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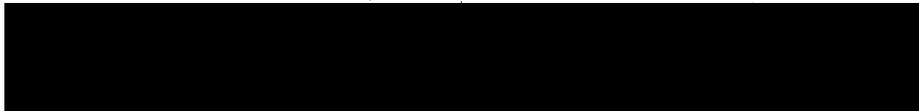
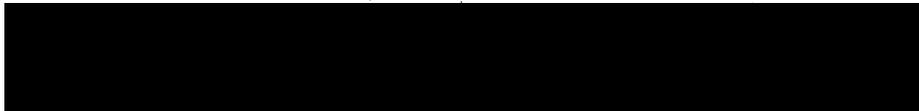
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**U.S. Citizenship
and Immigration
Services**



FILE: WAC 02 027 57139 Office: CALIFORNIA SERVICE CENTER Date: **APR 19 2004**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


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 on appeal. The appeal will be dismissed.

The petitioner is a board and care facility. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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.

The Regulation at 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. Here, the petition's priority date is April 23, 2001. The beneficiary's salary as stated on the labor certification is \$11.93 per hour or \$24,814.40 per year.

With the petition, counsel submitted a copy of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for the calendar year 2000.

The 2000 tax return shows that the petitioner declared an ordinary income of \$10,136 for that year. The accompanying Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets by \$16,305.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on February 9, 2002, requested additional evidence pertinent to that ability. The Service Center specifically requested the petitioner's Form DE-6, Quarterly Wage Report, for all employees for the last 4 quarters that were accepted by the State of California.

On May 14, 2002, the California Service Center again requested the petitioner's Form DE-6 for the last 4 quarters with the addition of the job title and description of duties of each employee listed on the form. Those reports show that the petitioner did not employ the beneficiary during any of those quarters.

On September 17, 2002, the Service Center requested that the petitioner provide evidence that it had the ability to pay the proffered wage from 2001 and continuing. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center noted that the evidence must be either in the form of copies of annual reports, federal tax returns, or audited financial statements. The Service Center also requested an explanation as to the discrepancy in the number of workers at the petitioning facility. The Service Center noted that the I-140 petition reflected twenty employees; however, a subsequent list reflected only three employees.

In response, counsel explained that under the umbrella of Midomar Homes Inc., there are six board and care facilities with the petitioning facility employing three workers and the remaining seventeen employees working for the other five facilities. Counsel also submitted copies of the petitioner's 2000 and 2001 Form 1120S, U.S. Income Tax Return for an S Corporation.

The tax return for 2001 shows that the petitioner declared an income of -\$33,597 for that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$32,459 and current liabilities of \$98,421, which yields net current assets of -\$65,962.

On January 10, 2003, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel submits a copy of the petitioning entity's owner's 2000 Form 1040, U.S. Individual Income Tax Return, copies of payroll checks paid to the beneficiary, copies of the beneficiary's 2000 and 2001 Form W-2, Wage and Tax Statement, reflecting wages earned of \$12,600 and \$14,000, respectively, and a copy of the beneficiary's 2000 Form 1040A, U.S. Individual Tax Return.

Counsel claims that the director erred in denying the petition and that the petitioner has the ability to pay the proffered wage to the beneficiary and has had that ability from the establishment of the priority date.

Counsel states:

Although Petitioner has not shown a positive net income during the relevant time period, **the beneficiary has been employed by the Petitioner since the priority date and has been paid a salary.** Moreover, not only has the beneficiary been receiving a salary, but the owner of the company is also receiving a salary from the petitioning company, which is deducted as an expense from the gross annual income. (See **Exhibit A**). Therefore, it is clear that the tax returns submitted as evidence of financial ability to pay the beneficiary the proffered wage, and more specifically the taxable income reported therein, do not reflect the corporation's true ability to pay.

Counsel continues by citing cases *Masonry Masters Inc. v. Thornburgh*, 742 F.Supp. 682 (D.D.C. 1990), *Matter of Sonogawa*, 12 I&N Dec. 612 (R.C. 1967), and *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex., 1989) as prior cases which help solidify his argument.

Finally, counsel concludes:

In summary, it is illogical to conclude that Petitioner has not shown an ability to pay the proffered wage, when for the past years, Petitioner has paid the beneficiary a salary and the fact that a significant salary is being paid out to the owners of the petitioning company against taxable income, should be a relevant factor in the determination of the employer's ability to pay.

The evidence, together with evidence of Petitioner's increased business and profits is persuasive evidence that the employer will continue to pay the beneficiary a salary that is higher than the prevailing wage for the proffered position once the petition is approved.

Counsel is mistaken. Counsel contends that the petitioner need not pay the proffered wage if it has paid the prevailing wage, citing *Masonry Masters, Inc. v. Thornburgh*, 742 F. Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989). That holding is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns. The Court held that Citizenship and Immigration Services (CIS), formerly the Service or INS, should not require a petitioner to show the ability to pay more than the prevailing wage. Counsel has not shown a difference between the proffered wage and the prevailing wage in this proceeding, and the petitioning organization is not located in the District of Columbia. See also, *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989). The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (R.C. 1967) as proof of the petitioner's ability to pay the proffered wage. *Matter of Sonogawa, supra*, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

Counsel claims:

In *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex., 1989), the Court justified the denial of the petition based on an inability to pay when the petitioner suffered net losses in his business while paying wages whose total was less than that which he proposed to pay to the

beneficiary. The Court in *Chi-Feng Chang*, therefore, considered the wages paid out against taxable income in its determination of the employer's ability to pay. *Id.* It follows that had the petitioner in that case been paying the prevailing wage for the proffered position as wages to the beneficiary and still had sufficient income to pay a significant salary to the owner of the company but had no net income or had a minimal loss, an ability to pay would have been established.

Counsel assumes much. As a means of determining the petitioner's ability to pay the proffered wage, the AAO will examine the petitioner's net income figure as 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 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.*, 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. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net 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.*, 632 F. Supp. at 1054.

In addition, 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.

Furthermore, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that the petitioner must demonstrate its continuing ability to pay the proffered wage using copies of annual reports, federal tax returns, or audited financial statements. The petitioner has submitted no copies of annual reports and no audited financial statements. The petitioner's income tax returns are the only competent evidence of record pertinent to the petitioner's ability to pay the proffered wage.

The petitioner was permitted to demonstrate its ability to pay the proffered wage with copies of annual reports or audited financial statements, but chose not to do so. The petitioner was not obliged to demonstrate that ability with its tax returns, but chose to do so. The petitioner shall not now be heard to argue that its tax returns are a poor indicator of its ability to pay the proffered wage.

The 2001 return shows that the petitioner was unable to pay the proffered wage during 2001 out of its income or its net current assets. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

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.

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ORDER: The appeal is dismissed.