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

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass., 3/F  
425 I Street, N.W.  
Washington, D.C. 20536

[Redacted]

File: [Redacted]

Office: Nebraska Service Center

Date:

**OCT 10 2003**

IN RE: Petitioner:  
Beneficiary:

[Redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

IN BEHALF OF PETITIONER:

[Redacted]

**INSTRUCTIONS:**

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

*Helen E. Crawford for*  
Robert P. Wiemann, Director  
Administrative Appeals Office



**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a mental health counseling service provider. It seeks to employ the beneficiary permanently in the United States as a counselor pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as member of the professions holding an advanced degree. As required by statute, the petition was accompanied by certification from the Department of Labor. The director found that the petitioner had failed to demonstrate its ability to pay the proffered wage at the time the priority date was established, and that such ability has been maintained.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is April 27, 2001. The beneficiary's annual salary as stated on the labor certification is \$38,058. We further note that, at the time the priority date was established, the petitioner identified itself as a "private mental health facility."

The petitioner submitted insufficient evidence of its ability to pay the proffered wage. In a request for evidence (RFE) dated September 12, 2002, the director instructed the petitioner to submit evidence showing that it "had the financial ability to pay the offered wage as of April 27, 2001." The petitioner was also instructed to submit a copy of its "2001 corporate income tax returns."

In a cover letter accompanying the petitioner's response, counsel states: "The employer is a sole proprietorship and the President states that she is personally financially responsible for the debts of the organization."

The response included a letter from [REDACTED] President, Family Institute of Mental Health, identifying herself "as the sole proprietor." Also submitted were an incomplete copy of her personal income tax return for 2001 and copies of IRS Form 941, Employer Quarterly Federal Tax Return, for 2001. According to the evidence presented, the petitioner paid total wages of \$4,600 in the first quarter, \$4,603 in the second quarter, and \$4,545 in the third quarter of 2001.

On December 11, 2002, the director issued a second RFE, stating: "The evidence submitted in response to our September 12, 2002 request for evidence does not establish that the petitioner had the ability to pay the offered wage at the time the labor certification was filed, and that such ability has been maintained." The director instructed the petitioner to submit a complete, signed copy of the business owner's 2001 income tax return, a list of her expenses, and the beneficiary's 2001 Form W-2.

In response to the second RFE, the petitioner submitted a letter from counsel, the owner's complete 2001 income tax return, a list of the owner's monthly recurring household expenses, and the petitioner's articles of incorporation (filed with the State of Missouri on December 27, 2001).

Counsel states:

During the 2001 calendar year, the beneficiary was not yet employed with the petitioner because he did not yet have work authorization. [The beneficiary] listed the petitioner as an employer on the ETA-750B because he did his required supervision for licensure there.

\* \* \*

As a counselor, the beneficiary will generate additional income that would be available for his salary.

Counsel's assertion that the beneficiary will generate sufficient income to pay his salary does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The pertinent regulation specifically mandates annual reports, federal tax returns, or audited financial statements. See 8 C.F.R. § 204.5(g)(2), *supra*.

According to the owner's Schedule C of Form 1040, Profit or Loss from Business, the petitioning entity paid \$18,429 in total wages and earned \$26,471 in net income in 2001. Counsel states that

the owner's personal income tax return for 2001 "shows sufficient personal income as well as income from her business to pay the wage offered." The owner's Form 1040 for 2001 reflects an adjusted gross income (which includes the owner's spouse's salary) of \$74,187. In this matter, we concur with counsel that the owner's income for 2001 reflects sufficient resources to pay the beneficiary's salary of \$38,058 and cover the owner's family's annual living expenses of \$25,860 (mortgage, electric, water, and other miscellaneous expenses).

On appeal, the petitioner submits an account statement from ██████████ Investments reflecting a balance of \$30,622 as of January 31, 2003. Counsel states: "These personal assets should be included in the petitioner's income." We note here that the petitioner's response to the RFE included a Certificate of Incorporation declaring the petitioning entity a corporation as of December 27, 2001. Because the petitioner is now a corporation rather than a sole proprietorship, only the corporation's net income and net current assets can be considered in determining its ability to pay the beneficiary's wage. The CIS (formerly the Service) may not "pierce the corporate veil" and look to the assets of a 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 held in the owner's Individual Retirement Account as of January 31, 2003 cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Nevertheless, after reviewing the evidence presented, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained.