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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.

BCIS, AAO, 20 Mass, 3/F

Washington, D.C. 20536



File: WAC 01 275 54513

Office: CALIFORNIA SERVICE CENTER Date:

AUG 12 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



PUBLIC COPY

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 the Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an international trading company. It seeks to employ the beneficiary permanently in the United States as an import/export manager. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

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.

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 18, 2001. The beneficiary's salary as stated on the labor certification is \$17.60 per hour for a 35 hour week or \$32,032 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request dated November 29, 2001 (RFE), the director required the federal

tax return for 2000, annual reports, or audited financial statements as evidence of the ability to pay the proffered wage from April 18, 2001, the priority date, until the beneficiary obtains lawful permanent residence.

Counsel submitted, in response to the RFE, the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return and a personal credit report of SAA from Equifax dated February 20, 2002 (personal credit report). The transmittal of the response, received February 21, 2002 (RFE response), asserted that the petitioning corporation carried over to 2000 more than \$955,000 of "total assets." Counsel's transmittal took special note of \$100,000 of SAA's personal, liquid assets available "to capitalize his company if needed." The RFE response promised the federal tax returns for 2000 and 2001, or pertinent reports and statements, "as soon as completed." More than 15 months later, no other tax return has been received.

The director considered that the petitioning corporation showed a loss of (\$31,073) for taxable income before net operating loss deduction and special deductions on the 1999 federal income tax return, observed that counsel had offered none of the documents required for 2000, and disallowed the proof of SAA's personal assets. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence and denied the petition.

Counsel, on appeal, initially complains of the decision that:

The Bureau [formerly the Service or the INS] relies on its personal decision and cites no case law, in this within [sic] denial, thus making the decision a frivolous denial.

Provisions of 8 C.F.R. §103.3 prescribe simply that:

- (a) *Denials and appeals in general*—(i) *Denial of application or petition.* When a [Bureau] officer denies an application or petition filed under [8 C.F.R.] § 103.2 of this part, the officer shall explain in writing the specific reasons for denial.

Counsel claimed to attach the 2000 federal tax return to a separate, and late, response to the RFE, dated February 26, 2002, and, on appeal, summarizes chosen parts of it. The AAO has directly requested federal tax returns of counsel's office as a matter of courtesy. No tax return has been received.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel pursues, on appeal, the reasoning that the 1999 federal tax return proves the ability to pay the proffered wage. It did not, however, relate to the priority date or any time after.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

It is too late now for the petitioner to produce the necessary evidence, for any purpose. The RFE exacted the petitioner's 2000 federal tax return, and the petitioner promised all evidence as completed. Over a year has elapsed and no federal tax return is in the record for 2000, 2001, or 2002 to establish the ability to pay the proffered wage at the priority date or continuing until the beneficiary obtains lawful permanent residence.

The director requested the federal tax returns, annual reports, or audited financial statements in accord with 8 C.F.R. § 204.5(g)(2). Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Bureau. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The petitioner neither produced items of evidence in accord with 8 C.F.R. § 204.5(g)(2), nor explained the documents' unavailability. Their withholding creates a presumption of ineligibility.

8 C.F.R. § 103.2 (b) states in part:

Evidence and processing - (1) General. An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

(2) *Submitting secondary evidence and affidavits - (i) General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, ... pertinent to the facts at issue.

Counsel simply ignores the Bureau's reliance on the taxable income before net operating loss deduction and special deductions, as requested for 2000 and on. Despite counsel's neglect, the Bureau must look to the net income as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In determining the petitioner's ability to pay the proffered wage, the Bureau 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. Tex. 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).

The petitioner inveighs, finally, that:

The [Bureau] again, is incorrect in its statement that the President of the Corporation cannot use his/her personal assets to capitalize the company if necessary. The President of the Company has the authority and power if he/she so chooses to add his/her personal assets to the company, whether a corporation or an individual company.

Contrary to counsel's primary assertion, the Bureau 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.

After a review of the 1999 federal tax return, a personal credit

report, and counsel's representations about the contents of the 2000 federal tax return, financial documents, Forms 941, and other personnel reports, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful 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.