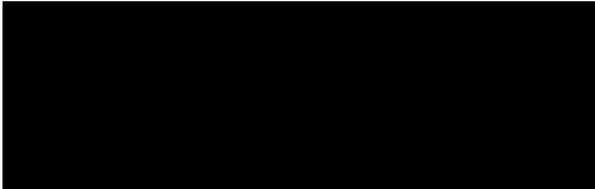


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: WAC 02 127 50155 Office: CALIFORNIA SERVICE CENTER Date: APR 27 2004

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

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

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 employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner manufactures and sells window and door screens. It seeks to employ the beneficiary as a first line supervisor of non-retail workers. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present. The director also determined that the beneficiary did not meet the educational requirements of the labor certification.

On appeal, counsel provides a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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. Section 203(b)(3)(A)(ii) provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

For a petition to be approvable, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In this case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of first line supervisor of non-retail workers as a "bachelor degree", no major field of study listed, and two years employment experience in the job offered.

As proof of the beneficiary's education qualifications, the petitioner submitted a copy of the beneficiary's diploma showing that the beneficiary's degree is a three-year foreign degree. The director determined that the diploma was insufficient to show that the beneficiary's foreign degree was equivalent to a U.S. bachelor degree, and on July 1, 2002, the director requested additional evidence in the form of an official college or university transcript.

In response, counsel submitted a copy of an abstract from the official registry of the college where the beneficiary received her degree. The director determined that the additional documentation was insufficient to establish that the beneficiary's degree is the equivalent to a U.S. bachelor degree, and on December 4, 2002, he denied the petition.

On appeal, counsel submits an evaluation, dated December 31, 2002, of the beneficiary's degree by International Educational Equivalency Evaluation Services.

The evaluation states:

U.S. Educational Equivalent:

Bachelor of Science degree in Business Administration with a major concentration in International Business awarded by a regionally-accredited college or university.

Comments:

This qualification represents completion of an intensive program of 2,700 hours of classroom instruction in general education studies, accounting, economics, finance, marketing, business law, and administration and management studies delivered over six semesters. It exceeds by approximately 50% the quantity of classroom instruction (1,800) in a baccalaureate degree program in business administration at an accredited postsecondary academic institution in the United States.

It is noted that *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides:

[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight.

The director denied the petition, concluding that the beneficiary's educational credentials are not an acceptable equivalency for a United States baccalaureate degree. The AAO concurs. The approved labor certification states that the proffered position requires a bachelor's degree.

A U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Here, the record reflects that the beneficiary's formal education consists of less than a four-year curriculum.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a skilled worker, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree.

Based on the evidence submitted, we concur with the director that the petitioner has not established that the beneficiary possesses a United States bachelor's degree or an equivalent foreign degree as required by the terms of the labor certification which specifically states that the bachelor degree be a four-year degree.

The second issue in the denial regards the ability of the petitioner to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 in the form of copies of annual reports, federal tax returns, or audited

financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted on April 30, 2001. The proffered salary as stated on the labor certification is \$35.11 per 45 hour week, which equals \$82,157.40 per year.

With the petition, counsel submitted copies of the petitioner's 1999 and 2000 Form 1120, U.S. Corporation Income Tax Return, copies of the petitioner's quarterly and federal wage and withholding reports, copies of the petitioner's business checking account statements, copies of sample invoices, copies of telephone bills, and copies of business advertisements. This documentation was considered insufficient by the Service Center, and, on July 1, 2002, the Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage in the form of the petitioner's 2001 corporate tax return.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, and personal financial documentation for the petitioner's owner. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of \$2,527 and net current assets of -\$35,381.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on December 4, 2002, denied the petition.

On appeal, counsel submits copies of the petitioning owner's 2000 and 2001 Form 1040 U.S. Individual Income Tax Return. Counsel states:

Mr. [REDACTED] shall use his personal assets if it is necessary to support his business.

Mr. [REDACTED] wishes to hire an experienced sales supervisor who will coordinate the every day operation of the company, and will keep business expenses at minimal. It is necessary for achieving his goal of raising the net income of the company. The gross income has been in the \$6-800,000 range for the last couple of years. Mr. [REDACTED] has been performing both sales supervisor and marketing director duties now. To achieve his financial goals for the business, he would like to hire an experienced sales supervisor to keep the expenses down. Than [sic] he can focus and be able to spend more time on marketing the products.

For the above reasons, Mr. [REDACTED] is willing to and he has to use his personal assets to keep his business in good financial health. It is essential for the business now to have an experienced sales supervisor assisting Mr. [REDACTED]

Mr. [REDACTED] has securities with a cash value of over \$150,000. He is offering these securities for paying the wages to a sales supervisor.

Contrary to counsel's assertion, Citizenship and Immigration Services (CIS) will 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.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at the priority date and continuing to the present.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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.*, 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net 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.*, 632 F. Supp. at 1054.

CIS may also review the petitioner's net current assets as another means of determining the petitioner's ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of \$2,527 and net current assets of -\$35,381. The petitioner could not pay the proffered wage in 2001 from either its taxable income of \$2,527 or its net current assets of -\$35,381.

¹ A petitioner's "current assets" consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner's balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner's "current liabilities" are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner's accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.

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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 sustained that burden.

ORDER: The appeal is dismissed.