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U.S. Department of Homeland Security

Citizenship and Immigration Services

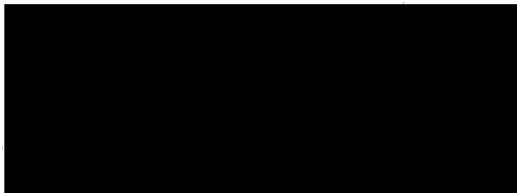
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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, 3/F

425 I Street, N.W.

Washington, DC 20536



File: WAC 02 081 53426

Office: CALIFORNIA SERVICE CENTER

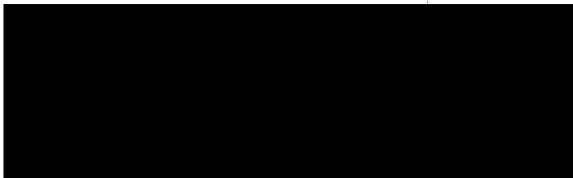
Date: **DEC 17 2003**

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:



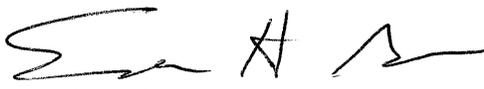
**INSTRUCTIONS:**

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile repair shop. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. 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 turns, in part, 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 November 14, 1997. The beneficiary's salary as stated on the labor certification is \$696 per week or \$36,192 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated March 28, 2002, the director required

additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required the petitioner's federal income tax return, annual report or audited financial statement for 1997-2000, the Quarterly Wage and Withholding Report (Form DE-6) for the last quarter, and Wage and Tax Statements (Forms W-2) for all employees for 2001. The director observed that the petitioner's documents named one GB-D as owner and required evidence that another, EL, was actually doing business as the petitioner. Egal Levaton (EL) had, in fact, filed the Immigrant Petition for Alien Worker (I-140) and executed the Form ETA 750.

Counsel responded to the RFE with GB-D's 1998, 1999, and 2000 Forms 1040, U.S. Individual Income Tax Returns. GB-D continued to report the income as his sole proprietorship in Schedule C. Counsel included a memorandum letter from EL dated June 3, 2002 (owner's memo). The owner's memo described circumstances that, it said, required EL to exercise all ownership and management rights in Eagle Muffler and Brake (Eagle).

The director determined that the adjusted gross income, as found on the tax returns, did not establish the petitioner's ability to pay the proffered wage and denied the petition.

On appeal, counsel specifies one (1) error of Citizenship and Immigration Services (CIS), formerly the Service or the INS:

**B. [CIS] ERRED IN ITS ANALYSIS of the pertinent DOCUMENTS that further establish the ability of QUANTUM DYNAMIC INC. [sic] to pay Mr. CALCIDAN [sic] the proffered wage.**

[CIS] finds that [Eagle] is incapable of paying the proffered wage only by means of a simple comparison...

We firmly dissent with the decision for such totally relied on the net income, which is only one item in the entire Income tax Return. [CIS] failed to thoroughly examine and analyze the Income Tax Returns in its [sic] entirety... Because of this, substantial entries in the ITR were completely missed out [sic]. **[EAGLE] is convinced that upon the thorough examination of the income tax returns its ability to pay the proffered wage is further reinforced.**

**The amount which appeared in the Net Income is after**

payment of wages to [the beneficiary]. The Compensation and Wages expense account includes the wages paid to [the beneficiary] for the years 1998, 1999, 2000, and until 2001.... Please refer to the copies of [Form DE-6] and W-3 Transmittal of Wage and tax Statement. (Exhibit "E")

Counsel titled the quoted section of the appeal brief with another case. Possibly, the argument does not apply to this record. Contrary to counsel's last statement, the record in its entirety only contains evidence of payments to the beneficiary for periods in 2001 and 2002. Forms DE-6, before the director in response to the RFE, reported wages paid to the beneficiary. Amounts for the quarterly reports' dates were: \$7,624.80 for 6-30-01, \$6,471.70 for 9-30-01, \$765 for 12-31-01 and \$5,596 for 3-31-02. The sums are \$14,861.50 in 2001 and \$5,596 in 2002, less than the proffered wage.

A page of Exhibit E, titled "Payrolls by PAYCHEX" with the beneficiary's name in the legend, contradicts counsel's argument that the beneficiary worked for Eagle since 1998. It records a "start" date of 1-5-00.

*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.

Though counsel complains of the director's use of net income to evaluate the ability to pay the proffered wage, the controlling authority confirms it. In determining the petitioner's ability to pay the proffered wage, CIS 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. v. Sava*, 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. 623 F.Supp. at 1084. 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. v. Sava*, 632 F.Supp. at 1054.

Counsel urges that Eagle "deeply needs the expertise" of the beneficiary as a very productive asset in the company as set forth in Exhibit H on appeal, a certificate of employment. Counsel suggests that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage.

Counsel's contention is not persuasive. An entirely unrelated business executed Exhibit H on appeal and benefited from the beneficiary's "relevant experience and enormous training." In passing, that exhibit is notably free of any such hyperbole. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers. Indeed, the I-140 states that the beneficiary's position is a new one.

Beyond the decision of the director and arguments of counsel, the AAO discerns no evidentiary value of tax returns of GB-D to establish the ability of the petitioner to pay the proffered wage at any time. In exhibit B, in response to the RFE, EL admitted that GB-D had no ownership interest in the business. The record lacks any tax return to satisfy the requirements of the petitioner under 8 C.F.R. § 204.5(g)(2). Various documents inconclusively identify EL as a sole proprietor of Eagle (the owner's memo), Eagle as a company or organization (I-140), or Eagle as a corporation, Egal Inc. dba Eagle Muffler & Brakes, California State ID number 260 0323 6 (Form ETA 750). It is very difficult to ascertain who the petitioner is and too late in the proceedings for the petitioner to materialize. For this additional reason, the petition may not be approved.

Indeed, if the petitioner is a corporation, counsel's offer of any Form 1040, U.S. Individual Income Tax Return, is inexplicable and the petition may not be approved. Contrary to counsel's submission of individual income tax returns, the 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, Forms DE-6 and W2, personnel records, exhibits, and briefs, 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.