



U.S. Citizenship
and Immigration
Services



FILE: EAC-02-085-52524 Office: VERMONT SERVICE CENTER Date:

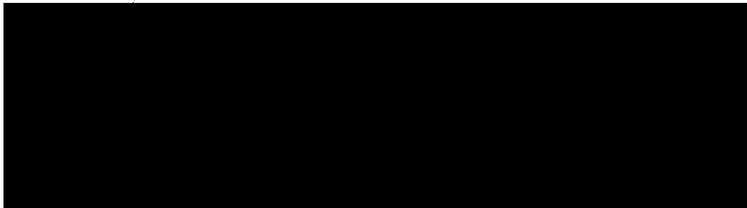
APR 26 2004

IN RE: Petitioner:
Beneficiary:



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:



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**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 an antique and imported furniture and home decoration firm. It seeks to employ the beneficiary permanently in the United States as a store 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.

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 February 26, 2001. The beneficiary's salary as stated on the labor certification is \$9.75 per hour or \$20,280.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The evidence on that issue consisted of copies of the petitioner's Form 1120S U.S. income tax return for an S corporation for 2000; bank statements dated February 28, 2001 and November 30, 2001 from the Sun Trust Bank for an account in the name of the petitioner's owner, trading as the petitioner; bank statements dated February 5, 2001 and November 7, 2001 from the Sun Trust Bank for a joint account for the owner and another person with the same last name; and a letter dated December 11, 2001 from the Sun Trust Bank summarizing the balances over a one-year period for the two accounts just mentioned.

In a request for evidence (RFE) dated March 13, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present.

Counsel responded with a letter dated June 3, 2002 accompanied by additional evidence consisting of copies of a letter dated May 21, 2002 from the petitioner; minutes dated November 6, 1995 of the corporate organizational meeting of the petitioner; a letter dated May 21, 2002 from the Southern Financial Bank; a certificate of deposit statement dated March 31, 2002 from the Southern Financial Bank; and an IRS Form 7004 Application for Automatic Extension of Time to File Corporation Income Tax Return for the petitioner for 2000.

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 denied the petition.

On appeal, counsel submits a brief and no additional evidence.

Counsel states on appeal that the petitioner is an S corporation wholly owned by one person and that the owner has sufficient assets which he has committed to use to pay the proffered wage should that be necessary.

In his decision the director found that the petitioner's most current tax return available was the return for the year 2000. The director found that that return showed a loss of -\$52,799.00, with depreciation of \$2,497. The director found that the Schedule L balance sheet showed current assets of \$30,906.00 and current liabilities of \$173,742.00. The director found that those figures failed to show the ability of the petitioner to pay the proffered wage. The director rejected suggestions by counsel that figures for compensation of officers or for rent be considered as alternate sources of the funds needed to pay the proffered wage. The director also rejected counsel's assertion that a certificate of deposit of the owner valued at \$93,863.92 be considered as a further alternate source of the funds needed to pay the proffered wage, on the grounds that personal assets of the owner may not be considered when evaluating the resources of a corporate petitioner.

The director erred in considering depreciation as part of his analysis of the petitioner's income. 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.

Although the director's use of the depreciation figure was an incorrect approach, the director's figure for the petitioner's ordinary income was correct. The figure of -\$52,799 appears on Line 21 of the petitioner's tax return for 2000, for ordinary income or loss.

The director stated \$30,906 as the petitioner's current assets shown on the petitioner's Schedule L for 2000, but that figure was incorrect. The director apparently failed to include the amount of \$10,779 of "other current assets" shown on line 6 of the Schedule L. Therefore the correct figure for the petitioner's current assets for the end of the year 2000 is \$41,685. The director stated \$173,742 as the petitioner's current liabilities on the Schedule L for 2000. The director correctly calculated that figure.

A calculation based on the current assets and current liabilities of the petitioner yields a figure for net current assets of -\$132,057 for the end of 2000. Despite the director's error in calculating the petitioner's current assets, the director was correct in his conclusion that the petitioner's current assets and current liabilities were insufficient to establish its ability to pay the proffered wage.

Counsel asserts that the personal financial resources of the owner of the petitioner should be taken into account when evaluating the petitioner's ability to pay the proffered wage. The owner is the sole shareholder of the petitioner and the resources cited by counsel are in the name of the owner as an individual, not in the name of the corporate petitioner. This is true not only of the certificate of deposit referenced by counsel, but also of the business checking account for the petitioner, which is in the individual name of the owner, trading as the petitioner. The owner has chosen to keep those assets in his own name, not in the name of the corporate petitioner.

Contrary to counsel's assertion, 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.

Moreover, even if some justification existed to consider the owner's personal assets, it would also be necessary to consider the owner's personal liabilities as well as the monthly personal expenses of the owner and his household in order to evaluate whether the owner's personal resources were sufficient to establish the petitioner's ability to pay the proffered wage. No evidence on the owner's personal liabilities and personal expenses is in the record.

For the reasons discussed above, the decision of the director that the petitioner had failed to establish its ability to pay the proffered wage at the time of filing was correct.

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.