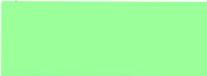


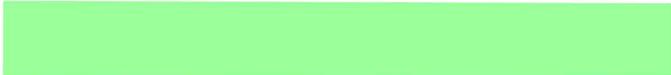
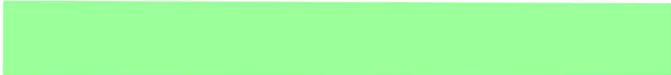


U.S. Citizenship
and Immigration
Services

(b)(6)



Date: FEB 21 2013 Office: NEBRASKA SERVICE CENTER FILE: 

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On April 22, 2010 the Administrative Appeals Office (AAO) dismissed the appeal and affirmed the decision of the Director, Nebraska Service Center (the director). The petitioner has now filed a motion to reopen the AAO's decision to dismiss the appeal. The motion will be granted, and the appeal will be reopened. The appeal will be dismissed.

The petitioner is an equestrian center. It seeks to employ the beneficiary permanently in the United States as a stable manager pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage from the priority date, particularly in 2006 and 2007. The AAO agreed.

On motion, counsel for the petitioner urges the AAO to consider the amount for "rent" stated on line item 11 of the petitioner's federal tax returns as evidence of the petitioner's ability to pay. The owners of the petitioner and their certified public accountant state that they own 100% of the property where they operate their business, and for this reason, they could have adjusted the rental amount downward if they so chose.

To show that the owners of the petitioner own the business property free and clear of any mortgage, counsel for the petitioner submits the following evidence:

- Affidavits dated May 18, 2010 from the owners of the petitioner, [REDACTED] and [REDACTED] stating among other things that they own 100% of the business real property;
- A copy of a real property deed granted to [REDACTED] the owners of the petitioner, and a recording of the conveyance by [REDACTED];
- Copies of the monthly mortgage statements issued from 2001 to 2005; and
- Various copies of documents showing that [REDACTED] paid off the mortgage on the property in 2005.

The record shows that the motion to reopen is properly filed, timely and supported by new evidence. The AAO conducts this appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted in this proceeding.²

¹ 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.

² The submission of additional evidence on appeal is allowed by the instructions to the 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

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Here, counsel has provided additional facts and evidence. The motion is granted, and the appeal is reopened.

Upon *de novo* review, we find that although the petitioner has shown that its shareholders or owners own 100% of the business property free and clear of any mortgage, their claim that the yearly rent expense is adjustable or discretionary is without merit. Business rent expenses are not "adjustable or discretionary," nor are they an accounting fiction as claimed by counsel for the petitioner on motion. Rent expenses are real expenses, and thus, they should not be added back to boost or reduce the company's net income or loss.

Internal Revenue Code (I.R.C.) section 482; 26 U.S.C. § 482; Allocation of Income and Deduction among Tax Payers in pertinent part states:

In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.

Here, we have a situation where husband and wife own a business and the property where they operate the business. The business pays rent to the owners (and deducts the amount paid for rent expenses from its gross sales and receipts). Accordingly under I.R.C. § 482, 26 U.S.C. § 482, the business (the petitioner) must pay the fair rental value for the property, or face a tax evasion charge if they do not do so. Rents below fair rental value may be adjusted by the Internal Revenue Service (IRS) per the regulation cited above.

We note that the petitioner claimed \$90,000 for rent expenses in its federal tax returns from tax year 2001 to tax year 2006. Without any evidence showing otherwise, we presume that such an amount paid for rent per year from 2001 to 2006 is the fair rental value of the property. Further, we determine that the \$90,000 paid every year for rent between 2001 and 2006 is not adjustable or discretionary.

Moreover, we cannot consider the owners' personal income, including their income from the rent, as evidence of the petitioner's ability to pay. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530

documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(b)(6)

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(Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

For these reasons, we conclude that the petitioner has failed to demonstrate by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence. 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.