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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: WAC-02-128-50101 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: N/A

**PUBLIC COPY**

INSTRUCTIONS:

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

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.

*[Handwritten signature]*  
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 an individual. He seeks to employ the beneficiary permanently in the United States as a domestic cook. 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:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

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 January 13, 1998. The beneficiary's salary as stated on the labor certification is \$13.50 per hour or \$28,080.00 per year.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The petitioner's documentation also included a G-28 signed by an immigration law consultant. That consultant, however, did not claim to be an attorney licensed in the United States, nor did he claim any other basis for serving as a representative as permitted by 8 C.F.R. § 292.1.

In a request for evidence (RFE) dated April 30, 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 required evidence from the year 1998 to the present. The RFE acknowledged receipt of tax returns for the petitioner for the year 2000.

The petitioner responded with a cover letter dated May 28, 2002 from the above-mentioned immigration law consultant accompanied by additional evidence.

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 beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits a brief and additional evidence. The immigration consultant also submits a second G-28 on appeal, which like the earlier G-28, fails to state any acceptable basis for serving as a

representative under the requirements of 8 C.F.R. § 292.1. The G-28s are therefore insufficient to establish that the immigration consultant is the representative of record in this case. The I-290B Notice of Appeal and the accompanying brief were each signed by the petitioner. The petitioner is therefore found to be appealing on his own behalf, with no representative of record.

The petitioner states on appeal that he is the sole owner of two businesses, each separately incorporated. The petitioner states that the beneficiary's services as a domestic cook are needed primarily because of frequent business visitors to the petitioner's home and states that the wages of the beneficiary will be paid by one or both of the businesses.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the decision of the director. The evidence submitted for the first time on appeal will then be considered.

The Form 1040 U.S. individual tax returns for the petitioner and his wife show the following amounts on line 33 for adjusted gross income: \$34,063 for 1998, \$24,298 for 1999, \$11,324 for 2000 and \$98,655 for 2001. In his decision, the director erroneously based his analysis on the figures which appear on each return on line 22 for total income, which the director labeled as "net income." On the returns for 1999, 2000 and 2001 the figures on line 22 and on line 33 were the same, but on the return for 1998 the figure for total income on line 22 is \$34,448, while the figure for adjusted gross income on line 33 is \$34,063. This error in analysis by the director did not significantly affect the director's conclusion.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.

The director found that the petitioner's net income in each of the years 1998, 1999, and 2000 was insufficient to pay the proffered wage of \$28,080.00 per year. When evaluating individual tax returns, the CIS considers the adjusted gross income figure as the petitioner's net income for purposes of evaluating the petitioner's ability to pay the proffered wage. In the instant case, the adjusted gross income in two of the years cited by the director, 1999 and 2000, was lower than the proffered wage of \$28,080.00. In the other year cited by the director, 1998, the adjusted gross income was higher than the proffered wage, but the amount remaining to the petitioner after paying the proffered wage would have been only \$5,983. That amount is not a reasonable amount to pay the expenses of the petitioner's household, which, according to the Form 1040 for 1998, consisted of four persons. The director therefore was correct in his conclusion that the petitioner's tax returns failed to establish the ability of the petitioner to pay the proffered wage.

On appeal the petitioner submits additional evidence, consisting of a copy of a corporation transcript from the California Secretary of State dated July 5, 1990 for Cambridge Associates, Inc.; a copy of a corporation transcript from the California Secretary of State dated December 7, 1999 for Merlin-Altec Mold Making, Inc.; copies of Form 1120S U.S. corporate income tax returns for an S corporation, with attached California Form 100S corporate income tax returns, for the corporation Cambridge Associates, Inc. for the years 1998, 1999, 2000, and 2001; and copies of Form 1120 U.S. corporate income tax returns, with attached California Form 100 corporate

income tax returns, for a corporation with the name Alltec Molds Merlin Alltec for the years 1997, 1998 and 1999 and with the name Merlin-Alltec Mold Making, Inc. for the year 2000.

The corporation transcript for Cambridge Associates, Inc. shows the petitioner as the only director of the corporation, and also shows a corporate name change from "Tilleke Plastics Incorporated" to "Cambridge Associates, Incorporated" dated March 28, 1990.

The corporation transcript for Merlin-Alltec Mold Making, Inc. shows the petitioner as the only director of the corporation, and also shows a corporate name change from "Alltec Molds" to "Merlin-Alltec Mold Making, Inc." dated November 16, 1999.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this by the regulation at 8 C.F.R. § 204.5(g)(2), which is quoted on page two above.

In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the Administrative Appeals Office and its predecessor agencies.

Moreover, in the instant case, the petitioner was put on notice by the director in the RFE dated April 30, 2002 that the evidence which it submitted with its I-140 petition was insufficient concerning the petitioner's ability to pay the proffered wage. The RFE mentioned that evidence on the years 1998 through the present was required.

The petitioner therefore was given reasonable notice by regulation, by case law, and by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted for the first time on appeal will not be considered for any purpose.

Moreover, even if the evidence submitted on appeal were properly before the AAO, it would not be sufficient to overcome the decision of the director. The petitioner's brief says that the beneficiary's salary will be paid with funds from one or both of the businesses owned by the petitioner. No documentation is offered which would give any legal effect to this assertion. According to the petitioner's brief, both businesses are wholly owned by the petitioner. Nonetheless, each business is separately incorporated. No evidence in the record makes either corporation liable to pay the wages of the beneficiary, who is being offered a position as domestic cook to be employed by the petitioner in the petitioner's private household. 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).

Furthermore, even if the resources of the corporations were considered, the petitioner has failed to provide any statement of the monthly expenses of the petitioner and his household. Such expenses would have to be deducted

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from any income or assets available to the petitioner to determine whether the petitioner had sufficient remaining resources to pay the proffered wage to the beneficiary.

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.