

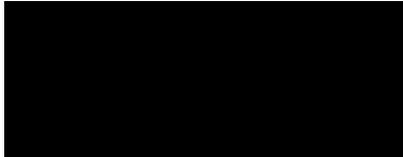
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

**B6**

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



File: EAC 01 108 53394

Office: VERMONT SERVICE CENTER

Date:

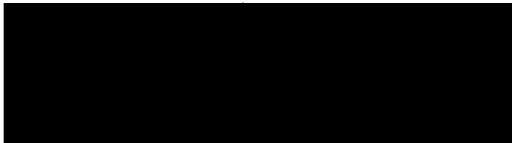
**DEC 13 2003**

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)

IN BEHALF OF PETITIONER:



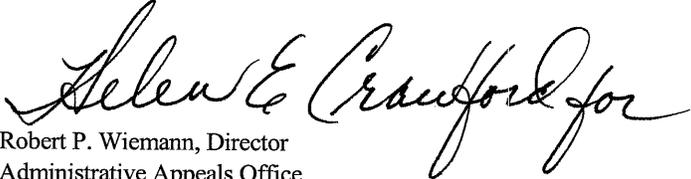
**INSTRUCTIONS:**

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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner, [REDACTED] is a dental firm. It seeks to employ the beneficiary permanently in the United States as a dental assistant. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The Application for Alien Employment Certification (Form ETA 750) in the record, however, authorized ALMA Dental P.C. (ALMA) to employ the beneficiary.

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). Here, the petition's priority date is May 30, 1997. The beneficiary's salary as stated on the labor certification is \$12.36 per hour or \$22,495.20 per annum, based on a work week of 35 hours.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for

evidence of August 8, 2001 (RFE), the director exacted additional evidence of the ability to pay the proffered wage by the submission of the petitioner's 1997, 1998, and 2000 Form 1120S, U.S. Income Tax Return for an S Corporation, with all schedules and attachments. RFE1, further, asked for evidence of the merger of ALMA into the petitioner. The RFE sought to determine if the beneficiary would occupy a new or an existing position.

In response, counsel submitted the petitioner's Form 1120S, U.S. Income Tax Return of an S Corporation for 1998 and 2000. The petitioner offered a computer printout, from the IRS, of the 1997 federal tax return. Counsel and the petitioner withheld the 1999 federal tax return. The ordinary income from trade or business activities, from 1997 to 2000, showed \$2,111 for 1997, \$2,163 for 1998, no data for 1999, and \$6,017 for 2,000, less than the proffered wage in each year.

The petitioner's federal tax returns reported the current assets minus current liabilities (net current assets), in Schedule L, as \$1,208 in 1998 and \$4,294 in 2000, both less than the proffered wage. The 1997 printout had no Schedule L data, and, as noted, the petitioner had no 1999 federal tax return.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition in a decision issued February 27, 2002.

On appeal, counsel submits the 1997 Form 1120S U.S. Income Tax Return for an S Corporation from ALMA and a brief. It urges that:

The issue is the ability of the employer to pay the prevailing wage of \$22,495.20. The employer, a dentist, had 2 dental offices in 1997, both in Brooklyn. The 2 dental offices were merged into one in December 2000. In 1997, the relevant year the two offices of the employer had the following gross income:

██████████ P.C.	\$ 82,029.00
██████████ P.C.	<u>130,386.00</u>
Total	212,415.00

The two offices had a total net income of \$3,024.00 in 1997.

The depreciation for ██████████ P.C. in 1997 was \$16,615.00 and the depreciation for ██████████ P.C. was \$6,315.00. Total depreciation for the two offices was therefore \$25,954.00 which is more than the prevailing wage. In addition, the total assets for

██████████ P.C. was \$28,879 and the total assets  
for ██████████ P.C. was \$33,130.00.

First, the evidence for a merger of ██████████ into ██████████ includes an Affidavit (undated), Agreement (undated), and letter (dated December 26, 2000) of Dr. ██████████. Inconsistent accounts of the merger mar the record. The notary's jurat indicates that the Affidavit and Agreement were not signed until October 31, 2001. Counsel's brief says the merger occurred in December 2000. ██████████ Affidavit says it happened in December 1998. Every arguable date of the merger occurred after the priority date, May 30, 1997.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Second, counsel's brief accumulates gross income, total assets, and depreciation of assets. A letter from a certified public accountant, dated March 25, 2002, advises to the same effect. Counsel concludes that that several combinations of these sums are equal to, or greater than, the proffered wage.

Contrary to counsel's primary argument, in determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) [formerly the Service or INS] 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that CIS 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos*

*Restaurant Corp.*, 632 F.Supp. at 1054.

Third, counsel states no purpose in combining the 1997 ordinary income from trade or business activities of the petitioner and [REDACTED]. The sum of \$3,024 is less than the proffered wage. Moreover, the record documents no supposed merger before December 1998.

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).

Fourth, counsel, evidently, believes that the merger combined assets in some way to qualify the petitioner as a successor-in-interest. The [REDACTED] Affidavit, Agreement, and letter completely ignore the obligations of [REDACTED] and the petitioner except as to "the pending immigration case of [REDACTED]. The record contains no evidence that [REDACTED] qualifies as a successor-in-interest to [REDACTED]. This status requires documentary evidence that [REDACTED] has assumed all of the rights, duties, and obligations of the predecessor company. No minutes document any corporate action. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Fifth, [REDACTED] and the petitioner are independent corporations, and each filed tax returns under a different EIN. Yet, no minutes authorize any action under the [REDACTED] Affidavit, Agreement, and letter. Counsel argues, instead, that [REDACTED] may use the resources of either corporation, or both, to pay the proffered wage.

Contrary to counsel's primary assertion, CIS 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 federal tax returns, [REDACTED] papers, and the brief, 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 attains lawful permanent resident status. 8 C.F.R. § 204.5(g)(2).

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.