

PUBLIC COPY identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



**U.S. Citizenship
and Immigration
Services**

FILE: [Redacted] **Office:** TEXAS SERVICE CENTER **Date:** JUL 21 2004
SRC-03-011-54009

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

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:
[Redacted]

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
for Administrative Appeals Office

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

The petitioner is an marine repair shop. It seeks to employ the beneficiary permanently in the United States as a machinist supervisor. 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. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief.

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 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 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. 8 C.F.R. § 204.5(g)(2). The petition's priority date in this instance is August 25, 1997. The beneficiary's salary as stated on the labor certification is \$14.70 per hour or \$30,576.00 per year.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated February 3, 2003, 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 specified the petitioner's 1997 through 2002 federal income tax returns and evidence of wage payments to the beneficiary, if any.

In response to the RFE, counsel submitted a letter in which he stated that the petitioner's gross income for the years 1997 through 2001 was more than sufficient to pay the proffered wage. Counsel further stated that the petitioner grossed \$165,209.75 with net income of \$28,703.63 during 2002. In addition to the tax returns discussed below, counsel submitted a 2002 profit and loss statement, bank statements from January 1, 2003 through March 1, 2003, and the Forms 1040 U.S. Individual Income Tax Returns of Phillip Robinson, the petitioner's president, for the years 1997 through 2001.

The unaudited profit and loss statement is of little evidentiary value as it is based solely on the representations of management. The pertinent regulation specifies that when a petitioner relies on financial statements, those statements must be audited. See 8 C.F.R. § 204.5(g)(2), quoted above.

In 1997, the petitioner was organized as a partnership. The petitioner submitted its 1997 Form 1065 U.S. Partnership Return of Income reflecting gross receipts of \$145,377.00; gross profit of \$86,254.00; salaries and wages of \$0.00; and ordinary income of -\$17,539.00. Schedule L reflects current assets of \$8,860, current liabilities of \$7,575, and net current assets of \$1,285.

On January 1, 1998, [REDACTED] incorporated the petitioning entity. The petitioner submitted its 1998 through 2001 Form 1120S U.S. Income Tax Return for an S Corporation. The 1998 tax return reflected gross receipts of \$158,333.00; gross profits of \$104,284.00; compensation of officers of \$0.00; salaries and wages of \$0.00; and ordinary income of -\$15,097.00. Schedule L of the return reflected current assets of \$894.00; current liabilities of \$12,502; and net current assets of - \$11,608.00.

The 1999 tax return reflected gross receipts of \$170,391.00; gross profits of \$105,333.00; compensation of officers of \$0.00; salaries and wages of \$0.00; and ordinary income of -\$5,471.00. Schedule L of the return reflected current assets of \$0.00; current liabilities of \$5,955.00; and net current assets of - \$5,955.00.

The 2000 tax return reflected gross receipts of \$184,852.00; gross profits of \$92,174.00; compensation of officers of \$0.00; salaries and wages of \$0.00; and ordinary income of -\$453.00. Schedule L of the return reflected current assets of \$0.00; current liabilities of \$6,216.00; and net current assets of - \$6,216.00.

The 2001 tax return reflected gross receipts of \$166,199.00; gross profits of \$112,187.00; compensation of officers of \$0.00; salaries and wages of \$0.00; and ordinary income of \$17,568.00. Schedule L of the return reflected current assets of \$1,773.00; current liabilities of \$0.00; and net current assets of \$1,773.00.

Additionally, counsel submitted two letters of credit extended to Phillip Robinson, the petitioner's president, in the amounts of \$50,000.00 from The Fifth Third Bank and \$5,000.00 from Wyandotte Community Federal credit Union.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that the petitioner's gross earnings for the years 1997 through 2002 are more than sufficient to pay the proffered wage. Counsel further states that the petitioner's president has lines of credit available to pay the proffered wage and that in filing as an S Corporation, the petitioner's president may use personal funds to pay the proffered wage.

As stated above, [REDACTED] incorporated the petitioning entity on January 1, 1998. Contrary to counsel's primary assertion, Citizenship and Immigration Services (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 after that date. 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 during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record contains no evidence that the petitioner has been paying the beneficiary the proffered wage since the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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 court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The proffered wage is \$30,576.00. During 1997 through 2001 the petitioner's net current assets were \$1,285, -\$11,608.00, - \$5,955.00, - \$6,216.00, and \$1,773.00, respectively. The petitioner's ordinary income was -\$17,539, -\$15,097.00, -\$5,471.00, -\$4,153.00, and \$17,568.00 for 1997 through 2001, respectively.

After a review of the evidence it is concluded that the petitioner has not 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.

Beyond the decision of the director, we note that the record lacks an original Form ETA 750. In connection with a previous petition, the director requested the original document. In response, counsel asserted that it had been misplaced and requested that the director accept a letter from the Department of Labor. 8 C.F.R. §§ 204.5(a)(2), (1)(3)(i) require submission of a labor certification. 8 C.F.R. § 103.2(b) provides:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, *such as labor certifications*, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, *must be submitted in the original* unless previously filed with the Service.

(Emphasis added.) 8 C.F.R. § 204.5(g) provides:

In general, ordinary legible photocopies of such documents (*except for labor certifications from the Department of Labor*) will be acceptable for initial filing and approval.

(Emphasis added.) Counsel has not provided any authority permitting CIS to accept a photocopy of this document. We note that petitioning employers are permitted to substitute alien beneficiaries but that a labor certification for an immigrant worker is not valid for multiple beneficiaries. See generally *Matter of Harry Bailen Builders*, 19 I&N Dec. 412 (Comm. 1986). 20 C.F.R. § 656.30(e) provides for the issuance of duplicate labor certifications by the Department of Labor. The record contains no evidence that the petitioner has obtained an official duplicate labor certification.

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.