was operated in a single individual(s) personal capacity. Relevant to its ability to pay the proffered wage, with the petition, it provided incomplete copies of the sole proprietor's Form 1040, U.S. Individual Tax Returns 2003 and 2004.

On February 27, 2006, the director issued a request for evidence advising the petitioner that its evidence must be in the form of federal income tax returns, audited financial statements or annual reports. In the same paragraph, the

director requested the petitioner's federal quarterly tax returns for 2005. In response, the petitioner, through counsel, submitted a copy of an Internal Revenue Service (IRS) form showing that the corporate petitioner filed for a six-month extension of time to file its 2005 income taxes, using a provisional tax identification number previously indicated in the record. Also provided were partial copies of the former sole proprietor's 2003 and 2004 individual tax returns. Counsel's transmittal letter advises of the petitioner's application for an extension of time to file its federal income taxes but nevertheless estimates that it will gross over one million dollars in 2005. As evidence of the petitioner's ability to pay the proffered wage, counsel provides a copy of a payroll "breakdown of billing" for wages paid to the petitioner's employees from April to December 2005. The cumulative wages appear to be \$463,864.

On June 1, 2006, the director issues a notice of intent to deny the petition. The director identifies the petitioner as a sole proprietorship and requests information related to that type of business structure such as an itemization of household expenses and evidence of personal assets of the sole proprietor that might support the proffered wage of \$20,883.20. The petitioner was afforded an additional thirty days to provide evidence and/or argument to support the petition.

In response to the notice of intent to deny, the petitioner provides a letter stating that the business pays the household expenses and that her weekly salary and that of her spouse provide funds for food and entertainment. She further advises that the 2005 taxes will be filed in 2006 and that the filing status has changed to a corporation. Also provided is an IRS document dated December 23, 2004, which lists the petitioner's provisional tax number and a copy of the petitioner's articles of incorporation, effective January 1, 2005.

On August 3, 2006, the director denied the petition, noting that the petitioner's evidence of a breakdown of billing for the wages paid to its employees was insufficient to demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel submits the former sole proprietor's 2005 individual income tax return which was previously unavailable. Counsel asserts that "once the petitioner's expenses were deducted from their income the Petitioner had a remaining balance of \$8,220.42, that can easily cover the beneficiary's salary."

Counsel's assertions are not supported by the record. In determining a 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 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. To the extent that wages less than the full proffered salary has been paid, those amounts will also be considered. In the instant case, the record does not indicate that the petitioner has employed the beneficiary.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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).

Showing that the petitioner's business operation achieved a certain gross income is insufficient because it does not include consideration of the expenses incurred in order to generate such revenue. Similarly, standing alone, the assertion that a petitioner has paid cumulative wages at a certain level does not establish its ability to pay the beneficiary's certified wage. 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.

It is noted that a corporation is a separate and distinct legal entity from its shareholders or other corporate enterprises. See *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). As such CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). The *Sitar* court 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."

In this case, the priority date established by the labor certification is August 23, 2005. The petitioner is identified on the preference petition as a corporation. Other documents in the record show that it was incorporated on December 23, 2004, effective January 1, 2005. The petitioner, through counsel, acknowledged that the petitioner had filed an application to extend the filing of its 2005 income taxes for six months, until September 2006, but failed to provide either an audited financial statement or annual report as an alternative and as required by the regulation at 8 C.F.R. § 204.5(g)(2). Instead the petitioner submitted a payroll document and selected copies from the former sole proprietor's 2003 and 2004 individual income tax returns. Similarly, on appeal, counsel submits a copy of the former sole proprietor's 2005 individual income tax return and refers to the proffered wage as \$8,220.42 per year rather than the \$20,883.20. Although it is recognized that the director erroneously referred to the petitioner as a sole proprietorship on the intent to deny, this does not excuse the corporate petitioner from its obligation to demonstrate its own ability to pay the proffered salary through its corporate income tax returns, audited financial statements, or annual reports. As the information contained in the record and provided on appeal fail to establish the petitioner's ability to pay the beneficiary's proposed wage offer of \$20,883.20, the petition may not be approved.

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.