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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, APO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[REDACTED]

OCT 02 2003

File: EAC 01 236 55561

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

[REDACTED]

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:

[REDACTED]

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider.¹ 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a service station. It seeks to employ the beneficiary permanently in the United States as a mechanic. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

On January 10, 2002, the director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition, November 2, 2000.

The AAO dismissed the petitioner's appeal on September 19, 2002. The AAO reviewed the financial information contained in the petitioner's 2000 Form 1120 U.S. Income Tax Return for an S Corporation and held that the petitioner's ordinary income of -\$3,584 was insufficient to cover the beneficiary's annual proffered wage of \$38,396.80.

On motion, current counsel submits a copy of the petitioner's 2001 Form 1120 U.S. Income Tax Return for an S Corporation, copies of the principal shareholder's stock portfolio statement, and copies of the petitioner's bank statements for November and December 2000. Counsel also asserts that this evidence demonstrates the petitioner's ability to pay the proffered wage. He contends that the facts supporting the approval of this petition are similar to a previous appeal that was sustained by the AAO in August 2000.

The petitioner's 2001 corporate tax return shows that the petitioner had \$1,579,125 in gross receipts or sales, no officers' compensation, no salaries and wages, and an ordinary income of \$49,254. Schedule L indicates that the petitioner had \$39,155 in net current assets. Although these figures represent sufficient sums to cover the beneficiary's wage in 2001, it does not relieve the petitioner's burden to establish that it had the ability to pay the proffered wage as of the visa priority date of November 2, 2000. Counsel's assertion that the petitioner's gross income should be considered is not persuasive. 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. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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.

¹ Counsel's motion is styled as a "motion to reconsider" pursuant to 8 C.F.R. § 103.5(a)(3). As it asserts new facts and offers additional documentary evidence, it will also be considered as a motion to reopen under 8 C.F.R. § 103.5(a)(2).

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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Even though counsel submits the petitioner's November and December 2000 bank statements to show that the petitioner's cash flow was sufficient to pay the proffered wage, there is no proof that these funds somehow represent additional resources beyond those summarized by the 2000 corporate tax return. We note that the primary evidence required to establish a petitioner's ability to pay is set forth in 8 C.F.R. § 204.5(g)(2) and consists of annual reports, federal tax returns, or audited financial statements. While additional material may be submitted, it may not be substituted for the primary evidentiary requirements.

Counsel also submits copies of the petitioner's principal shareholder's personal stock portfolio holdings. The record indicates that the petitioning business is a corporation. As such, it is considered a separate and distinct legal entity from its owners and shareholders. Consequently the assets of the shareholders of other enterprises or corporations cannot be considered in evaluating the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958); *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel*, 17 I&N Dec. 531 (Act. Assoc. Comm. 1980).

Counsel refers to a past appeal sustained by the AAO on August 10, 2000 and submits a copy of the AAO decision. He asserts that its similar facts should mandate a similar decision in the instant case. That case does not represent a binding precedent as described in 8 C.F.R. § 103.3(c). Although the complete record of that case is not presently before us, a brief review of the AAO's decision in that case reveals that the petitioner was a sole proprietorship. Therefore, the AAO's determination to sustain the appeal included consideration of the owner's significant individual bank and portfolio accounts. As stated above, the owner or principal stockholder's personal assets in this case cannot be included in the examination of the petitioner's ability to pay the beneficiary's offered wage because the petitioning business is a corporation, a separate legal entity.

Upon review, the petitioner has been unable to present convincing additional argument or evidence to overcome the findings of the director and the prior AAO decision. The petitioner has demonstrated its ability to pay the proffered wage as of the priority date of the petition.

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 reconsider is granted, and the previous decisions of the director and the AAO are affirmed. The petition remains denied.