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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-02-181-50579 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

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**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 florist. It seeks to employ the beneficiary permanently in the United States as a floral designer. 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 evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, the petitioner counsel argues that he the petitioner 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.

The 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 November 25, 1997. The beneficiary's salary as stated on the labor certification is \$31.21 per hour or \$64,916.80 per year.

With the initial petition, the petitioner submitted a copy of its 1997 NYC 4S General Corporation Income Tax Return claiming total capital of (-) \$39,706.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated September 12, 2002, 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 exacted the petitioner's federal income tax returns for the years 1997 through 2001, inclusive.

In response to the RFE, the petitioner submitted its 1998 Form 1120 U.S. Corporation Income Tax Return. The tax return reflected gross receipts of \$-282,816; gross profit of \$142,055; compensation of officers of \$20,800; salaries and wages paid of \$51,462; and a taxable income before net operating loss deduction and special deductions of  
(-) \$36,942.

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 submits a bank statement reflecting that, as of an unspecified date, the petitioner's account had \$27,914.00 balance; 1998 through 2001 Forms 1040 U.S. Individual Income Tax Returns for the petitioner's president, George Dimitri; and 1998 and 1999 Forms 1120 U.S. Corporation Income Tax Returns. The tax return for 1998, as previously stated, reflected gross receipts of \$282,816; gross profit of \$142,055; compensation of officers of \$20,800; salaries and wages paid of \$51,462; and a taxable income before net operating loss deduction and special deductions of (-) \$36,942. The tax return for 1999 reflected gross receipts of \$340,305; gross profit of \$120,937; compensation of officers of \$19,700; salaries and wages paid of \$24,720; and a taxable income before net operating loss deduction and special deductions of \$618.

Counsel also submits copies of the petitioner's 2000 and 2001 Forms 1120S U.S. Corporation Income Tax Returns. The tax return for 2000 reflected gross receipts of \$301,058; gross profit of \$137,340; compensation of officers of \$15,600; salaries and wages paid of \$28,870; and a taxable ordinary income of \$2,933. The tax return for 2001 reflected gross receipts of \$505,903; gross profit of \$194,720; compensation of officers of \$20,800; salaries and wages paid of \$68,302; and a taxable ordinary income of \$10,085.

Although the petitioner submitted a commercial bank statement apparently as evidence that it had additional cash flow, there is no evidence that the bank statement somehow reflects any additional available funds that were not reflected on the petitioner's tax returns.

With the appeal, counsel also submitted copies of the 1998 through 2001 Form 1040 tax returns of the petitioner's president. A corporation is, however, 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).

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 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), *ff'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.

The petitioner's Form 1120 for calendar year 1998 shows a taxable income of (-) \$36,942. Schedule L of that return reflected current assets of \$15,759; current liabilities of \$3,675; and net current assets of \$12,084. The petitioner could not pay a proffered salary of \$64,916.80 out of these figures.

In addition, the petitioner's 1999 through 2001 federal tax returns continue to show an inability to pay the wage offered, reflecting adjusted gross incomes of \$52,082, \$51,895, and \$59,228, respectively. Schedule L of the petitioner's 1998 1120 tax return reflects current assets of \$15,759; current liabilities of \$3,675; and net current assets of \$12,084. Schedule L of the petitioner's 2000 1120S tax return reflects current assets of \$17,092; current liabilities of \$1,292; and net current assets of \$16,710. Schedule L of the petitioner's 2001 1120S tax return reflects current assets of \$6,800; current liabilities of \$1,783; and net current assets of \$5,017. The petitioner could not pay the proffered wage of \$64,916.80 out of these figures.

After a review of the federal tax returns, 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.

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.