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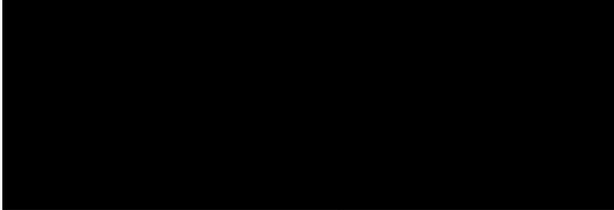
U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: WAC-02-226-50128 Office: CALIFORNIA SERVICE CENTER Date: MAY 26 2004

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

PETITION: Immigrant Petition for Alien 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.

*for*  
  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. 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, counsel asserts that 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 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(d). The petition's priority date in this instance is September 2, 1999. The beneficiary's salary as stated on the labor certification is \$1,270.53 per month or \$15,246.36 per year.

The record does not reflect that the petitioner initially submitted any financial evidence of its ability to pay the proffered wage. In a request for evidence (RFE), dated August 26, 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 RFE specified the petitioner's 1999 through 2001 federal income tax return.

In response to the RFE, counsel submitted a letter from the president of the petitioner, who indicated that the corporation owned the property it operated and that its officers (family members) received rent(s) from the corporation. The president indicated that the amount of rents received would be reduced sufficiently to make funds available to pay the proffered wage. The petitioner did not submit a list of the rent paid, or a list of family members agreeing to reduce the rents for fiscal years running from December 1, 1999 through November 30, 2000 and from December 1, 2000 through November 30, 2001.

Counsel submitted copies of the petitioner's 1999 and 2000 Form 1120 U.S. Corporation Income Tax Return along with Schedule L. The tax return for fiscal year 1999 (December 1, 1999 through November 30, 2000) reflected gross receipts of \$653,283; gross profit of \$538,642; compensation of officers of \$0; salaries and wages paid of \$85,200; and a taxable income before net operating deduction and special deduction of \$6,116. Schedule L reflected \$42,489 in total current assets; \$2,079 in total current liabilities and net current assets of \$40,410. The tax return for fiscal year 2000 (December 1, 2000 through November 30, 2001) reflected gross receipts of \$708,336; gross profit of \$594,926; compensation of officers of \$0; salaries and wages paid of \$109,200; and a

taxable income before net operating deduction and special deduction of \$3,739. Schedule L reflected \$2,938 in total current assets; \$1,759 in total current liabilities and net current assets of \$1,179.

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 submitted a letter from the petitioner's accountant, who indicates that the family is willing to renegotiate the amount of rent(s) they receive in order to be able to pay the proffered wage. Additionally, counsel submits a copy of a check issued to the beneficiary by the petitioner in the amount of \$1,035.28 for the period November 1, 2002 to November 29, 2002.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Service (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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983).

In *K.C.P. Food Co., Inc.*, 623 F. Supp at 1084, the court held that the 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. 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.

We acknowledge that the tax returns reflect \$283,149 in rent during fiscal year 1999 and \$316,000 in rent in fiscal year 2000. The petitioner, however, has not submitted any documentary evidence that all of this rent was paid to its owners, nor any evidence that such rent will be reduced to provide funds to pay the proffered wage. Therefore, counsel's statements that the rents will be reduced must be viewed as conjecture. Further, a corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003).

The petitioner's Form 1120 for fiscal year 1999 shows a taxable income of \$6,116. The petitioner could not pay a proffered salary of \$15,246.36 per year out of this amount. The petitioner's net current assets, however, for fiscal year 1999 were greater than the proffered wage. Nevertheless, in fiscal year 2000, the petitioner's net income (\$3,739) and net current assets (\$1,179) were both well below the proffered wage. Further, the petitioner has not submitted any documentary evidence as to the amount of rent paid to its owners, nor any evidence that such rent will be reduced to provide funds to pay the proffered wage. Although such efforts have been asserted, regulations require that the petitioner demonstrate the ability to pay the proffered wage from the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. As the priority date is September 1999 and the tax documents submitted are for fiscal years beginning after that date, the petitioner was charged with also submitting its 1998 tax returns, which it did not do.

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.

WAC-02-226-50128

Page 4

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.