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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 01 283 50778 Office: California Service Center

Date:

JUL 16 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 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 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 Acting Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a board and care home. It seeks to employ the beneficiary permanently in the United States as a board and care manager. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The Acting Director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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 continuing ability to pay the proffered wage beginning on the priority date, 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 request for labor certification was accepted for processing on June 13, 1997. The proffered salary as stated on the labor certification is \$10.98 per hour which equals \$22,838.40 annually.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 990-EZ return of organization exempt from income tax. The return shows that the petitioner's expenses exceeded its revenue during that year.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on January 29, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested the petitioner's federal tax returns for 1997, 1998, and 1999 and copies of the petitioner's California Form DE-6 wage reports for the previous four quarters.

In response, counsel submitted copies of the petitioner's 1997, 1998, and 1999 Forms 990-EZ return of organization exempt from income tax. Those documents show that the petitioner's expenses exceeded its revenue during those years.

Counsel also submitted page two of the petitioner's California Form DE-6 quarter wage reports for all four quarters of 2000 and all four quarters of 2001. Those documents show that the petitioner employed the beneficiary during the third and fourth quarters of 2000 and during all four quarters of 2001. According to those documents the petitioner paid the beneficiary \$1,355.50 during 2000 and \$3,708 during 2001.

On May 7, 2002, the Acting Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The Acting Director observed that the petitioner's expenses exceeded its revenue during 1997, 1998, 1999, and 2000. The Acting Director noted that the petitioner employed the beneficiary during a portion of the pendency of this petition, but that the small amounts paid to the beneficiary did not demonstrate the petitioner's ability to pay the entire proffered wage.

On appeal, counsel submitted a copy of the petitioner's 2001 Form 990-EZ return of organization exempt from income tax. That return shows that the petitioner's expenses exceeded its revenue during that year.

Counsel also submitted photocopies of bank statements of the accounts of the petitioner and those of Margaret L. Silmon, who presumably has some relationship to the petitioner.

Counsel acknowledged that pursuant to *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex 1989) the bureau may rely upon net income to determine the company's ability to pay the proffered

wage, but then urged, nevertheless, that the bureau rely upon the petitioner's gross sales to calculate that ability. Counsel further argued that the bureau must also consider other sources of income pledged to the petitioner, citing *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, 449 (D.D.C 1988) but submitted no evidence of any other funds pledged to the petitioner.

In determining the petitioner's ability to pay the proffered wage, the Bureau will first 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 both Bureau and 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*, (Supra.); *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 the Bureau, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income.

Although counsel submitted evidence of the petitioner's monthly bank balances, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

The funds available to Margaret L. Silmon through her bank accounts are irrelevant to this proceeding, even if Ms. Silmon owns the petitioner. A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980).

As the owners or stockholders are not obliged to pay those debts,

the assets of the owners or stockholders and their ability, if they wished, to pay the corporations debts and obligations, are irrelevant to this matter and shall not be further considered.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 1997, 1998, 1999, 2000, or 2001. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

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.