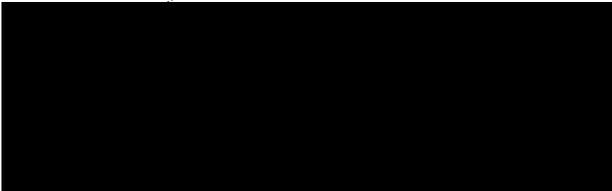


Bo

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: LIN-02-224-51549 Office: NEBRASKA SERVICE CENTER Date: APR 23 2004

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[Redacted]

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an antique conservation and restoration business. It seeks to employ the beneficiary permanently in the United States as a furniture restorer. 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.

The director determined that the petitioner failed to establish its ability to pay.

On appeal, counsel submits a brief.

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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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. The petition's priority date in this instance is April 26, 2001. The beneficiary's salary as stated on the labor certification is \$14.95 per hour or \$31,096 per year.

With the initial petition, the petitioner submitted its 2000 and 2001 Form 1120S U.S. Income Tax Returns for an S Corporation. The tax return for 2000 reflected gross receipts of \$114,826; gross profit of \$114,826; compensation of officers of \$0; salaries and wages paid of \$0; and an ordinary income (loss) from trade or business activities of -\$15,767. Schedule L reflects negative net current assets. The tax return for 2001 reflected gross receipts of \$121,218; gross profit of \$121,218; compensation of officers of \$0; salaries and wages paid of \$0; and an ordinary income (loss) from trade or business activities of -\$21,360. Schedule L reflects net current assets of \$25,833.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated September 10, 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 exacted the petitioner's audited financial statement, bank account records and or personal records.

In response to the RFE, the petitioner submitted a bank certification letter indicating that as of November 14, 2002, the petitioner had a bank balance of \$39,463.66; an income statement for the 9 months ending September 30, 2002; a commercial contract to buy and sell real estate, a building; a mortgage refinance memo; a commercial contract to buy and sell real estate, a vacant lot; and, four automobile titles.

Although the petitioner submitted evidence of the petitioner's monthly bank balances, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. Going on record without supporting documentation 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). Additionally, contracts to buy and sell real estate do not reflect tangible or current assets.

The titles of the automobiles identified as being owned by Los Stanislaw are irrelevant to this proceeding, even if Los Stanislaw owns the petitioner. A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980).

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that as of May 2001, the petitioner had a gross income of \$121,218.00 and outside services of \$99,501.00. Counsel states that these outside services were contracted and were for the position the beneficiary was offered. Counsel concludes that if the beneficiary is hired, the petitioner will have these contract funds available to pay the beneficiary the proffered wage. No evidence was provided by the petitioner to corroborate counsel's assertions. The assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez* 17 I&N Dec. 503, 506 (BIA 1980). Counsel cites several non-published CIS decisions as corroboration of the beneficiary's eligibility.

On appeal, counsel cites several unpublished AAO decisions, which have no precedential effect in this proceeding. See 8 C.F.R. § 103.3(c). Further, counsel also asserts that the employment of the beneficiary will help expand the business and eliminate the use of independent contractors. Counsel's assertion that the funds paid to independent contractors could be used to pay the beneficiary's salary is not persuasive. Even if corroborated with evidence from the petitioner, these funds were not retained by the petitioner for future use. Instead, these monies were expended on compensating the contractors, and therefore, not readily available for payment of the beneficiary's salary.

After a review of the evidence, 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.

Lin-02-224-51549

Page 4

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.