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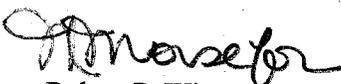
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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]

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 filed with the Director, Texas Service Center, transferred to, then 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 convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a shift 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.

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

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(d). The petition's priority date in this instance is April 20, 2001. The beneficiary's salary as stated on the labor certification is \$41,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated April 5, 2002, 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 specified the petitioner's 2001 federal income tax return with all schedules and attachments. It further exacted the Wage and Tax Statement (Form W-2), as evidence of wage payments to the beneficiary, and the 2001 Form W-3 with all employees' names and salaries. Also, the RFE requested the submission of the original Form ETA 750.

Counsel submitted the original Form ETA 750, as requested. Forms W-2 and W-3 did not report wages paid to the beneficiary in 2001. With the filing of the I-140, the petitioner included its 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. Form 1120S reported an ordinary (loss) from trade or business activities of (\$101,608). Schedule L reflected net current assets of \$25,902, less than the proffered wage. An inventory of \$29,864 and a cash deficit of (\$3,962) comprised current assets, and Schedule L reflected no current liability.

The petitioner submitted, as of December 31, 2001, its unaudited profit and loss statement, reflecting net income of \$17,705.26, less than the proffered wage. Its unaudited balance sheet showed negative (\$62,179.81) current assets, no current liability, and a total deficit (\$62,179.81) of net current assets, less than the proffered wage. Counsel stated that the petitioner could produce its 2001 Form 1120S after its filing was extended to August 2002.

Counsel offered a deed of real property to the petitioner, and counsel's statement averred that:

[The petitioner] also has \$81,000 in liability to [the President of the corporation and majority shareholder]. Said \$81,000 is actually an asset of the company (we attach a copy of the deed evidencing commercial ownership). Fixed assets exceed \$668,000.

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, in a decision dated August 27, 2002, denied the petition.

On appeal, counsel submits the same unaudited financial papers. They do not even identify the preparer and are, at the best, representations of management without regard to the standards for audited financial statements. As such, they carry little evidentiary weight. See 8 C.F.R. § 204.5(g)(2), which requires audited financial statements.

Counsel filed the appeal on September 27, 2002. Inexplicably, the petitioner did not offer the federal tax returns, as it had suggested, in the response to the RFE, that it would. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. §103.2(b)(14).

First, counsel elects to rely on the unaudited papers and avers:

The net income of \$17,705.26 must be considered with the noncash flow expenses that have been booked into the income statement. In 2001, these expenses were an Amortization expense of \$2000.00 and Depreciation expense of \$27,573.00.

The authorities contradict counsel's attempt to add depreciation expense back to net income. In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, 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.*, 623 F.Supp 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.*, 632 F.Supp. at 1054.

Second, counsel asserts that:

The bank balance on this balance statement shows a balance of -\$97,953.75 [overdraft] which is not normally the case for the [petitioner]. In fact the [petitioner] maintains balances of more than \$10,000 in its account. The figure on the balance sheet was an end of year adjustment purely for bookkeeping purposes.

The record contains no description of bookkeeping purposes, and balances of \$10,000 are, in any case, less than the proffered wage. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, counsel asserts that:

Third, the liabilities are not really as high as listed on this balance sheet. There is an outstanding loan from [the President of the corporation] of \$81,035.50 which is an insider loan and not owed to a third party.

Contrary to counsel's primary assertion, 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. 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.

Counsel asserts that the petitioner may show cash balances in its account to confirm that it will have sufficient assets to pay the beneficiary. These proceedings reflect neither an account nor a positive balance. As already noted, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California, supra*.

Counsel's citation to *Quintero-Martinez*, 18 I&N Dec. 348 (BIA 1982), *aff'd* 745 F.2d 67 (9th Cir. 1984), is in error, as the Board of Immigration Appeals (BIA) does not discuss cash balances or total assets. In any case, counsel offers no authority to supplant net current assets as the relevant measure of funds readily and currently available to pay the proffered wage.

Counsel cites another case holding, "*Oriental Pearl Restaurant*, 92 INA 59 (Aug. 24, 1993)," but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel's citations, avowedly, advocate that the petitioner may explain temporary setbacks in terms of "how that situation will change to support the salary that is being offered." *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) relates to that proposition, but counsel misplaces reliance on *Matter of Sonogawa*. It relates to a petition filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

The record does not support counsel's explanations or conclusion, namely, that the petitioner had more assets than liabilities. The proceedings have no evidence of the petitioner's payment of wages to the beneficiary, of its ordinary income, or of its net current assets equal to, or greater than, the proffered wage, at the priority date, or otherwise.

After a review of the federal tax return, unaudited financial papers, Forms W-2 and W-3, the I-140, and the deed of real estate, 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.