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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

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LIN 04 035 51287

Office: NEBRASKA SERVICE CENTER

Date: **MAY 22 2007**

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Middle Eastern specialty cook. 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 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by 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 denial dated August 25, 2005, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, 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* 8 C.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 January 24, 2002.¹ The proffered wage as stated on the Form ETA 750 is \$11.50 per hour (\$23,920.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from the petitioner dated November 5, 2003; Form 941 Employer's Quarterly Federal Tax Return statements dated January 20, 2003, April 22, 2003, July 24, 2003, and October 30, 2003, and one statement for the second quarter of 2005; the State of Ohio Employer's Contribution Report dated January 20, 2003, April 22, 2003, July 24, 2003, October 30, 2003, April 24, 2005 and July 20, 2005 stating, inter alia, wage payments to the beneficiary of \$5,980.00 per quarter; five "Employee's Earning Statement" from October 3, 2003 through October 31, 2003, stating weekly wages payable to the beneficiary in equal gross amounts of \$460.00; a copy of a payroll ledger statement of wages paid to the beneficiary for three quarters of 2003 in equal amounts of \$460.00; U.S. Internal Revenue Service Form 1120S tax returns for 2001, 2002, 2003, and 2004; a non-precedent case decided by the AAO;³ counsel's explanatory letter dated July 25, 2005; a Citizenship and Immigration Services (CIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; one business banking statement dated September 30, 2002; approximately 20 employee W-2 Wage and Tax Statements for the years 2002, 2003 and 2004 including the 2002 and 2003 W-2 statements for the beneficiary stating wages paid of \$5,980.00 and \$23,920.00 respectively (*we note after careful examination that no W-2 statement or other wage information was provided for the beneficiary for 2004 in the statements provided*); the beneficiary's pay statements evidencing wages paid to the beneficiary in equal payments of \$460.00 dated from January 1, 2005 to September 24, 2005; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996 and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 21, 2002, the beneficiary did not claim to have worked for the petitioner. According to other documents in the record of proceeding, the beneficiary began working for the petitioner on September 2002.

On appeal, the petitioner asserts that although the director stated that there were inconsistencies in the financial evidence presented (i.e. tax returns and W-2 statements), there were no inconsistencies. Further, counsel states that the petitioner has been paying the beneficiary the proffered wage "up to September 24, 2005" which payments are evidence of the petitioner's ability to pay the proffered wage.

750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ Counsel refers to a decision issued by the AAO concerning the ability to pay the proffered wage, but does not provide its published citation. 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, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Accompanying the appeal, counsel submits an undated explanatory statement and additional evidence that includes copies of the following documents: the director's decision dated August 25, 2005; a letter from the petitioner's accountant dated September 26, 2005; employee W-2 Wage and Tax Statements for the years 2002 and 2003; U.S. Internal Revenue Service Form 1120S tax returns for 2002, 2003, and 2004; approximately 8 earnings statements evidencing wages paid to the beneficiary in equal payments of \$460.00 dated from August 6, 2005 to September 24, 2005; and, a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. 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 CFR § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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. The petitioner provided evidence of wage payments to the beneficiary: 2002 and 2003 W-2 statements for the beneficiary stating wages paid of \$5,980.00 and \$23,920.00 respectively; beneficiary's pay statements evidencing wages paid to the beneficiary in equal payments of \$460.00 dated from January 1, 2005 to September 24, 2005. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage in years 2002, 2004 and 2005 for which evidence was submitted. In year 2003, the petitioner paid the beneficiary 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, CIS will next 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). Counsel asserts that the wage expense of the petitioner is evidence of the ability to pay the proffered wage. Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay as of the priority date, January 24, 2002:

- In 2002, the Form 1120S stated net income⁴ of \$8,687.00.
- In 2003, the Form 1120S stated net income of \$3,224.00.
- In 2004, the Form 1120S stated net income of \$6,594.00.

In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage or the difference between wages actually paid and the proffered wage, for the years 2002 (\$17,940.00) and 2004 (\$23,920.00) for which the petitioner's tax returns information was offered for evidence.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2002 were \$2,813.00, (current assets and current liabilities were not stated for 2003 and 2004).

Therefore, in 2002, the petitioner did not have sufficient net current assets to pay the proffered wage. The burden of proof in these proceedings rests solely with the petitioner that includes the obligation to come forth with information. Section 291 of the Act, 8 U.S.C. § 1361.

⁴ IRS Form 1120S, Line 21 that states the petitioner's ordinary business income or loss. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Tax returns submitted for tax periods prior to the priority date have little probative value in ascertaining the petitioner's ability to pay the proffered wage from the priority date. In 2001 the petitioner stated net income of \$3,860.00.

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).

⁵ 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.

On appeal and in her letter dated November 17, 2003, counsel asserts that the compensation paid to the corporate officers is evidence of the ability to pay the proffered wage. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Income Tax Return for an S Corporation. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. For this reason, the petitioner's figures for compensation of officers may not be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. Further, we find that there is not sufficient evidence that the officer/sole shareholder would forgo officer's compensation to pay the proffered wage.

Counsel cites the case of *Matter of Quintero-Martinez*, A 29 929 323 (AAU Aug. 4, 1992) for the proposition that whenever the petitioner pays the beneficiary the proffered wage, the ability to pay the proffered wage has been determined. Counsel's contention must be qualified. The only year in which the petitioner has demonstrated that it paid the beneficiary the proffered wage was in year 2003. Counsel also provides on appeal a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004. The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation 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 Yates 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 January 24, 2002. Thus, the petitioner must show its continuing ability to pay the proffered wage thereafter. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Counsel refers to a decisions issued by the AAO concerning payment of the proffered wage, but does not provide its published citation. 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, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Therefore, 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 continuing ability to pay the beneficiary the proffered wage for years 2002 or 2004 through an examination of wages paid to the beneficiary, or its net income or net current assets.

The evidence submitted does not establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.