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

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



File: WAC 02 220 54718 Office: CALIFORNIA SERVICE CENTER Date: **SEP 15 2003**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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: SELF-REPRESENTED

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 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.

Robert P. Wiemann
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 TV/video and computer service firm. It seeks to employ the beneficiary permanently in the United States as an accountant and auditor. 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, 2001. The beneficiary's salary as stated on the labor certification is \$29.13 per hour or \$60,590.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated October 31, 2002, the director required additional evidence to establish the petitioner's ability to pay

the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required the petitioner's completed and signed federal income tax return, annual report or audited financial statement for 2001 to the present, as well as its payroll summary (Form W-3) and last four (4), accepted quarterly wage reports (Form DE-6).

The petitioner (Salco) submitted the 2001 Form 1120, U.S. Corporation Income Tax Return of another party, Ferbak Flowers, Inc. (FFI), for the fiscal year from March 1, 2001 to February 28, 2002. Before the priority date, April 30, 2001, FFI divested Flowers Plus, and made FFI a separate entity to operate Salco. Resignation and Release Agreement of March 30, 2001 (divestiture). The tax return reports financial data in the name of FFI, however, and never names Salco.

FFI's federal tax return reported taxable income before net operating loss deduction and special deductions of \$6,697, less than the proffered wage. Schedule L reported current assets of \$6,708 minus no current liabilities, or net current assets of \$6,708, less than the proffered wage. FFI, also, submitted the Forms DE-6 and a Wage and Tax Statement (Form W-2), but they did not evidence that the petitioner had previously employed the beneficiary.

Also, FFI submitted the bank statement of Flowers Plus. The divestiture divided it to one [REDACTED] and the petitioner does not attribute any effect to the balance. As of April 30, 2001, it is \$2,722.42, less than the proffered wage.

[REDACTED] (VF), an individual, submitted credit card statements for three (3) accounts. The name of their holder is omitted on two (2) of them. In any case, the petitioner does not explain how credit card balances, plausibly, prove the ability to pay the proffered wage at the priority date, especially when dated July 24, 2001 and after.

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.

The director considered the employment records and the tax return, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage, and denied the

petition.

On appeal, the petitioner again offered its partially illegible bank statements for periods ending April 9, 2001 to February 6, 2002. Among them, the highest balance was for February 6, 2002, \$8,041.45, after the priority date and less than the proffered wage. The balance nearest the priority date was \$3,044.73, less than the proffered wage.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that they somehow show additional funds beyond those of the tax returns and financial statements. 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).

On appeal, VF submitted his personal savings account statements for selected periods ending February 8, 2001 to December 9, 2002. The balance at the priority date was \$34,657.98, 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. 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 (12).

Also, VF, for the first time on appeal, offers a bond fund exemplar. Though on a recognized fund's letterhead, dates, shares, and values are entered in pen. The petitioner's brief states their sum is worth \$310,831.40, though the value of 9,671.71 shares at \$10.34 is \$99,999.90, more than the proffered wage.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Therefore, the bond fund exemplar warrants a sharp examination.

It is the only asset equal to or greater than the proffered wage. It claims bond fund shares in the name of "Ferbak Flowers, Inc., FBO Viken Fermanian." Presumably, "FBO" means for the benefit of the individual, FV. Schedule L, the balance sheet of the corporate income tax return, has no entry of that asset at the priority date. VF's brief admits that the bond fund exemplar and bank statements in his name are personal records of personal assets. VF says that they are available for the purpose of paying the proffered wage because he is the only shareholder of FFI.

Contrary to the petitioner's primary assertion, the Bureau 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.

Next, VF claims that the petitioner may rely on additional evidence, other than the tax return and audited financial statements. The Bureau, formerly the Service or the INS, on the contrary, must rely on tax returns and audited financial statements under the regulation. See 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, the Bureau 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 the Bureau 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 return, bond fund exemplar, credit card records, and bank statements, 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.