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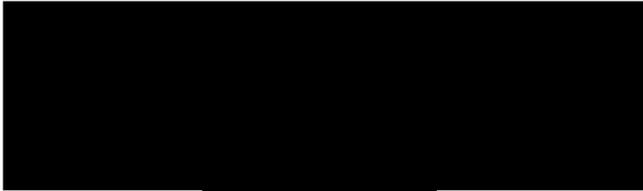
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:

SRC 04 153 50372

Office: TEXAS SERVICE CENTER

Date:

MAR 30 2007

IN RE:

Petitioner:

Beneficiary:



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: SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the instant preference visa petition. The Administrative Appeals Office (AAO) remanded the matter for further consideration and action. The director denied the petition again and certified the matter to AAO. The director's decision will be affirmed. The petition will be denied.

The petitioner is a home health care firm. It seeks to employ the beneficiary permanently in the United States as a physical therapist. As required by statute, a Form ETA 750, Application for Alien Employment Certification 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. The AAO noted that the petitioner submitted a letter implying that it had paid wages to the beneficiary during the salient years and remanded the matter with instructions to the director to request evidence of the wages paid to the beneficiary and to consider that evidence. The director denied the petition again.

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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. See 8 CFR § 204.5(d). Here, the petition was filed with CIS on August 2, 2004. The proffered wage as stated on the Form ETA 750 is \$1,442.31 per week, which equals \$75,000.12 per year.

On the petition, the petitioner stated that it was established on March 1, 2004 and that it employs eight workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since April 2004. As to the petitioner's gross annual income and net annual income the petition states, "Undetermined – This is first year of operation."

In support of the petition, the petitioner submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on December 4, 2004, the Texas Service Center requested, *inter alia*, evidence pertinent to that ability.

In response, the petitioner submitted a letter, dated December 22, 2004, from its director of human resources, and the consolidated financial statements of various WellCare companies, including the petitioner, for July, August, September, and October of 2004. Those financial statements do not indicate that they were audited. The December 22, 2004 letter from the petitioner's human resources director states that the petitioner has employed the beneficiary as a physical therapist since April 4, 2004.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 14, 2005, denied the petition. On appeal, the petitioner submitted the audited financial reports of WellCare Enterprises and its subsidiaries, and a letter dated February 7, 2005 from the petitioner's CFO.

In her February 7, 2005 letter the petitioner's CFO noted that the petitioner is a start-up company and was not projected to show a profit before the fourth quarter of 2004. The CFO further stated that it was projected that the other subsidiaries of WellCare Enterprises, Incorporated would support it as necessary. The CFO added that the audited financial statements show that the other companies are able to provide that support.

This office remanded the matter on September 11, 2006. The decision noted that the evidence in the record was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The decision also noted, however, that the letter dated December 22, 2004 stated that the petitioner had employed the beneficiary since April 4, 2004, and that it should be accorded an opportunity to demonstrate the amount of wages it had paid to him during that period, as those wages might show that the petitioner was able to pay the proffered wage.

On remand, the director issued a request for evidence dated October 27, 2006. The director asked that the petitioner provide copies of Form W-2 Wage and Tax Statements or earning statements showing wages the petitioner paid to the beneficiary. The director also requested the petitioner's 2004, 2005, and 2006 tax returns.

The petitioner did not respond to that request. On February 28, 2007 the director denied the petition again, finding that the evidence in the record does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and certified the matter to AAO. The petitioner did not submit a response to the notice of certification.

The issue before this office is whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date pursuant to the requirements of 8 C.F.R. § 204.5(g)(2).

The petitioner's reliance on the unaudited financial records submitted is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence

and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

The petitioner also provided audited financial statements. Those financial statements, however, do not pertain to the petitioner in this case, but to other corporate entities. A letter from the petitioner's CFO states that the other entities are expected to support the petitioner as necessary.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), 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 with no legal obligation to pay the wage."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts the income and assets of the owners, stockholders, and others, including other corporations, and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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, although the beneficiary and the petitioner's human resources director both say that the petitioner has employed the beneficiary since April 2004 the petitioner did not provide any evidence of wages it paid to the beneficiary. The wages the petitioner may have paid to the beneficiary may not, therefore, be considered in the analysis of its ability to pay the proffered wage.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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 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 Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically¹ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$75,000.12 per year. The priority date is August 2, 2004.

The petitioner provided no copies of annual reports, federal tax returns, or audited financial statements pertinent to 2004 or 2005, nor any other reliable evidence of its ability to pay the proffered wage during those years. Therefore the petitioner has not demonstrated the ability to pay the proffered wage during 2004 or 2005.

The October 27, 2006 request for evidence asked that the petitioner provide its 2004, 2005, and 2006 returns. The 2006 returns were not then available. The petitioner is excused from the obligation of proving its ability to pay the proffered wage during 2006.

Because the petitioner failed to demonstrate its ability to pay the proffered wage during 2004 and 2005, however, it has failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date as required by 8 C.F.R. § 204.5(g)(2). The petition was correctly denied on that basis, which has not been overcome.

The record suggests an additional issue that has not been previously raised. In the October 27, 2006 request for evidence the director requested the petitioner's 2004, 2005, and 2006 tax returns. As was noted above, the petitioner is excused from providing its 2006 return. The petitioner failed, however, to provide the requested 2004 and 2005 returns and provided no explanation for that omission.

¹ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

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). The decision certifying this matter to AAO should have denied the petition on this additional basis. Because this issue was not previously raised, however, and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decisions of January 14, 2005 and February 28, 2007 are affirmed. The petition is denied.