

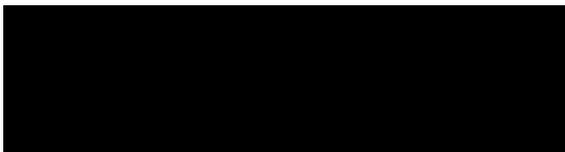
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U.S. Department of Homeland Security

Citizenship and Immigration Services

identifying data deleted to prevent unauthorized invasion of personal privacy

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



File: EAC 01 085 53211

Office: VERMONT SERVICE CENTER

Date:

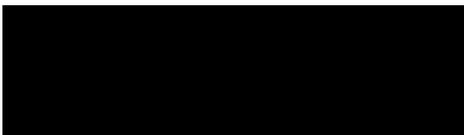
DEC 25 2003

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 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 preference visa petition was denied by the Director, Vermont Service Center, reopened on MTR 1, addressed to the director pursuant to appeal, and, again, denied. Thereafter, the appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on MTR 2, a motion to reopen and reconsider addressed to the AAO. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a wholesale and retail tapestries business. It seeks to employ the beneficiary permanently in the United States as a patternmaker. 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 September 23, 1997. The beneficiary's salary as stated on the labor certification is \$21.90 per hour or \$45,552

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 14, 2001, the director reviewed the ordinary (loss) from trade or business activities for 1997, (\$83,331), as found in the petitioner's 1997 Form 1120S, U.S. Income Tax Return for an S Corporation. In Schedule L, it reported current assets minus current liabilities, or a deficit of net current assets, (\$247,721). The RFE required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date, as well as Wage and Tax Statements (Forms W-2), as evidence of wage payments to the beneficiary, if any, for 1997.

Counsel responded with page 1 only of the 1998 and 1999 federal tax returns. This extract reported ordinary income from trade or business activities of, respectively, \$3,309 and \$4,297, both less than the proffered wage. The truncated tax returns omitted Schedule L and any evidence of the petitioner's net current assets, or deficit of them. The President's letter, regarding the 1997 loss, dated May 21, 2001 (the loss letter), did not explain the ordinary income, less than the proffered wage, and conceded that the petitioner never had employed the beneficiary. The loss letter is discussed, *infra*.

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 dated October 2, 2001 (NOD).

Petitioner's counsel appealed one (1) day late and submitted an appeal brief, dated November 1, 2001. It "advised" that counsel and the petitioner's office staff were unaware that two (2) other companies "come under [the petitioner]." Counsel offered only page 1 of 1997-1999 federal tax returns for such entities, TTI and FDAM. From this page, counsel recited amounts of gross income and of salaries paid and requested their consideration for all three (3) companies.

The director treated the late appeal as a motion to reopen and reconsider. His decision of February 13, 2002 (MTR 1) noted that the essential facts of the petitioner's ability to pay remained the same, concluded that the assets of other companies, organized as separate entities, could not be considered, denied the motion, and affirmed the NOD.

The AAO considered the appeal in its decision, dated September 19, 2002 (AAO decision). On appeal, counsel, stated that the

petitioner had incurred a one-time charge of \$255,292 for 1997. The loss letter added that it did not affect any other year's operations. Financial statements document neither the loss nor its effect.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel, also, insisted that the AAO should be willing to apply *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). It stands for the proposition, however, that a corporation is a separate and distinct legal entity. Contrary to counsel's primary assertion, Citizenship and Immigration Services (CIS), formerly the Service or INS, 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*, *supra*. 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 responded with this motion to reopen and reconsider, filed October 22, 2002 (MTR 2). Counsel still pleads that the same two (2) owners own three (3) corporations, linked except for tax purposes. To the contrary, the appeal brief suggested that counsel and the petitioner's office staff were unaware that two (2) other companies were "under the petitioner." The AAO cannot speculate about arrangements. No evidence of a contract or operating agreement defines how entities might "come under the petitioner."

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).

Similarly, the appeal brief compiled merely pages 1 from tax returns of two (2) more businesses, TTI and FDAM. They showed no information on net current assets or ownership of the three (3) corporations. The RFE clearly requested complete tax returns, which, inexplicably, the petitioner gave for 1997 and truncated for all other years.

In the state of this evidence, the AAO is ill prepared to pierce the corporate veil and blindly distribute the benefits and burdens

of corporate status. The record does not even support the supposed, common S status of the corporations.

Omissions of complete federal tax returns for 1998 and later years create a presumption of ineligibility. The requirements of the RFE and of 8 C.F.R. § 204.5(g)(2) are compelling.

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. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The director, in the RFE, requested complete federal tax returns, including Schedule L, 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 CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). For this additional reason, the petition may not be approved.

Therefore, the selection of truncated tax returns avails the petitioner neither to prove the ability to pay nor the existence

of three (3) related S corporations. Moreover, no extract in the record shows net income equal to, or greater than, the proffered wage. Indeed, FDAM's sample page 1 even fails to identify its link to the alleged plan of a common S corporation. FDAM filed a Form 1120, U.S. Corporation Income Tax Return. The remnants of tax returns are of little evidentiary value.

*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.

MTR 2 states of salaries and wages paid, as reflected on line 8 of Form 1120S:

This [petitioner] is still in business and is still paying salaries as evidence by the 2001 tax return showing salaries of \$139,741.00. For each year line 8 far exceeds the required \$45,552 salary....

Counsel pleads that line 8 of the federal tax returns, wages and salaries paid to others, proves the ability to pay the beneficiary. Counsel offers no authority for the principle that amounts, once applied to the wages of another, are still available to pay the beneficiary. Its logic is not persuasive.

The petitioner's letter dated October 30, 2001, invites the AAO to compound the gross receipts and sales of the petitioner, TTI, and FDAM to prove the ability to pay the beneficiary. Counsel refers to the petitioner's gross receipts and sales in MTR 2.

The controlling authority does not support the use of gross receipts and sales. 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. *K.C.P. Food Co., Inc. v. Sava*, 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.

After a review of the federal tax returns, the petitioner's responses, and counsel's 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 motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.