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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, 3/F

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Washington, DC 20536



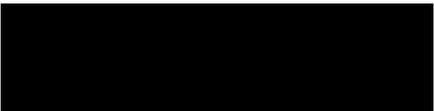
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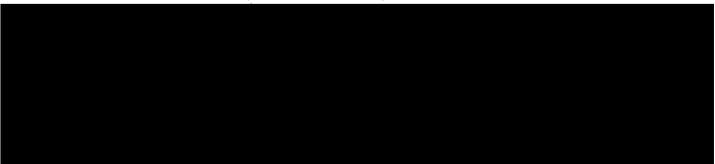
OCT 29 2003

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.

*Helen E Crawford*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a property manager. 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. Part B, dated January 23, 2002, substituted the current beneficiary for one Bautista.

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 January 9, 1998. The beneficiary's salary as stated on the labor certification is \$3,660.54 per month or \$43,926.48 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority

date and continuing until the beneficiary obtains lawful permanent residence. In a request for evidence dated April 10, 2002 (RFE), the director required the petitioner's federal income tax returns with all schedules and tables for 1998, 1999, and 2001. The petitioner had already submitted the return for 2000.

Counsel completed the record with the petitioner's Forms 1120 U.S. Corporation Income Tax Returns as requested, except for the inexplicable omission of Schedule L from the 1999 exemplar. The submissions reflected the taxable income before the net operating loss deduction and special deductions. Schedules L for 1998, 2000, and 2001 showed net current assets, the difference of current assets minus current liabilities.

The petitioner's taxable incomes before net operating loss deduction and special deductions from 1998-2001 were \$56,568, a loss of (\$35,456), \$22,683, and \$36,078. Net current assets were \$41,109 for 1998, \$999 for 2000, and \$67,542 for 2001. Each was less than the proffered wage, except for \$56,568, the 1998 taxable income before net operating loss deduction and special deductions, and 2001 net current assets, \$67,542. They were greater than the proffered wage.

The director summarized amounts of compensation for officers and determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage.

Counsel's appeal introduces new points and evidence:

- C. The [current] beneficiary is intended to replace another worker, who will be ready for retirement from the affiliated company.
- D. Tax and income records will follow to prove that the company has the ability to pay the proffered wage.

Counsel's brief on appeal concedes that the replacement arises from a retirement in an affiliated company, not in the petitioner:

In addition, [the current beneficiary] is intended to replace another worker who will be ready for retirement from the affiliated company. Exhibit B.

Finally, [the petitioner] is only one company owned by [the conglomerate]. Not only does [the petitioner's] income exceed that required to sufficiently evidence the ability to pay [the beneficiary], but the affiliated companies, as a conglomerate, are unquestionable (sic). Petitioner has attached a letter

of explanation that [the petitioner] is one of fifteen (15) homes owned by the conglomerate. Exhibit C. In addition, Petitioner has attached the Corporate and Franchise Income Tax Returns filed by Petitioner's affiliated companies. Exhibit D.

Furthermore, the petitioning employer has pledged her own income to pay the salary of [the beneficiary].

Contrary to counsel's assumption, 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*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations can not be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel, even on appeal, has not offered any wage statement, such as Form W-2 or U.S. 1099 Misc., to prove the payment of wages to either the retiring employee or the beneficiary. The Form ETA 750, in the amendment dated July 27, 1998, arguably infers that a named employee (retiree) might retire from the petitioner. The appeal, however clearly places him in an affiliated company of the conglomerate. See Exhibits B, C, E and F.

The record does not establish that the petitioner employed the retiree or the beneficiary and paid a salary, said to be over \$44,000, more than the proffered wage, to either one. Some other entity, evidently, paid the salary of one, or both. See Exhibits C, E, and F and Form ETA 750, Part B.

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 further argues on appeal that the total income of the petitioner's business, alone, evinced the ability to pay and cites 8 C.F.R. § 204.5(g)(2).

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. 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 net income and net current assets for 1999 and 2000 are less than the proffered wage. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. 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 (12). In addition, the petitioner must demonstrate that financial ability 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).

After a review of the federal tax returns, brief, and exhibits, 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.