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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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invasion of personal privacy



File: EAC 00 240 50863

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)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen (the motion). 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 firm in general construction and renovations with concentration in architectural, custom woodwork. It seeks to employ the beneficiary permanently in the United States as a woodworker. 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 April 30, 1997. The beneficiary's salary as stated on the labor certification is \$22.35 per hour \$46,488 per year.

The petitioner displayed a mixture of federal income tax returns.

Submissions included the 1997 Form 1040, U.S. Individual Income Tax Return, of two (2) persons (Frydmans' return). The Frydmans' return reflected adjusted gross income of \$448,017 for 1999, more than the proffered wage.

Next, the petitioner submitted 1998-2000 Forms 1120S, U.S. Income Tax Returns for an S Corporation, from two (2) other corporations. They had employer identification numbers and names differing from each other's and from the petitioner's. Notwithstanding their irrelevance, the director reviewed the financial data of these corporate strangers and concluded that the petitioner could not pay the proffered wage at the priority date.

Other submissions included 1998 and 1999 Forms 1120S, U.S. Income Tax Returns for an S Corporation, which actually named the petitioner. They reported, respectively, ordinary income of \$13,561 and a loss of (\$1,723), both less than the proffered wage.

The director denied the petition on June 26, 2001. Counsel appealed on July 23, 2001, stood on the evidence submitted, and requested 60 days to present a brief. None was filed, and the AAO dismissed the appeal on April 11, 2002. Counsel filed this motion on May 10, 2002.

Counsel asserts that copies of the petitioner's 1998 and 1999 corporate income tax returns "covered the priority date of the petition." They did not, as the priority date is April 30, 1997, and the returns are based on calendar years. For 1997, the petitioner has presented no corporate tax return and no explanation of why the petitioner's tax return is unavailable for 1997. The petitioner's tax returns clarify that it is a corporation formed in 1992.

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 states that assets in 1998 and 1999 suffice to pay the proffered wage. They do not. Net current assets available to pay the proffered wage are, by definition, the difference of current assets minus current liabilities, (\$965), a deficit in 1998, and \$1,141 in 1999, both less than the proffered wage.

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.

Instead, counsel's brief tenders evidence of other assets to Citizenship and Immigration Services (CIS), formerly the Service, the INS, or the Bureau:

6. ... [The Frydmans] are offering to [CIS] the income tax returns of Lum Holdings, Inc. [Lum] for the years 1998 and 1999, as well as the income tax returns of KSF Investment Corp. [KSF] for the tax year 2000. Both are corporations wholly owned by [the Frydmans], who are also same shareholders of the petitioning corporation.

* * *

8. [The Frydmans] have in the past, and remain willing to contribute their other corporate and personal assets to the petitioning corporation to enable it to continue its operation, and specifically to pay the beneficiary's wages as offered to him in the [Form ETA 750].

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.

Consequently, the income and assets, as revealed in the tax returns of individual shareholders and corporate strangers, are irrelevant to the petitioning corporation. They do not establish its ability to pay the proffered wage at the priority date or until the beneficiary obtains lawful permanent residence.

Counsel persists in the effort to pierce the corporate veil:

Such personal assets of the shareholders are acceptable to show the petitioning corporation's ability to pay the offered wages. See *In the Matter of Devi's Enterprise Inc, Employer on behalf Nir Bahador Rayamajhi, Alien*, 956 INA 378, 1/16/98.... Such evidence

was admitted and considered by the Board of Alien and Labor Certification Appeals in reaching its decision...

Similarly, the Board in *In the Matter of Far East International, Inc. Employer on Behalf of Rong Jian, Alien*, 93 INA 22, 12/21/93, accepted the same type of personal financial evidence of the petitioner's shareholders to vacate a denial of certification by the Certifying Officer and to direct the Officer to grant certification based on such personal assets of the shareholders.

Counsel's motion insists on decisions of the Board of Alien and Labor Certification Appeals to justify piercing the corporate veil. They do not appear to be decisions of CIS. Though counsel cites certain matters as apposite, the records are not before the AAO. In any case, 8 C.F.R. § 103.1(f)(3)(iii)(B) confers on CIS the authority over the Immigrant Petition for Alien Worker, and its appeal. Likewise, CIS has specific warrant concerning the ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2).

Published citations, as to the appeal of issues of ability to pay, appear pursuant to the authority of CIS. 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 and those from other administrative sources are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions under the authority of 8 C.F.R. § 103.9(a). Counsel's citations, therefore, are not controlling over the determination of issues under 8 C.F.R. § 204.5(g)(2).

Counsel's motion postulates gross income and receipts and total assets without reference to expenses and liabilities. On the contrary, 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.

The petitioning corporation did not establish the ability to pay the proffered wage in any year. 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. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (2).

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.