

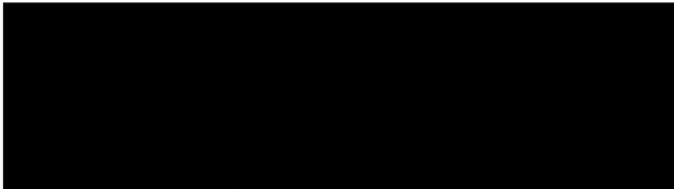
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U.S. Citizenship
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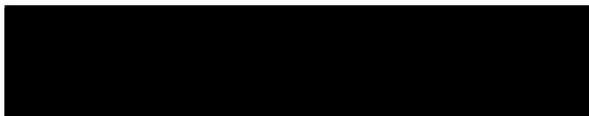
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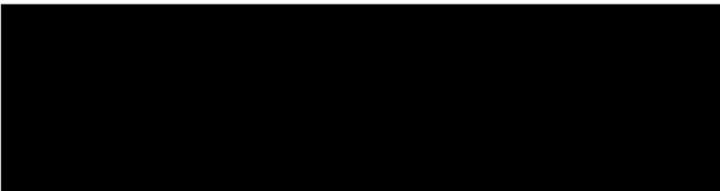
Petitioner:



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:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted as a motion to reopen and the previous decisions of the director and the AAO will be affirmed. The petition will remain denied.

The petitioner is a wholesale distributor of telephones, phone cards and accessories business. It sought to employ the beneficiary permanently in the United States as a merchandise manager. 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 financial ability to pay the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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).¹

In this matter, the AAO dismissed the appeal on December 18, 2006, concurring with the director's decision that the petitioner had failed to establish that it had the continuing ability to pay the beneficiary's proposed wage offer.

On January 18, 2007, the petitioner, through counsel, filed a motion styled as a motion for reconsideration. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). With the motion, counsel submits a copy of a letter from the petitioner's accountant, as well as copies of documents relating to a proposed acquisition of the petitioner by [REDACTED] of Miami, Florida. Because this motion is submitted with new evidence that are consistent with the regulation, it will also be considered as a motion to reopen in accordance with 8 C.F.R. § 103.5(a)(2).

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

¹ The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

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 was accepted for processing by any office within DOL's employment system. *See* 8 CFR § 204.5(d). The ETA 750 reflects that the priority date in this case is April 30, 2001. As set forth on the ETA 750, the certified wage is \$1,290 per week, which amounts to \$67,080 per annum.

As indicated by the record, the petitioner was established in 2001, and, at the time the petition was filed on February 14, 2003, employed 49 workers. The petitioner, [REDACTED] is organized as a multi-member domestic limited liability company with two members; [REDACTED] and [REDACTED], both of [REDACTED] Deerfield Beach, Florida. Although structured and taxed as a partnership, its owners retain limited liability similar to the owners of a corporation, and like a corporation, a limited liability company is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts of the owners or anyone else.² Therefore, a petitioner must show the ability to pay the proffered wage out of its own funds.

On appeal, the AAO reviewed the evidence of the petitioner's continuing financial ability to pay the proffered wage including copies of photos of the petitioner's business; copies of the petitioner's separate LLC subsidiaries' commercial checking records; a copy of an unaudited income statement and statement of assets as of December 31, 2001; copies of the petitioner's federal income tax returns for 2001, 2002 and 2003, submitted as Form(s) 1065, U.S. Return of Partnership Income. The AAO also considered counsel's assertions that the petitioner's gross revenues and salaries and wages paid justified approval of the petition. Counsel had emphasized that the petitioner had established itself in the market place, was expanding and supported a "significantly sized staff."

² As noted in the AAO's previous decision, the record of proceedings indicates no evidence that this rule is inapplicable in the instant matter.

Counsel makes the same argument on motion, contending that the petitioner's gross revenues of \$58.1 million in 2001; \$71.9 million in 2002; and \$69 million in 2003, as well as the increases in payroll during those years supports the petition's approval based on the petitioner's overall circumstances. As noted above, counsel also provides documentation relevant to a proposed acquisition as evidence of the petitioner's position in the marketplace. The documentation consists of an undated, unsigned executive summary of a proposed acquisition of the petitioner;³ a letter, dated January 16, 2007 from [REDACTED] to USCIS indicating that [REDACTED] has reached an agreement to acquire the petitioner and its related entities and employ those persons which have been sponsored for an alien labor certification; and a copy of a December 15, 2006, letter from [REDACTED] to [REDACTED] indicating that [REDACTED] will provide financial advisory services in raising funds for mergers, acquisitions and joint ventures. This letter does not mention the petitioner by name. Another document in the form of a fax with three dates of September 11, 2005, September 8, 2006 and September 11, 2006 indicates an agreement by [REDACTED] with [REDACTED] to fund the acquisition of several companies, none of which is identified in the record as affiliated with the petitioning business.

The AAO does not find that such documents support approval of the petition. As set forth by the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner's ability to pay a proffered salary must be established as of the priority date and continues until the beneficiary obtains permanent residence status. It is not contingent upon the possibility of the occurrence of some event in the future, such as the petitioner's acquisition by another company, such as suggested on motion. Additionally, a petitioner must establish eligibility at the time of filing; a petition can not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 &N Dec. 45, 49 (Comm. 1971).

Counsel also provides a copy of a letter on motion from the petitioner's accountant, [REDACTED]. Mr. [REDACTED] identifies eight LLCs that report their income and expenses through the petitioner. His list includes the six companies that were identified on the copies of bank records submitted to the record in support of the petitioner's ability to pay the proffered wage. The AAO's previous decision had questioned whether their financial information was included in the petitioner's federal tax returns because they had not been identified on the returns. Mr. [REDACTED] states that they are not required to file separate corporate tax returns because they were all disregarded entities. In this

³ This letter has little probative value as it is unsigned and undated, however it is noted that it mentions [REDACTED] as a prospective large shareholder after the acquisition. As noted in the previous AAO decision, (footnote 2), this still raises a question as to what degree the beneficiary is related to or is identical to this person and to the person identified as [REDACTED] as referenced in the AAO's previous decision (footnote 2). It is noted that as a successor-in-interest, if this acquisition is consummated and properly documented, as a petitioner for an employment-based preference petition using the same labor certification for this beneficiary, [REDACTED] would still have to rely on [REDACTED] ability to pay the certified wage as of the priority date until the date of acquisition.

respect, however, if their income and expenses are merged into the petitioner's on each of the respective tax returns, then their cash would be included as a collective total on line 1 of the current assets listed on Schedule L of the tax return. As such, it is already included in the consideration of the petitioner's net current assets, which is reflected as the difference between current assets (line(s) 1 through 6 of the amounts listed on Schedule L) and current liabilities (line(s) 15 through 17).

As stated in the AAO's previous decision, 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, USCIS will 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 receipts and wage expense is misplaced. 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 USCIS, 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.

In rendering its previous decision, the AAO found that in 2001, neither the petitioner's net income of -\$345,206 nor its net current assets of -\$435,529 could cover the proffered wage. The AAO also found that in 2002, each of the petitioner's net income of -\$939,115 and its -\$1,416,499 in net current assets were not sufficient to pay the proffered wage of \$67,080. The AAO further noted that in 2003, neither the petitioner's net income of -\$202,732 nor its net current assets of -\$1,606,341 could cover the proffered salary.

The AAO finds that the petitioner has not met its burden in establishing that it had continuing financial ability to pay the proffered wage as of 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.

ORDER: The motion to reconsider and motion to reopen is granted. The prior decision of the AAO, dated December 18, 2006, is affirmed. The petition remains denied.

