

BY



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted]

Office: NEBRASKA SERVICE CENTER

Date: **APR 27 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:

[Redacted]

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a precision machine shop. It seeks to employ the beneficiary permanently in the United States as a numerical control machine set-up & operator of Heidenhain Control TNC-145. 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 January 13, 1998. The beneficiary's salary as stated on the labor certification is \$15.00 per hour or \$31,200 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The evidence relevant to that issue consisted of a letter dated May 25, 2001 from an accountant, an unaudited financial statement for the year 2000 of one of the owners of the petitioner, and copies of the petitioner's Form 1120S, U.S. income tax return for an S corporation for the years 1998 and 1999. In a request for evidence (RFE) dated October 25, 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. The RFE specifically requested the petitioner's complete tax return for the year 2000.

Counsel responded to the RFE with a letter dated January 2, 2002 and with a copy of the petitioner's tax return for the year 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 continuing to the present, and denied the petition.

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

Counsel states on appeal that since the petitioner is an S corporation, which is not a taxable entity, the assets of both the petitioner and the assets of the petitioner's owner should be taken into account when evaluating the petitioner's ability to pay the proffered wage.

In his decision the director found that the tax returns of the petitioner showed ordinary income of -\$8,737 with depreciation of \$1,554 in 1998, income of \$65,918 with depreciation of \$5,828 for 1999, and income of -\$39,862 with depreciation of \$9,127 for 2000. The director found that only in 1999 did the petitioner have sufficient income to pay the proffered wage. The director said that he had not taken into account the personal funds of the owner of the petitioner since the only evidence of those funds was a financial statement submitted by the owner himself.

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 should not have taken depreciation into account, the director's references to the petitioner's net income figures were accurate. The figures cited by the director appear on Line 21 of the returns, showing ordinary income for each of the years in question.

The director did not consider the financial statement submitted by one of the owners of the petitioner. The director referred to this document as a listing submitted by "the owner," in the singular. The director apparently failed to note that the Schedule K-1's attached to the petitioner's tax returns show two owners, a male and a female, both with the same last name and the same address. Although the two owners perhaps are husband and wife, the evidence does not specify their relationship. The financial statement was submitted only by the male, who is listed on the Schedule K-1's as holding a 49% share of the petitioner. The female is listed on the Schedule K-1's as holding a 51% share of the petitioner.

Counsel's brief also refers to the male owner as "the owner" in the singular, omitting any reference to the female owner, who according to the Schedule K-1's, is the majority owner of the petitioner. Counsel asserts that the petitioner and "the owner" should be treated as a single entity when evaluating the petitioner's ability to pay the proffered wage.

Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner or owners 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 was therefore correct in not relying on the financial statement submitted by the male owner of the petitioner.

The director did not refer to the letter from an accountant submitted in evidence. The director was correct in not relying on that letter, since the letter contains no audited or unaudited financial analysis of the petitioner. The

accountant's letter merely states that for the petitioner and for all small businesses "it is a customary practice for an owner/shareholder to invest personal capital into their business during slow or down periods." The accountant's letter therefore fails to provide any probative evidence addressing the ability of the petitioner to pay the proffered wage during the specific years at issue.

In the director's analysis of the petitioner's tax returns the director considered only the income and depreciation figures, as discussed above. The director failed to consider any figures on those returns pertaining to the petitioner's assets and liabilities.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

In the instant case, the petitioner's assets and liabilities are shown on the Schedule L's attached to the returns for the years 1998 and 2000. The petitioner did not submit a copy of its Schedule L for 1999. However, the figures for the beginning of the year on the Schedule L for 2000 may be assumed to be equal to those for the end of the year 1999 and are therefore used in the calculation of the net current assets for the end of the year 1999 in the calculations below.

Calculations based on the current assets and current liabilities shown on the Schedule L's for 1998 and 2000 for the petitioner yield the following figures for net current assets: \$89,730 for the beginning of 1998, \$114,541 for the end of 1998, \$237,205 for the end of 1999, and \$162,678 for the end of 2000.

The foregoing figures show that as of the January 13, 1998 priority date and continuing through the most current year for which tax returns were available, the year 2000, the petitioner always had net current assets more than sufficient to pay the proffered wage of \$31,200 per year. The petitioner therefore has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. The director did not address this issue in his decision, presumably finding that the evidence was sufficient to establish the beneficiary's qualifications.

A letter in the file dated November 19, 1997 from the Tire Rotation Company Wolbrom, Inc. of Wolbrom, Poland states that the applicant worked for that company from June 2, 1992 until August 4, 1995 as a molding machine operator and setter for TNC Heidenhain 145 numerically controlled units. That letter is sufficient evidence that the beneficiary possessed the required two years of experience in the job offered as of the January 13, 1998 priority date.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.