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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

PUBLIC C[redacted]

File: EAC 01 097 51667 Office: VERMONT SERVICE CENTER Date: DEC 17 2003

IN RE: Petitioner: [redacted]
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: [redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 January 4, 2000. The beneficiary's salary as stated on the labor certification is $11.47 per hour or $23,857.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated August 20, 2001, the director required

additional evidence to establish both the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present and the beneficiary's experience as a cook, as stated in Form ETA 750. The RFE exacted, for the year 2000, the petitioner's federal income tax return, annual report or audited financial statement and Wage and Tax Statements (Forms W-2), as evidence of wage payments to the beneficiary. The RFE specified the evidence of qualifying experience and training.

Counsel submitted the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. It reflected an ordinary loss from trade or business activities of ($95,033), less than the proffered wage. Current assets of $12,502 minus current liabilities of $41,921, from Schedule L, stated a deficit of net current assets, ($29,419), less than the proffered wage. A Form W-2 for 2000 reflected the petitioner's payment to the beneficiary of $14,312.08, less than the proffered wage.

Counsel's transmittal, in response to the RFE, referenced the petitioner's profit and loss statements for 1998 and 1999, but the record has none. The omission is inconsequential, since those years are irrelevant to the priority date.

The director observed that no interpretation of the data produced a result equal to, or greater than, the proffered wage, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage, and denied the petition.

On appeal, counsel submits a brief and references the 2000 Form 1040, U.S. Individual Income Tax Return, of JJE, III and PAE (Form 1040). The Form 1040 is said to reveal the misguided and single-minded interpretation of Citizenship and Immigration Services (CIS), formerly the Service or the INS. The taxpayers stated an adjusted gross income, $157,752, equal to or greater than the proffered wage. Counsel avers that JJE, III is the owner of the petitioning corporation and the father of the manager of the petitioning corporation. Apparently, counsel contends that the corporation may rely on the individual assets of its owners to satisfy its obligations.

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.

Counsel further reasons that:

> The depreciation tax loss is not a mandatory loss and can be taken through a number of methods under current and past tax law. The type of deduction/depreciation taken in this case and/or paying of less than the proffered wage prior to the issuance of a permanent resident status does [sic] not demonstrate that the petitioner did not have the ability to pay the prevailing wage as of the time of filing as claimed by the Bureau.

Contrary to the assertion about depreciation, 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 (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).

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 cites no authority for the idea that "paying less than the proffered wage prior to the issuance of a permanent resident status does not demonstrate that the petitioner did not have the ability to pay the prevailing wage." The pertinent regulation plainly obliges the petitioner to prove the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

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. § 103.2(b)(1) and (12).

Counsel distinguishes, on behalf of the petitioner, the proffered wage and the prevailing wage. Counsel implies that the petitioner need not pay the proffered wage if it has paid the prevailing wage. *See Masonry Masters, Inc. v. Thornburgh*, 742 F.Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989). That holding does not stand for the proposition that a petitioner's unsupported assertions have greater weight that its tax returns. The Court held that CIS should not require a petitioner to show the ability to pay more than the prevailing wage. Counsel has not shown a difference between the proffered wage and the prevailing wage in this proceeding, and the petitioning organization is not located in the District of Columbia. *See also, Masonry Masters, Inc. v. Thornburgh,* 875 F.2d 898 (D.C. Cir. 1989).

Counsel asserts that the petitioner has demonstrated the ability to pay the prevailing wage, but that offer of proof is not in the record. 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).

After a review of the federal tax returns, Forms W-2, 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 obtains lawful permanent residence.

The determination of this appeal does not require a decision on whether the beneficiary met the petitioner's qualifications for the position. Though it is beyond the scope of the director's decision, the petitioner has not established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 indicated, in block 14, that the position of cook

required two (2) years of experience in the job offered or a related occupation. The petitioner's letters of January 6, 2001 and October 29, 2002 (experience letters) verified experience of the beneficiary only for 16 months, namely, from September 1998 until the priority date, January 4, 2000. Block 15, further, included the special requirement of "Working knowledge of industry term and machinery." The experience letters made no reference to the experience for this special requirement. For these additional reasons, the petition may not be approved.

The RFE exacted specified evidence of the beneficiary's experience as stated on the Form ETA 750. 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 CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The failure to produce evidence creates a presumption of ineligibility since 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.
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> (2) *Submitting secondary evidence and affidavits* - (i) *General*. The non-existence or other unavailability of required evidence creates a presumption of ineligibility.

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.