

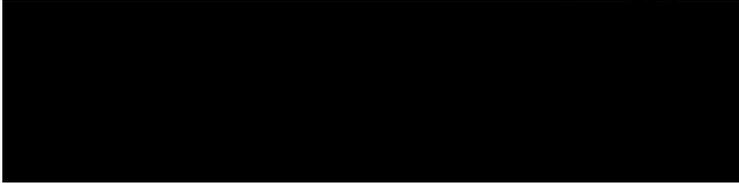
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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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Bob

APR 28 2004

FILE: WAC 01 272 57827 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



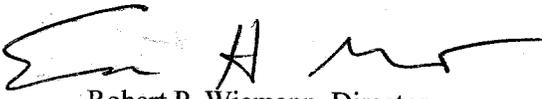
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, California Service Center, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted. The previous decision of the AAO will be affirmed. The petition will be denied.

The petitioner is an accounting company. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director and the AAO denied the visa petition because the petitioner failed to establish that it had the ability to pay the proffered wage at the time the priority date was established and continuing until the beneficiary obtains lawful permanent residence. Counsel submits a motion to reopen that is accompanied by additional documentary evidence submitted for the first time into the record of proceeding. Thus, the motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

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.

With the petition, counsel provided a copy of the petitioner's federal tax return for the 1999 fiscal year.¹ In response to a request for additional evidence by the director specifically requesting regulatory-sanctioned evidence such as complete tax returns with all schedules and attachments, counsel for the petitioner submitted copies of the petitioner federal tax returns for 1997, 1998, and 2000 fiscal years.² The director determined that the evidence submitted did not establish the petitioner's ability to pay the proffered wage, and denied the petition on March 29, 2002. On appeal, the AAO upheld the director's findings, noting that the evidence in the record was insufficient to establish that the petitioner had the ability to pay the proffered wage. With the motion to reopen, counsel submits personal tax returns that appear to be for an owner or shareholder of the petitioner.³

¹ Counsel also submitted a letter from the Iran Tourism & Tourist Organization, verifying the beneficiary's work experience. Since the director did not base his decision to deny the petition upon the beneficiary's qualifications, the issue will not be discussed within the scope of this decision.

² The AAO notes that the petitioner's tax returns are filed for the fiscal year beginning on October 1 and ending on September 30.

³ The motion to reopen, as indicated by counsel in the opening paragraph, is filed on behalf of the *beneficiary*. The regulations preclude the beneficiary as a party to the proceeding or as one entitled to representation. *See* 8 C.F.R. § 103.2(a)(3). Since it is evident that the petitioner executed the form G-28 on February 11, 2003 appointing counsel to act on

Eligibility in this matter hinges 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. Here, the petition's priority date is November 14, 1997. The beneficiary's salary as stated on the labor certification is \$30,077.00 per annum.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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. Texas 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).

The record contains copies of the petitioner's tax returns for the fiscal years 1997, 1998, 1999, and 2000. The petitioner's net income for these years is as follows:

<u>Year</u>	<u>Net Income</u>
1997	-\$16,341.00
1998	\$ 6,107.00
1999	\$ 3,706.00
2000	\$19,901.00

Since the proffered wage in this case was \$30,077.00 per annum, the director's determination that the petitioner did not have the ability to pay the proffered wage based on its net income was correct.

The AAO notes, however, that the director did not consider the petitioner's net current assets in analyzing its ability to pay. As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities, and are found on Schedule L of the federal tax returns.⁴ 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.

In this case, the petitioner's net current assets for the relevant years were as follows:

<u>Year</u>	<u>Net Current Assets</u>
1997	\$11,779.00
1998	\$53,544.00

its behalf, the AAO will presume that counsel inadvertently substituted the beneficiary's name for the petitioner's name on the motion.

⁴ Current assets are determined by adding lines 1-6 on Schedule L, and current liabilities are determined by adding lines 16-18.

1999	\$70,738.00
2000	\$ 411.00

It is evident from the above totals that the petitioner did in fact have the ability to pay the proffered wage during the fiscal years 1998 and 1999. However, the priority date in this case is November 14, 1997. Since the petitioner's net current assets for the fiscal year 1997 were only \$11,779.00, or \$18,298.00 less than the proffered wage, the petitioner has not established that it had the ability to pay the proffered wage at the time the priority date was established. Similarly, the petitioner's net assets for the fiscal year 2000 are \$411.00, or \$29,666.00 less than the proffered wage. Although the petitioner had sufficient funds to pay the proffered wage in the fiscal years 1998 and 1999, it has failed to meet the regulatory requirements of 8 C.F.R. § 204.5(g)(2) since it did not have the ability to pay the proffered wage at the priority date and thereafter.

On appeal, counsel for the petitioner asserted that (1) the federal cases cited by the director in support of his decision were not binding on the petitioner, since the petitioner is a California corporation; and (2) the employment of the beneficiary by the petitioner would increase the petitioner's business. These arguments were found to be unpersuasive by the AAO, since counsel failed to provide any evidence in support of these statements. Specifically, the assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On motion, counsel includes newly submitted federal tax returns, which appear to be the personal returns of the petitioner's owner(s) and/or shareholder(s).⁵ Counsel has submitted these personal joint returns for 1997, 1998, 1999, 2000 and 2001, which demonstrate net income as follows:

<u>Year</u>	<u>Net Income</u>
1997	\$ 93,009.00
1998	\$ 87,624.00
1999	\$125,194.00
2000	\$ 78,792.00
2001	\$ 79,322.00

Although the net income set forth on these returns is substantial, these figures cannot be considered in establishing the petitioner's ability to pay the proffered wage. The petitioner is a corporation. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owners or shareholders 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 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.

⁵ In his brief, counsel fails to explain the relationship between the taxpayers named on the return and the petitioning entity.

ORDER: The motion to reopen is granted. The AAO's decision of January 14, 2003 is affirmed. The petition is denied.