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U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
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Washington, D.C. 20536

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prevent clearly unwarranted
invasion of personal privacy**



File: EAC 02 039 50045 Office: VERMONT SERVICE CENTER Date: **OCT 29 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)

PUBLIC COPY

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

The petitioner is a take-out food operation. 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 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 October 27, 1999. The beneficiary's salary as stated on the labor certification is \$18.89 per hour or \$39,291.20 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated January 17, 2001, the director required

additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE exacted the petitioner's federal income tax return for 2000, as well as Wage and Tax Statements (Forms W-2) and payroll data as evidence of wage payments to, and employment of, the beneficiary from 1999.

Substituted counsel submitted, in response to the RFE, the petitioner's 1999 to 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The federal tax returns reported, in the respective years, ordinary income from trade or business activities of \$18,065, \$18,655, and \$14,637, less than the proffered wage. Current assets minus current liabilities, namely, the net current assets, were less than the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, current counsel submits a brief, dated September 12, 2002, and copies of federal tax returns. Line 19 reflects deductions for outside services.

Counsel's brief states that:

The deduction was \$161,638.00 in 2001, \$126,300.00 in 2000, and \$91,873.00 in 1999. These deductions are for outside contractors that the petitioner paid rather than filing W-2s. This is where the money is to pay the salary of the beneficiary.

Counsel advises that the beneficiary will replace some workers. The Immigrant Petition for Alien Worker (I-140) acknowledged that the petitioner had only two (2) employees and claimed that the beneficiary would occupy an existing position, not a new one. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner replaced them. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

In response to the RFE, the petitioner contradicted its use of the beneficiary as a replacement, stating that the beneficiary's position was newly created by the growth of the business. The petitioner went farther and denied that it could "provide evidence of other employees/salaries with respect thereto." The petitioner has not established that the beneficiary replaced any worker.

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 distinguishes "C" corporations and admits that:

Rather, the goal of an S corporation is to minimize profits and distribute any surplus to the shareholders or take whatever legal expenses that are available.

Counsel, evidently, argues that the "surplus" should be returned from the shareholders to the books of the petitioning corporation to prove the ability to pay the proffered wage at the priority date. Contrary to counsel's primary assertion, Citizenship and Immigration Services (CIS), formerly the Service or the 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*, 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 claims that the petitioner secured the approval of its petition on behalf of a different beneficiary for the petitioner and requests it for this one. The record of the previous action is not now before the AAO. CIS, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel, also, avers that the petitioner has nine (9) employees, though the I-140 stated that there were two (2). The record offers no explanation for that discrepancy, and such may affect the outcome of cases.

Counsel does not provide the published citation of the previous approval. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel attempts to limit the holding of *K.C.P. Food Co., Inc. v.*

Sava, 623 F.Supp. 1080 (S.D.N.Y. 1985) to "C" corporations, but supports the distinction of "C" and of "S" corporations with neither reason nor authority.

CIS may rely on the federal tax returns to assess the ability to pay the proffered wage, and that principle controls this record. 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.

After a review of the federal tax returns and the entire record, 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.