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

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536



File: EAC-02-156-53625 Office: Vermont Service Center

Date:

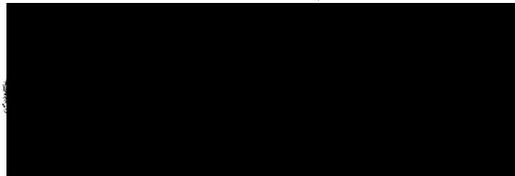
MAR 31 2004

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 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

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

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as travel agency manager. 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.

On appeal, the petitioner asserts that it has the ability to pay the proffered wage.

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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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. The petition's priority date in this instance is January 12, 1998. The beneficiary's salary as stated on the labor certification is \$38.07 per hour or \$79,180.56 per year.

With its initial petition, the petitioner submitted a letter from its president, [REDACTED] who stated that he was personally guaranteeing the beneficiary's salary from the date of filing to the "present." The president further indicated that the beneficiary had been employed by his company in H-1B nonimmigrant visa status since 1998.

The petitioner also submitted copies of the first page of Form 1120 U.S. Corporation Income Tax Return for the years 1998, 1999, and 2000; copies of the first page of Mr. [REDACTED] Form 1040 U.S. Individual Income Tax Return for the years 1998, 1999, and 2000; and, copies of the beneficiary's 1998, 1999, and 2000, Form W-2

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Wage and Tax Statement. The W-2's indicated that the beneficiary had worked for the petitioner from 1998 through 2000, and that he had earned \$28,535 during 1998, \$31,500 during 1999, and \$34,259.92 during 2000.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a Request for Evidence (RFE) dated November 7, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The director stated, in pertinent part, that:

As the petitioning entity is incorporated, only the assets and liabilities of the business may be considered in determining ability to pay the wage. The personal assets of a company official may not be considered, as there is no legal obligation to supply them in order to satisfy the expenses of the business.

In response, counsel submitted a letter taking issue with CIS's position, stating that [REDACTED] was sole owner of the petitioner; that counting depreciation, the petitioner has sufficient funds to pay the proffered wage; and that Mr. [REDACTED] had sufficient personal income during 1998, 1999, and 2000, to pay the proffered wage. Counsel submitted copies of Mr. [REDACTED] complete Form 1040 for the years 1998, 1999, 2000, and 2001 as well as his W-2's for those years.

Counsel submitted a letter from [REDACTED] who stated in pertinent part, that:

Petitioner also submitted a personal guarantee, which I executed on March 15, 2002, of the [sic] beneficiary's salary. Your notice attempts to minimize or ignore the guarantee. As shown by our attached attorney's letter, those attempts are unjustified. First, I am not just a company official, as you claim. I am the sole owner of the company, as mentioned above. It would defy common sense to assume that I would stand by and do nothing if my business had problems paying its obligations. Moreover, your statement that my guarantee is not legally binding is incorrect, as shown in our attached attorney's letter. Therefore, the evidence which was previously submitted, including legal decisions, shows that this petition should be approved.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director noted that the salary paid the beneficiary was below the proffered wage and that the petitioner had demonstrated that it had insufficient funds to pay the difference.

On appeal, the petitioner's current counsel submits a letter from [REDACTED] explaining the operation of his business as well as the duties of the position offered, and summarizing the financial status of the petitioner.

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On appeal, the petitioner's current counsel submits a letter from Kenro Matsuki explaining the operation of his business as well as the duties of the position offered, and summarizing the financial status of the petitioner.

Counsel submits copies of the petitioner's complete 1998 through 2001 Form 1120 U.S. Corporation Income Tax Return. The tax return for 1998 reflected gross receipts of \$7,243,127; gross profit of \$401,562; compensation of officers of \$40,008; salaries and wages paid of \$69,406; and a taxable income before net operating loss deduction and special deductions of \$23,537.

The tax return for 1999 reflected gross receipts of \$7,544,018; gross profit of \$357,221; compensation of officers of \$40,008; salaries and wages paid of \$69,844; and a taxable income before net operating loss deduction and special deductions of \$23,611.

The tax return for 2000 reflected gross receipts of \$7,018,911; gross profit of \$401,127; compensation of officers of \$45,000; salaries and wages paid of \$78,393; and a taxable income before net operating loss deduction and special deductions of \$10,455.

The tax return for 2001 reflected gross receipts of \$4,932,881; gross profit of \$366,626; compensation of officers of \$45,000; salaries and wages paid of \$102,048; and a taxable income before net operating loss deduction and special deductions of (-) \$8,720.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, not gross receipts, 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 both CIS and 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

With respect to personal accountability and the Form W-2's submitted on behalf of the petitioner's president, a corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980). Thus, the assets, income, and personal guarantees of Mr. Matsuki will not be considered with respect to the petitioner's ability to pay the proffered wage.

The record indicates that the beneficiary earned \$28,535 during 1998, \$31,500 during 1999, and \$34,259.92 during 2000. Therefore, the petitioner would have to pay \$50,645.56 in additional wages for 1998, \$47,680.56 in 1999, and \$44,930.64 in 2000. The record does not indicate any earnings for the beneficiary during 2001, so it is concluded the petitioner is obligated for the entire proffered wage of \$79,180.56 during 2001.

The petitioner's Form 1120 for calendar year 1998 shows an ordinary income of \$23,537. The petitioner could not pay a proffered salary of \$50,645.56 out of this income. The petitioner's tax returns for 1999 through 2001 continue to show an inability to pay the remaining wage for each year out of the petitioner's ordinary income.

The petitioner's 1999 through 2001 Form 1120 federal tax returns, Schedules L reflect net current assets of \$5,354; \$8,142, and - \$8,623, respectively. The petitioner could not pay the proffered wage, or remaining wage, from these current assets for any relevant year.

The petitioner must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage as of the priority date of the application for alien employment certification as required by 8 C.F.R. § 204.5(g)(2). Therefore, the petition may not be approved.

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.