

B6

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
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



File: WAC 02 147 51847 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:
[Redacted]

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 an exporter of apparel. It seeks to employ the beneficiary permanently in the United States as an export 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.

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 February 23, 1998. The beneficiary's salary as stated on the labor certification is \$70,187.52 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated May 7, 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 federal income tax returns, annual reports or audited financial statements for 1998 and 2000, as well as Forms W-2 for any wage payments to the beneficiary from 1998. The record contained Form 1120, U.S. Corporation Income Tax Return, for 1999.

Counsel submitted the petitioner's Forms 1120 for 1998 and 2000 and wages reported on Forms W-2 for each year from 1998-2001. Also, counsel added expenses, said to pertain to the beneficiary, such as "auto expense, entertainment, trip expense, comm. [sic] expense, daycare, attony [sic] fee, visa expense." The aggregate for each year (wages plus benefits summary) was said to represent real wages, but was, still, less than the proffered wage.

The director detailed the taxable income before net operating loss deduction and special deductions, wages reported for the beneficiary on Forms W-2, and net current assets, i.e., current assets minus current liabilities, for 1998 to 2001. Each was less than the proffered wage in every year. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

Conceding that no measure of the ability to pay, as examined by the director, is equal to or greater than the proffered wage, counsel condemns them all:

The [petitioner] has been in existence since 1993 and is an ongoing concern. This indicate [sic] that it is a viable on going [sic] business. When determining the ability to pay, you should look at the gross income... The [Bureau, formerly the Service] totally ignores gross receipts and gross income and fixates entirely on taxable income. In fact, the petitioner can easily cut down on expenses to reduce deductions and increase net or taxable income.

In determining the petitioner's ability to pay the proffered wage, the Bureau [formerly the Service] 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.

Counsel claims that the petitioning corporation has other assets and asserts:

The [Bureau] is taking a narrow minded approach to attack the interpretation of numbers of a viable enterprise; of which [sic] the owner states that he is ready, willing and able to pay the proffered wage...

This is a sole proprietor business and if the owner chose not to show a lot of assets is [sic] his own business. In fact, the owner, [REDACTED] lives in Japan and has property in California and Japan and also owned an airplane. He is more than able to pay the beneficiary's proffered wage.

I hope that the [AAO] will not be so tunnel vision [sic], and will overturn the denial of the Service Center...

Contrary to counsel's primary assertion, the Bureau (formerly the Service) 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 proposes that the petitioner might have cut many expenses for 1998, 1999, and 2000. The petitioner made the expenditures, however, and the funds were not, therefore, available to apply to paying the proffered wage at the priority date. Forms W-2 report that the petitioner paid wages to the beneficiary, from 1998-2001,

of \$30,000, \$30,000, \$33,500, and \$34,000, respectively, less than the proffered wage. Counsel's wages and benefits summary does not reveal additional wage payments or any sum equal to or greater than the proffered wage in any year.

The Form ETA 750 does not authorize the inclusion of benefits and expenses in the wages of the beneficiary. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service may not ignore a term of the labor certification, nor may it impose additional requirements.

See Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Moreover, 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).

After a review of the federal tax returns, Forms W-2, and counsel's briefs, 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.