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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

D6

PUBLIC COPY

[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date: MAY 02 2007

SRC 05 201 51550

IN RE:

Petitioner:

[REDACTED]

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:

[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 Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile service station. It seeks to employ the beneficiary permanently in the United States as an automobile garage supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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 record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$54,766 per year.

The Form I-140 petition in this matter was submitted on June 30, 2005. On the petition, the petitioner stated that it was established during 1999 and that it employs three workers. The petition states that the petitioner's gross annual income is \$275,080. The space provided for the petitioner to report its net annual income in was left blank. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Houston, Texas.

The beneficiary in the instant case is not the original beneficiary for whom the petitioner petitioned, but a substituted beneficiary. Typically, in filing for a substituted beneficiary a petitioner would provide Part B of Form ETA 750 describing the beneficiary's employment experience. The record does not contain a Form ETA 750B pertinent to the instant beneficiary.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) photocopies of portions of the petitioner's 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) photocopies of 2001, 2002, and 2003 Form 1099 Miscellaneous Income statements, (3) photocopies of checks drawn by the petitioner, (4) a Texas wage report for the third quarter of 2005, (5) unaudited financial statements of the petitioner, (6) articles of incorporation, bank statements, and unaudited financial statements pertinent to other corporations the petitioner's owner also owns, (7) photocopies of monthly statements pertinent to the petitioner's bank account, (8) a letter from the petitioner's owner's bank and a statement pertinent to his account with that bank, and (9) a copy of a monthly telephone bill of the petitioner's owner. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on March 29, 1999, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2001 the petitioner reported ordinary income of \$5,268. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$19,681 and current liabilities of \$2,573, which yields net current assets of \$17,108.

During 2002 the petitioner reported a loss of \$703 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$19,793 and current liabilities of \$1,113, which yields net current assets of \$18,680.

During 2003 the petitioner reported ordinary income of \$3,807. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$19,632 and current liabilities of \$8,813, which yields net current assets of \$10,819.

During 2004 the petitioner reported ordinary income of \$14,487. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$14,960 and current liabilities of \$486, which yields net current assets of \$14,474.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The 1099 forms show that the petitioner paid total non-employee compensation of \$45,688 to four people during 2001, \$28,200 to two people during 2002, and \$56,210 to five people during 2003, but not that it paid non-employee compensation to the beneficiary. None of those 1099 forms appear to show full-time employment.

The photocopied checks were submitted on November 16, 2005 and show that the petitioner paid \$829.85 to the beneficiary's order on September 15, October 1, October 10, and October 14, 2005.² Notations on those checks indicate that they are net pay after various deductions. The September 15, 2005 paycheck states that it covered the pay period from August 29 to September 3, 2005. The October 1 paycheck states that it covered the pay period from September 4, to September 10, 2005. The October 10, 2005 paycheck states that it covered the period from September 11 September 17, 2005.

The October 14, 2005 paycheck does not state the pay period it covers, but it apparently covered a period prior to its issuance on October 14, 2005.

The Texas wage report shows that the petitioner paid the beneficiary \$4,400 in wages during the third quarter of 2005. This office finds that the wage report, together with the checks showing net pay and deductions, demonstrate that the petitioner paid the beneficiary gross wages of \$4,400 during the third quarter of 2005.³

The proposition counsel intended to support with a copy of the petitioner's owner's telephone bill is unknown to this office.

The director denied the petition on November 19, 2005.

On appeal, counsel cites a memo from CIS's Associate Director of Operations for the proposition that a petitioner need not show the continuing ability to pay the proffered wage beginning on the priority date if it is able to show that it is currently paying the proffered wage to the beneficiary. Counsel asserts that the bank statements submitted should also be considered.

Counsel states that the petitioner's owner has "other very profitable business interests." Counsel cites a BALCA case for the proposition that the petitioner's owner's personal income and assets should be considered in determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Counsel is permitted, of course, to argue that the reasoning of a BALCA decision is compelling and to urge that it be applied in the instant case but counsel did not address

² This office notes that those checks were paid in regular amounts, which suggests that they were paychecks, but at irregular intervals, which does not.

³ This office will accept the deductions listed on each check as part of the beneficiary's gross pay.

the reasoning. This office shall address below the proposition that a corporation's owner's income and assets should be considered in assessing the corporation's ability to pay additional wages.

Counsel cites to a non-precedent decision of this office for the proposition that the petitioner may show its ability to pay the proffered wage with the bank statements submitted. Counsel also argued that the amounts in the bank account statements submitted and the unaudited financial statements should be included in the determination of the petitioner's ability to pay the proffered wage.

The CIS memorandum relied upon by counsel states that it is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but is merely offered as guidance. It is not, therefore, binding on this office insofar as it may conflict with the regulations, including 8 C.F.R. § 204.5(g)(2).

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the associate director's memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 23, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only during 2001, but also during subsequent years. The petitioner must show the ability to pay the proffered wage not merely at the present time, but since the priority date. Demonstrating that the petitioner paid the proffered wage during a specific year suffices to show the petitioner's ability to pay it during that year, but the petitioner must still demonstrate its ability to pay the proffered wage during the remaining salient years.

Further, even if this office accepted counsel's interpretation of the CIS memorandum relied upon, the evidence does not support that the petitioner was "currently" paying the proffered wage to the beneficiary at any determinative moment. The only evidence of wages paid to the beneficiary shows that the petitioner paid the beneficiary gross wages of \$4,400 during the third quarter of 2005.

The priority date of the instant petition is April 23, 2001. The petition in this matter was submitted on June 30, 2005. Counsel responded to the request for evidence on November 16, 2005. The petition was denied on November 19, 2005 and counsel submitted the appeal in this matter on December 19, 2005. Counsel did not make clear on which of those dates the petitioner is obliged, pursuant to counsel's interpretation of the memorandum cited, to show that it was then "currently" paying the proffered wage.

However, no evidence in the record demonstrates that the petitioner was "currently" paying the proffered wage to the beneficiary on any of those dates. The petitioner has never demonstrated, nor even alleged, that it was employing the beneficiary on the priority date or the date the petition in this matter was submitted. The record contains no evidence that the petitioner paid any wages to the beneficiary except during the third quarter of 2005.

Further, the checks and wage report, taken together, demonstrate conclusively that the petitioner paid no wages to the beneficiary at any time during the third quarter of 2005 except on September 15, October 1,

October 10, and October 14. The checks purport to cover pay periods from August 29, 2005 to some date prior to October 14, 2005.

The record conclusively demonstrates, therefore, that the petitioner was not paying the proffered wage to the beneficiary on, November 16, 2005, the date of the response to the request for evidence; on November 19, 2005, the date of the adverse decision; or on, December 19, 2005, the date the appeal in this matter was filed. Even pursuant to counsel's own interpretation of the memorandum, on whichever date the petitioner was obliged to show that it was "currently" paying the proffered wage, counsel's argument fails.

This office does not agree that the petitioner's owner's assets may be used to show the ability of the petitioner to pay the proffered wage. 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 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.

Counsel's citation of a non-precedent decision is without effect. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel did not cite the reasoning, relate it, or argue from it.

Counsel's reliance on the bank statements in this case, even those of the petitioner itself, is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁴ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

⁴ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 the petitioner established that it paid the beneficiary \$4,400 during 2005, but did not establish that it paid any wages to the beneficiary during any other year. The petitioner is obliged to show the ability to pay the proffered wage during each of the salient years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. The amounts the petitioner paid to its other employees, or to contractors, does not, therefore, show the ability to pay the beneficiary the proffered wage.⁵ Similarly, showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, 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 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

⁵ The result might be different if, in a given case, some portion of the petitioner's total wage and outside labor expense was shown to have been paid for the performance of the duties of the proffered position by an employee or contractor whom the beneficiary would replace. In this case, however, as the wages and outside labor expenses, together, during each of the salient years, was less than the amount of the proffered wage, such a showing would have no effect.

beneficiary during that 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 -- the petitioner's year-end cash and those assets expected to be consumed or 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 minus 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 end-of-year current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁶ 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 \$54,766 per year. The priority date is April 23, 2001.

During 2001 the petitioner reported ordinary income of \$5,268. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$17,108. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to the petitioner during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner reported a loss as its ordinary income. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had net current assets of \$18,680. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to the petitioner during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner reported ordinary income of \$3,807. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$10,819. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to the petitioner during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner reported ordinary income of \$14,487. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$14,474. That amount is also

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to the petitioner during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petitioner has demonstrated that it paid the beneficiary \$4,400 during 2005 and would ordinarily be obliged to show the ability to pay the remaining \$50,366 balance of the proffered wage during that year. The petition in this matter was submitted, however, on June 30, 2005. On that date the petitioner's 2005 tax return was unavailable. Evidence pertinent to 2005 was never subsequently requested. The petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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 appeal is dismissed.