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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: EAC 00 272 51251 Office: VERMONT SERVICE CENTER Date: SEP 15 2003

IN RE: Petitioner: [redacted]
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

[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 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.

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider (motion). The motion will be granted, the previous decisions of the director and the AAO affirmed, and the petition denied.

The petitioner is a computer services firm. It seeks to employ the beneficiary permanently in the United States as a computer programmer. 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 23, 1997. The beneficiary's salary as stated on the labor certification is $73,000 per year.

The director denied the Immigrant Petition for Alien Worker (I-140), in a decision dated April 2, 2001, because the petitioning

corporation had not established that it had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

On appeal, prior counsel cited no authority, but argued that the AAO must consider tax returns of the individual shareholders of the petitioning S corporation to establish the ability to pay the proffered wage. Since precedent decisions control the decision of the AAO, the contention of substituted counsel (counsel), now, as then, is not persuasive.

Contrary to prior counsel's primary assertion, the Bureau (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 cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The AAO determined, in a decision issued March 11, 2002, that the federal tax returns, therefore, did not establish the petitioning corporation's ability to pay at the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO concluded that reliance on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) was misplaced and dismissed the appeal.

Counsel responded in the present motion, received March 25, 2002, referenced a decision in a certain file, and stated that:

> [The Bureau] held that the Petitioner's bank statements showing sufficient cash balance to pay the monthly wages was sufficient to demonstrate ability to pay the wages. [The Bureau] also considered the cash balance at the end of the year to determine the ability to pay the wages.
>
> .... The enclosed CPA analysis of the balance sheet (Schedule L [of the federal tax returns]) for each of the five years [1997-2001] clearly shows that the ending Cash Balance is more than the proffered wage of $73,000.
> (Exhibit numbers omitted)

Counsel does not provide a published citation for the Bureau's

decision. While 8 C.F.R. § 103.3(c) provides that Bureau precedent decisions are binding on all Bureau 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).

Even though the petitioner submitted its investment and commercial bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage, there is no proof that they somehow represent additional funds beyond those of the tax returns and financial statements. The balance as of the priority date was $65,000, less than the proffered wage.

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 offers Schedule L, the balance sheet of the 1997 Form 1120S, on appeal. It reports the difference of current assets of $74,597 minus current liabilities of $4,567, equaling net current assets of $70,030, less than the proffered wage. The Schedules L for 1998-2001 state net current assets equal to or greater than the proffered wage. Although the conclusion is a difficult one, the petitioner must show the ability to pay the proffered wage with particular reference to the priority date.

A petitioner must establish the elements for the approval of the petition at the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel urges that the Bureau must consider the beneficiary's ability to generate future income and that it establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

The full 1997 tax return reveals gross receipts and sales of only $40,250, less than the proffered wage, compensation to officers of $7,500, less than the proffered wage, and no salaries or wages paid at the priority date. The I-140 states that the petitioner went into business just in 1997 and had two (2) employees.

Future earnings do not evidence the ability to pay the proffered

wage at the priority date. *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977).

Counsel's reliance on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is misplaced. Counsel concedes that *Sonegawa* applies to a business with a profitable record for several years at the priority date, when the net loss was due to unusual circumstances. That is not this petition.

Employment-based petitions depend on priority dates. The priority date is established when the petition is properly filed with the Bureau. 8 C.F.R § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1).

Moreover, no evidence indicates that either position of the two (2) employees involves the same duties as those set forth in the Form ETA 750 for the beneficiary. The I-140 states that the computer programmer position is not a new one. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

After a review of the federal tax returns, bank statements, unaudited financial statements, and I-140 of the petitioner, 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 motion to reopen is granted, the previous decisions of the director and the AAO are affirmed, and the petition is denied.