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U.S. Citizenship and Immigration Services
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Date: APR 21 2009

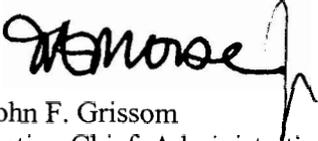
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

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.


John F. Grissom
Acting 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 sustained. The petition will be approved.

The petitioner operates a landscape company. It seeks to employ the beneficiary permanently in the United States as a machine repairer. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification certified by the U.S. Department of Labor (DOL). 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 demonstrated that the appeal was properly filed, timely, and made 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 March 9, 2007, 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 either 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 DOL. *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 DOL 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 April 11, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$23.33 per hour (\$48,526.40 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position and two years of experience as an automotive mechanic.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). 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 approved by the DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2001 to 2005; the beneficiary's IRS Form W-2 Wage and Tax Statements for 2001 to 2005 issued by the petitioner in the amounts of \$17,660.47, \$16,705.85, \$17,834.79, \$19,106.84, and \$22,285.07 respectively; the beneficiary's IRS Form 1040 for 2005 and IRS Forms 1040A for 2002 to 2005; the beneficiary's New York State Resident Income Tax Returns for 2001 to 2005; the petitioner's New York State General Business Corporation Franchise Tax return Short Forms for 2001 to 2003³; the IRS Form W-2 Wage and Tax Statements for 2003 to 2005 of the single officer of the petitioning company, [REDACTED] in the amounts of \$205,245.56, \$232,016.72, and \$237,777.40 respectively; a copy of a letter from the petitioner's accountant dated April 3, 2007 stating that David Ferraro may reduce or augment his own salary proportionately so as to pay the wages of his employees and that the petitioner has had the ability to pay the proffered wage since the

¹ It has been approximately eight years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 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." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

² The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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 The AAO notes that state tax returns do not constitute regulatory-prescribed ability to pay evidence.

date the ETA 750 was filed with the DOL; and copies of documentation concerning the beneficiary's qualifications.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1988. The petitioner did not list its number of workers on the petition. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$5,262.00 and \$1,052,471.00 respectively. On the Form ETA 750, signed by the beneficiary on April 3, 2001, the beneficiary claim to have worked for the petitioner in 1999.

On appeal, counsel asserts that the petitioner has paid the beneficiary wages since the ETA 750 was filed in April of 2001. Counsel also urges USCIS to consider the petitioner's compensation of officers within its IRS Form 1120 tax returns for 2001 to 2005, because the single officer of the company, [REDACTED], may reduce or augment his own salary proportionately so as to pay the wages of his employees. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The amount of compensation for officers from 2001 to 2005 was \$200,784.00, 205,246.00, 205,246.00, \$232,017.00, and \$237,777.00 respectively. Counsel additionally references the letter from the petitioner's accountant dated April 3, 2007 stating that [REDACTED] may reduce or augment his own salary proportionately so as to pay the wages of his employees and that the petitioner has had the ability to pay the proffered wage since the date the ETA 750 was filed with the DOL.

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 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS 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, USCIS 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. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date.

Counsel submitted the beneficiary's IRS Form W-2 Wage and Tax Statements for 2001 to 2005 issued by the petitioner in the amounts of \$17,660.47, \$16,705.85, \$17,834.79, \$19,106.84, and

\$22,285.07 respectively. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$48,526.40 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is \$30,865.93, \$31,820.55, \$30,691.61, \$29,419.56, and \$26,241.33 respectively.

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, USCIS 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). Reliance on the petitioner's gross sales and profits that 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 petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120 stated net income of -\$27,239.00.⁴
- In 2002, the Form 1120 stated net income of \$50,899.00.
- In 2003, the Form 1120 stated net income of -\$2,178.00.
- In 2004, the Form 1120 stated net income of \$24,788.00.
- In 2005, the Form 1120 stated net income of \$5,262.00.

The petitioner did not have sufficient net income to pay the difference between wages actually paid and the proffered wage for 2001, 2003, 2004, or 2005. The petitioner demonstrated its ability to pay in 2002 since the petitioner's net income is greater than the difference between wages paid and the proffered wage.

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, USCIS 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

⁴ The AAO notes that net income is listed on line 28 of the IRS Form 1120.

petitioner's ability to pay the proffered wage. Rather, USCIS 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 2001 were \$14,607.00.
- The petitioner's net current assets during 2003 were \$26,132.00.
- The petitioner's net current assets during 2004 were \$60,818.00.
- The petitioner's net current assets during 2005 were \$8,360.00.

Based on the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage even if the petitioner's net current assets are combined with wages paid to the beneficiary except for in 2004.

Accordingly, from the priority date or when the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, its net income, or its net current assets except for in 2002 and 2004.

Counsel asserts in his letter accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel also urges USCIS to consider the petitioner's compensation of officers within its IRS Form 1120 tax returns for 2001 to 2005, because the single officer of the company, [REDACTED], may reduce or augment his own salary proportionately so as to pay the wages of his employees. The amount of compensation for officers from 2001 to 2005 was \$200,784.00, 205,246.00, 205,246.00, \$232,017.00, and \$237,777.00 respectively. Counsel additionally references the letter from the petitioner's accountant dated April 3, 2007 stating that David Ferraro may reduce or augment his own salary proportionately so as to pay the wages of his employees and that the petitioner has had the ability to pay the proffered wage since the date the ETA 750 was filed with the DOL.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable

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.

income. Compensation of officers is an expense category explicitly stated on the IRS Form 1120. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock. According to the petitioner's 2001 to 2005 IRS Forms 1120 Schedule E (Compensation of Officers), [REDACTED] elected to pay himself \$200,784.00, \$205,246.00, \$205,246.00, \$232,017.00, and \$237,777.00 respectively. These figures are supported by [REDACTED] IRS Forms W-2 for 2003 to 2005, which were submitted for the record.⁶

USCIS has long held that it 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.

In the present case, however, counsel is not suggesting that USCIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their corporation. The overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1988 and has maintained a gross income of approximately \$1 million per year. In 2001, 2003, and 2005, the petitioner paid \$174,668.00, \$196,406.00, and \$173,780.00 in salaries and wages respectively.⁷ For those years, [REDACTED] paid himself \$200,784.00, \$205,246.00, and \$237,777.00 respectively. The difference between wages paid and the proffered wage for 2001, 2003, and 2005 is \$30,865.93, \$30,691.61, and \$26,241.33 respectively. If [REDACTED] compensation were reduced by those amounts for those years, he would still have \$169,918.07, \$174,554.39, and \$211,535.67 respectively in yearly wages. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

⁶ The AAO notes that the petitioner did not submit

IRS Forms W-2 for 2001 or 2002.

⁷ The AAO notes that salaries and wages are listed on line 13 of the IRS Form 1120.

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.