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20 Mass, Rm. A3042, 425 I Street, N.W.  
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U.S. Citizenship  
and Immigration  
Services

FILE:  Office: CALIFORNIA SERVICE CENTER Date: MAY 26 2004

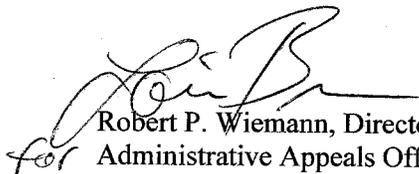
IN RE: Petitioner:   
Beneficiary: 

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:

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 sustained. The petition will be approved.

The petitioner is a general construction firm. It seeks to employ the beneficiary permanently in the United States as a painter. 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.

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 turns, in part, 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 April 16, 2001. The beneficiary's salary as stated on the labor certification is \$11.13 per hour or \$23,150.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The evidence relevant to that issue consisted of copies of the petitioner's Form 941 employer's quarterly tax returns, dated April 27, 2001 through July 26, 2002. In a Notice of Intent to Deny (ITD) dated January 16, 2003 the director found that the evidence in the record was insufficient to establish the petitioner's ability to pay the proffered wage.

Counsel responded to the ITD with a letter dated January 30, 2003 accompanied by additional evidence consisting of copies of the petitioner's Form 1120 U.S. corporation income tax returns for 2000 and 2001.

The director determined that the evidence in the record was insufficient to establish the petitioner's ability to pay the proffered wage, and issued a request for evidence (RFE) dated March 3, 2003, requesting evidence of the beneficiary's employment in the United States, copies of tax documents for 1998, 1999, 2000 and 2001, and Form W-2's for 1998, 1999, 2000 and 2001. Counsel responded to the RFE with a letter dated March 17, 2003 accompanied by additional evidence consisting of copies of the beneficiary's pay stubs for December 2002 through March 2003; and copies of Internal Revenue Service printouts of the beneficiary's W-2 wage and tax statements for the years 1998, 1999, 2000 and 2001.

In a decision dated April 3, 2003, 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 continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits additional evidence, consisting of the following: a copy of a bank verification form for the petitioner dated December 17, 2003 from the Nevada State Bank; a copy of a bank verification form for the petitioner dated April 17, 2003 from the Well Fargo Bank Nevada, N.A.; and an unaudited personal financial statement dated June 30, 2002 from the individual who signed the I-140 petition and other documents on behalf of the petitioner.

Counsel states on appeal that the beneficiary has been paid the proffered wage of \$11.13 per hour for each hour worked by the beneficiary. Counsel also states that the employment of the beneficiary will generate additional funds for the petitioner, and that the bank verification statements in evidence demonstrate that the petitioner has had more than sufficient daily operating balances to pay the proffered wage to the beneficiary.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner established that it had previously employed the beneficiary. The IRS printouts of the beneficiary's Form W-2 wage and tax statements show compensation received from the petitioner in the amounts of \$2,900.00 in 2000 and \$17,605.00 in 2001. The IRS printouts also show compensation received by the beneficiary from a previous employer for the years 1998, 1999, and 2000. The amounts received from a previous employer are not relevant to the issue of the petitioner's ability to pay the proffered wage, therefore the information concerning the previous employer will not be considered by the AAO.

The compensation received by the beneficiary from the petitioner for the year 2000 is only indirectly relevant to the instant petition, since the year 2000 was the year before the priority date. For the year 2001, the year of the priority date, the compensation received by the beneficiary from the petitioner, totaling \$17,605.00, was \$5,545.40 less than the proffered wage of \$23,150.40. The information from the beneficiary's W-2 form for 2001 therefore fails to establish the ability of the petitioner to pay the proffered wage.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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.*, 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net 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 *Elatos Restaurant Corp., supra*, at 1054.

The petitioner's Form 1120 U.S. corporation tax return for 2001 shows taxable income before the net operating loss deduction and special deductions, on line 28, as \$25,133.00. That amount is greater than the \$5,545.00

needed to raise the beneficiary's actual compensation to the proffered wage. Therefore the petitioner's tax return for the year 2001 is sufficient to establish the petitioner's ability to pay the proffered wage that year. As of the April 3, 2003 date of the director's decision, the petitioner's tax return for 2002 was not yet due. Therefore the tax return for the year 2001 was the most recent return available. The information on that return is found sufficient to establish the ability of the petitioner to pay the proffered wage to the beneficiary as of the priority date and continuing until the beneficiary obtains permanent residence.

In his decision the director analyzed the W-2 forms for the beneficiary in evidence and correctly found that they failed to establish the ability of the petition to pay the proffered wage. The director's decision mentions the ITD, which was issued on January 16, 2003. However, the director's decision fails to mention the evidence submitted in response to the ITD, most notably, the copy of the petitioner's tax return for the year 2001. The response to the ITD is date stamped as received on February 12, 2003. Therefore that evidence should have been considered by the director in his decision dated April 3, 2003. The director's decision also fails to mention the fact that an RFE was issued after the ITD, even though the director's decision relies on the W-2 forms which were submitted in response to that RFE. The director erred in failing to give a complete procedural history of the petition and in failing to consider the evidence submitted in response to the ITD.

As discussed above the printouts of the beneficiary's W-2 form for 2001 and the petitioner's tax return for 2001 are sufficient to establish the ability of the petition to pay the proffered wage as of the priority date and continuing until the beneficiary obtains permanent residence. Therefore the decision of the director to deny the petition was incorrect, based on the evidence then in the record.

On appeal the petitioner submits additional evidence. In light of the analysis above which concludes that the petitioner's net income as shown on the petitioner's tax return for 2001 is sufficient to establish the ability of the petitioner to pay the increase required to raise the beneficiary's actual wage to the proffered wage, the additional evidence submitted on appeal is not needed. Nonetheless the AAO has examined the bank verification forms submitted on appeal by the petitioner and finds that the information therein is consistent with the information on the petitioner's tax returns.

The other document submitted on appeal is a personal financial statement submitted of the individual who signed the I-140 petition and other documents on behalf of the petitioner. It is an unaudited statement which includes a list of assets and liabilities of that individual. The individual is identified as a part owner in several businesses with names similar to the petitioner, but the statement does not refer to any ownership interests of the individual in a business with a name identical to that of the petitioner. Unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. See 8 C.F.R. § 204.5(g)(2). That regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Moreover, CIS may not "pierce the corporate veil" and look to the assets of another person 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). Furthermore, in the instant case the evidence shows no ownership interest in the petitioner by the individual who submitted the financial statement. For the foregoing reasons, that financial statement is found to be not relevant to the instant petition.

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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.