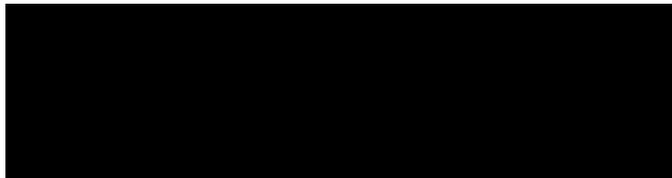


B10



U.S. Citizenship  
and Immigration  
Services



FILE: EAC 02 119 53395 Office: VERMONT 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:



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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 16, 2001. The beneficiary's salary as stated on the labor certification is \$17.00 per hour for a forty-hour workweek, which equates to \$35,360.00 per annum.

With its initial petition, counsel for the petitioner provided a profit and loss statement dated June 30, 2000 and experience verification letters from former employers of the beneficiary. The director found that the financial documentation in the record was insufficient to establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition. On November 5, 2002, the director issued a request for additional evidence, specifically requesting regulatory-sanctioned evidence such as complete tax returns with all schedules and attachments.

In response to the director's request, counsel submitted copies of the petitioner's federal tax returns for the years 2000 and 2001, which were accompanied by a statement by counsel regarding the petitioner's current financial status. The director found this additional evidence to be deficient, and consequently denied the petition on April 10, 2003.

On May 1, 2003, the petitioner's counsel filed an appeal which was accompanied by supporting documentation. Counsel alleges, in pertinent part, that the petitioner's ability to pay was established, and that the director erred in failing to consider the compensation paid to officers of the petitioning corporation. Specifically, counsel alleges that since most of this compensation was paid to the petitioner's owner and sole shareholder, it should be

collectively considered in conjunction with the petitioner's overall financial status. The AAO will review this evidence and the evidence contained in the record in determining whether the director's findings were proper.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) 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. Texas 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).

A review of the record before adjudication of the petition shows that counsel submitted copies of the petitioner's 2000 and 2001 federal tax returns, a profit and loss statement dated June 30, 2000, and a statement by counsel regarding the petitioner's financial status. The tax returns show that the petitioner is a corporation and that it had net losses of \$46,796.00 for 2000 and net losses of \$67,131.00 for 2001. An examination of the accompanying Schedule L for these returns shows that the petitioner had net current liabilities of \$40,295.00 for 2000 and net current liabilities of \$97,595.00 for 2001. Since these returns clearly demonstrate that the petitioner had no income or net current assets during the relevant period, the director correctly determined that the petitioner had not demonstrated its ability to pay the proffered wage.

Additionally, the director correctly did not consider the profit and loss statement provided by counsel with the initial petition. The profit and loss statement was an unaudited statement. Unaudited statements are of little evidentiary value because they are based solely on the representations of management. See 8 C.F.R. § 204.5(g)(2). This regulation neither states nor implies that an *unaudited* document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. Therefore, the director's decision to exclude this document was appropriate.

Finally, counsel submitted a statement providing an overview of the beneficiary's financial status. This statement is not persuasive, because 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). Since the record contained no additional evidence that established the ability of the petitioner to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence, the director's decision was proper.

On appeal, counsel alleges that the personal income of the petitioning entity's owner and sole shareholder should be considered in determining the petitioner's ability to pay the proffered wage. Counsel submits copies of the owner's personal tax return and W-2 form for 2001 in support of this contention. Counsel's position is that since the petitioner's owner is its sole shareholder, the owner's income should be considered in the petitioner's financial analysis. The AAO rejects this argument. Counsel cannot rely on the revenue of an individual shareholder as a means of establishing the petitioning corporation's ability to pay, for this position clearly contradicts the established legal practices and treatment of business organizations.

Specifically, the AAO may not "pierce the corporate veil" and look to the assets of a corporation's owner and sole shareholder to satisfy a 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). In this matter, therefore, the assets of the petitioner's owner and sole shareholder cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.<sup>1</sup>

After a review of the record, 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 thereafter.

Beyond the decision of the director, the AAO notes that the experience verification letters submitted with the petition are unacceptable. The labor certification requires that the beneficiary possess two years of relevant work experience. In an attempt to show that the beneficiary meets these requirements, the petitioner submitted two letters from the beneficiary's former employers. First, the petitioner submitted a letter from On Time Labor, which states that the beneficiary worked with this company as an individual subcontractor. It does not, however, provide the dates during which the beneficiary worked with this company, nor does it provide his position title or a description of the duties he performed. Experience verification letters must describe what the beneficiary was doing at his past employment and must state specifically the time period the beneficiary worked for the employer. See 8 C.F.R. § 204.5(l)(3)(ii)(A). This letter has not complied with the regulatory requirement.

Additionally, the petitioner provided a certification from Sawmill San Jose with an English translation. This document states that the beneficiary allegedly worked as a carpenter for this company during 1994, 1995, and 1996. The specific dates on which he began and ended his employment, however, are not provided. In addition, this employer is not listed as a previous employer on the labor certification. Finally, the certification, although translated, does not contain a certification from the translator, and therefore does not comply with the regulatory requirements of 8 C.F.R. § 103.2(b)(3), which states that:

Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation *which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.*

(Emphasis added).

No such certification from the translator of the Sawmill San Jose certification was submitted. Therefore, this document also fails to meet the regulatory requirements.

The record does not contain sufficient evidence that establishes that the beneficiary is qualified for the proffered position. If the petitioner chooses to further pursue this matter, it must submit acceptable documentation regarding the beneficiary's prior experience in accordance with the regulatory requirements.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035,

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<sup>1</sup> If, however, the petitioner was a sole proprietorship, the office could consider the sole proprietor's income, including officer's salaries received and personal assets. In this case, however, the petitioner is a *corporation*, so the personal assets of the owner and sole shareholder are excluded from analysis in this matter.

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1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.