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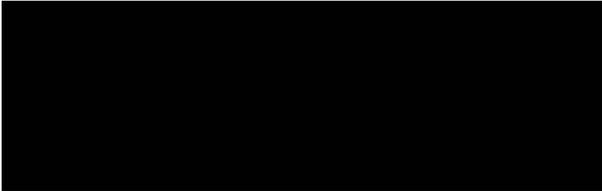
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship
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Services

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FILE: LIN 06 188 52293 Office: NEBRASKA SERVICE CENTER

Date: SEP 01 2009

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:

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 and the petition will be approved.

The petitioner is a medical management service. It seeks to employ the beneficiary permanently in the United States as a computer operator. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States 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 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 June 21, 2007 denial, 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on August 1, 2005.¹ The proffered wage as stated on the ETA Form 9089 is \$13.81 per hour (\$28,725 per year). The ETA Form 9089 states that the position requires two years of experience.

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 the petitioner's 2004 and 2005 tax returns, W-2 forms for a current employee, and an audited profit and loss statement for the petitioner's fiscal year 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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 1992 and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year is from November 1 to October 31. On the ETA Form 9089, signed by the beneficiary on June 4, 2005, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in not finding that the petitioner is able to pay the proffered wage as the beneficiary will be taking over for a retiring employee who receives more per annum than the proffered wage. In addition, counsel asserts that although the petitioner's net income is not sufficient, the petitioner possess sufficient net current assets to cover the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances

¹ We note that the cover sheet for the Form 9089 indicates that it was accepted for processing on August 1, 2005, but the filing date automatically assigned in section O of the form is July 18, 2005.

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

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, 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 the beneficiary worked for or received remuneration from the petitioner.

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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed on April 30, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2006 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2005 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2004 and 2005, as shown in the table below.

- In 2004, the Form 1120S stated net income³ of \$11,668.
- In 2005, the Form 1120S stated net income (loss) of -\$817

The petitioner provided a statement titled “Audited Profit & Loss Statement” for its fiscal year 2006. That statement includes a net income figure of \$1,346.19. Therefore, for the years 2004 to 2006, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. The petitioner’s total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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, 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.⁴ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. 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

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

⁴According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 and 2005, as shown in the table below.

- In 2004, the Form 1120S stated net current assets (liabilities) of -\$8,352.
- In 2005, the Form 1120S stated net current assets (liabilities) of -\$10,762.

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage. The Profit & Loss statement submitted showed a bank account balance of -\$36,292.35 and an overall "total current assets" figure of -\$32,953.20. As a result, it failed to show that it had sufficient net current assets to pay the proffered wage in 2006. On appeal, counsel states that the petitioner had net assets in 2005 of \$53,882. That number is found on Schedule L, line 15 of the 2005 Form 1120S and includes depreciation of depreciable assets including personal property and other assets. We reject counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date: the replacement of a current employee by the beneficiary. The petitioner submitted W-2 forms for a [REDACTED] which show that she earned \$33,059.19 in 2004, \$30,952.55 in 2005, and \$30,157.11 in 2006. The petitioner also submitted earnings statements for [REDACTED] which reflect that she is being paid at a similar rate for the first two months of 2007. A signed statement dated March 28, 2007 from [REDACTED] states that she planned to retire upon the beneficiary's appearance as her replacement. A signed statement from the President of the petitioner affirms that the beneficiary will be replacing [REDACTED]. This evidence names the worker, contains competent evidence of the wages paid and fulltime employment, verifies that her duties are those of the proffered position as set forth on the ETA 9089, and contains evidence that the petitioner has replaced or will replace them with the beneficiary. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. As we accept that the beneficiary will replace [REDACTED] and her salary exceeds that of the proffered wage, the petitioner has demonstrated its ability to pay the beneficiary.

On appeal, counsel also submits a signed statement from [REDACTED] of the petitioner, which states that he would forego the amount of his salary necessary to pay the proffered wage to the beneficiary. The statement avers that his salary exceeded \$400,000 in 2005 and was \$261,000 in 2006. Schedule E of the tax returns shows that [REDACTED] is a 100% stock owner of the petitioner. According to the petitioner's 2005 IRS Form 1120 Schedule E (Compensation of Officers), [REDACTED] elected to pay himself \$261,425. According to the Schedule E for 2004, Mr. [REDACTED] paid himself \$424,015. 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 income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. 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. We note here that the compensation received by the company's owner during these two years was not a fixed salary.

USCIS (legacy INS) 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 his medical management practice. Clearly, the petitioning entity is a profitable enterprise for its owners. As previously noted, the medical management practice earned a gross profit of \$2.1 million in 2004 and \$1.8 million in 2005. Counsel asserts that the amount paid to the owners, into profit sharing, and into employee benefit programs is determined by the profitability of the corporation. None of these numbers represent fixed expenses. We concur with the arguments presented by counsel on appeal. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owners confirms that the job offer is realistic and that the proffered salary of \$28,725 can be paid by the petitioner.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the 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); *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). Accordingly, after a review of the petitioner's federal tax returns and the totality of circumstances in this individual case including the beneficiary's replacement of [REDACTED] 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.

ORDER: The appeal is sustained. The petition is approved.