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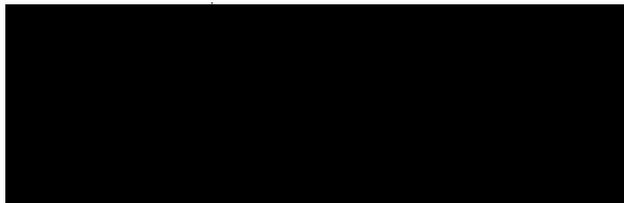
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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 26 2004

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

PETITION: 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: SELF-REPRESENTED

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.

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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 machine shop. It seeks to employ the beneficiary permanently in the United States as a programmer/operator. 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.

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 turns, in part, 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 November 9, 1998. The beneficiary's salary as stated on the labor certification is \$23.59 per hour or \$49,067.20 per year.

Counsel initially submitted insufficient evidence of the beneficiary's experience and of the petitioner's ability to pay the proffered wage. The evidence submitted with the I-140 petition consisted of a copies of the following documents: the petitioner's family registry; an earnings statement for the beneficiary from the petitioner dated August 2, 1997; a business license of the petitioner dated February 13, 2002; federal tax summaries for the petitioner dated January 20, 2001 and January 19, 2002; the petitioner's Form 1120S U.S. income tax return for an S corporation for 2001; and the petitioner's California Form 100S franchise or income tax return for 2001.

In a request for evidence (RFE) dated October 9, 2002 the director requested additional evidence to establish that the beneficiary had the required experience as of the priority date. The director also requested 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 petitioner responded to the RFE with additional evidence consisting of an undated letter from a former employer of the beneficiary confirming the beneficiary's experience from 1991 to 1995; a pay stub dated May 1, 1993 for the beneficiary from the beneficiary's former employer; the petitioner's Form 1120 U.S. income tax returns for an S corporation for the years 1998, 1999, 2000 and 2001; the petitioner's Form W-2 summary wage and tax statements for 2000 and 2001; quarterly state reports of wages paid to each employee by the petitioner for the quarters ending December 31, 2001, March 31, 2002, and September 30, 2002; and quarterly taxable wage tables of the petitioner's employees for the quarters ending December 31, 2001, March 31, 2002, June 30, 2002 and September 30, 2002.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the present. In a decision dated January 21, 2003 the director denied the petition.

The petitioner submitted an I-290B notice of appeal which was date stamped by the California Service Center as received on February 25, 2003. With the notice of appeal the petitioner submitted a brief in the form of a letter dated February 17, 2003 from the president of the petitioner and additional copies of quarterly state reports and quarterly taxable wage tables which had been submitted previously.

The director determined that the appeal was untimely; however, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2), the director treated the appeal as a motion to reopen or to reconsider. The director then issued another decision dated March 10, 2003 again finding that the petitioner had failed to establish its ability to pay the proffered wage from the priority date until the present.

The petitioner submitted a second Form I-290B notice of appeal, which was received by the California Service Center on April 9, 2003. This appeal is now before the AAO. With the notice of appeal the petitioner submits a brief in the form of a letter dated April 8, 2003 from the petitioner's president and also submits additional evidence. The petitioner's additional evidence consists of a copy of a post office receipt dated February 20, 2003 and copies of Form I-797C notices dated October 16, 2002 acknowledging receipt of I-485 applications for adjustment of status submitted by the petitioner and his family members.

The petitioner states on appeal that the first notice of appeal was mailed on February 20, 2004 and was delivered by the post office on "April 22, 2003." The latter date is an apparent typographical error in the petitioner's brief, since the context indicates that petitioner intended to assert a delivery date by the post office of February 22, 2003. The petitioner further states that the instructions pertaining to the notice of appeal allowed the notice of appeal, if sent by mail, to reach the director's office by February 24, 2003. The petitioner asserts that it has demonstrated the ability to pay the proffered wage. The petitioner also requests that if the petition is not approved fees paid by the beneficiary for concurrent filings of adjustment of status applications by the beneficiary and his family be returned to the petitioner and to the beneficiary, in a total amount of \$3,555.00.

The petitioner's contention on appeal that its first submission should be treated as an appeal and not a motion and that certain fees should be returned if the petition is approved are issues which are not germane to the current proceeding. The issue on appeal here is whether the petitioner had demonstrated the continuing ability to pay the proffered wage.

In his March 10, 2003 decision the director noted that in the letter dated February 17, 2003 from the president of the petitioner the president had stated that he was the owner of the petitioner and that his own personal financial resources should be considered in evaluating the ability of the petitioner to pay the proffered wage. The director correctly rejected this assertion. Citizenship and Immigration Services (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.

The director also rejected an assertion by the president that the petitioner's depreciation expenses should be considered when evaluating the petitioner's ability to pay the proffered wage. The director was also correct on this issue. In determining the petitioner's ability to pay the proffered wage, 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. 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. supra*, at 1084, 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. 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, supra.*, at 1054.

The director found that the petitioner's tax returns showed the following amounts for ordinary income: \$16,031 for 1998, \$18,199 for 2000 and \$43,583 for 2001. The director also found that the petitioner's total assets for the end of the year 1998 were reported as \$0, for the end of the year 2000 the net current liabilities exceeded the net current assets and for the end of the year 2001 the net current liabilities were \$82,710. The director found that the tax returns for 1998, 2000, and 2001 failed to establish the ability of the petitioner to pay the proffered wage of \$49,067 in those years. The director's analysis was correct.

The director did not discuss the petitioner's tax return for 1999. That return shows ordinary income of \$113,747, an amount which would be sufficient to pay the proffered wage.

Although the petitioner's evidence establishes the ability of the petitioner to pay the proffered wage in 1999, the evidence fails to establish the ability of the petitioner to pay the proffered wage in the years 1998, 2000 and 2001. The director was therefore correct in his conclusion that the petitioner had failed to establish its ability to pay the proffered wage as of the priority date and continuing to the present.

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.