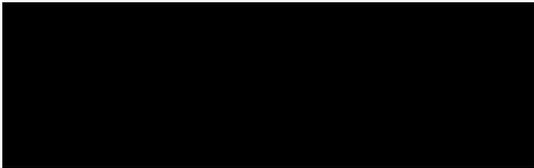




U.S. Citizenship
and Immigration
Services

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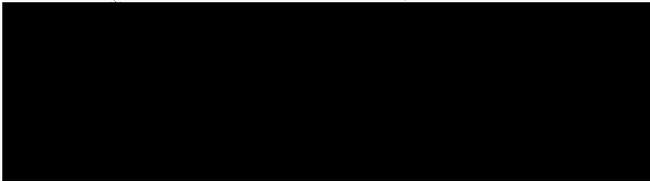
Date: SEP 08 2004

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.

Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

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 in the business of horse racing and racehorses. It seeks to employ the beneficiary permanently in the United States as a stable manager for thoroughbred racehorses. 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 from 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. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is November 17, 1997. The beneficiary's salary as stated on the labor certification is \$2,976.13 per month or \$35,713.56 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The director took exception to the petitioner's proof for two (2) years and three (3) months of the beneficiary's experience in the job offered.¹ In a request for evidence (RFE) dated January 23, 2003, 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 annual report, federal income tax return, or audited financial statement for each year, as well as Wage and Tax Statements (Forms W-2), as evidence of wage payments to the beneficiary.

In response to the RFE, counsel submitted 1997 and 2001 Forms W-2, reflecting wages that the petitioner paid to the beneficiary in the amounts of \$22,227 and \$28,568. Submissions with the Immigrant Petition for Alien Worker (Form I-140) included only page 1 of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return (2000 fragment), reporting total income of \$1,687,258, salaries and wages paid of \$1,060,768, taxable income before net operating loss deduction and special deductions of \$1,269, and taxable income of \$0. Counsel

¹ The director was mistaken. Form ETA 750, Part A, in block 14, exacted two (2) years of experience in the job offered or three (3) years of experience in the related occupation of a thoroughbred racehorse groom. This matter was beyond the scope of either the RFE or the decision.

submitted no other financial documentation and no proof of experience in the related occupation or of three additional months of experience.

The director considered the matter on the record that consisted of taxable income from the fragment of the 2000 Form 1120 and the Forms W-2, each less than the proffered wage, 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 the additional evidence, such as the RFE requested, and a brief, which suggests that:

The petitioner, [REDACTED] has complied with the requirement to show that it can pay the proffered wage. The Section 103.2(b)(8)(ii) of the 8CFR [sic] states that the applicant or petitioner may submit some or none of the requested additional evidence and ask for a decision on the record.

The director based the decision on the record. The 1997 and 2001 Forms W-2 reflected the payment of wages, respectively, of \$22,227, at the priority date, and \$28,568, less than the proffered wage. If wages paid to the beneficiary do not support the ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will consider the net income of the petitioner. The only evidence of that was the 2000 fragment, showing taxable income before net operating loss deduction and special deductions of \$1,269, less than the proffered wage. Moreover, no evidence related to 1998 or 1999, and this lacuna is fatal.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability, as continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

Counsel contends, on appeal, that:

In 1997, the federal tax return reflects gross receipts of \$882,857, total income of 882,957 [sic] and net current assets of \$100,515. Also, based on, page 4, line 19, of the balance sheet, it shows monies loaned to the corporation by the owner of \$53,290 to pay for any ordinary and necessary expenses such as wages.

Judicial authority contradicts this appeal to gross receipts and total income without reference to the expenses incurred to produce them. In determining the petitioner's ability to pay the proffered wage, 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 (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.

Counsel correctly notes that CIS will consider net current assets from the balance sheet (Schedule L) of the federal tax return in respect to the ability to pay the proffered wage.² The petitioner did not submit Schedule L in response to the RFE. Consequently, it could not be a portion of the director's decision.

Also, counsel claims that Schedule L shows a loan of \$53,290 from a shareholder to the corporation for expenses. Without Schedule L, loan documents, or a record of the supposed expenses, the petitioner could not expect the director to imagine the alleged purpose of the loan, or how the obligation to repay it is an asset or income of the corporate petitioner.

The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

A common fallacy arises from the conjecture that assets of shareholders of a corporation are assets of the corporate petitioner. 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). CIS will not "pierce the corporate veil" to consider 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).

As already noted, counsel reserves, for appeal, the additional evidence that the RFE requested, the petitioner's 1997-2000 Forms 1120 and 2001 Form 1120S. They are untimely, and the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). Counsel also submits personal tax returns for 1997-2001 on Form 1040, U.S. Individual Income Tax Return, pertaining to a filer under social security number [REDACTED]. The appeal will be adjudicated based on the record of proceeding before the director.

² Net current assets, readily available to pay the proffered wage, equal the difference of current assets minus current liabilities. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the period.

³ As already noted, CIS will not, in any case, pierce the corporate veil to consider assets of shareholders of a corporation.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. §§ 103.2(b)(8)(i)-(iii). Within the 12 weeks allowed,⁴ the petitioner may submit all the requested initial or additional evidence, submit some or none of the additional evidence and ask for a decision based on the record, or withdraw the petition. *See also* 8 C.F.R. § 103.2(b)(11). If the evidence in response to an initial request does not establish eligibility for the benefit at the time of the filing of the petition, the petition will be denied. *See* 8 C.F.R. § 103.2(b)(12).

The response to the RFE lacked an annual report, a complete federal tax return, or an audited financial statement for any year. The 1997 and 2001 Forms W-2 did not prove the petitioner's payment to the beneficiary of wages equal to, or greater than, the proffered wage.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, but the petitioner did not produce it. The director must issue a decision based on existing submissions in the record. If failure to produce requested evidence precludes a material line of inquiry, the director may deny the petition. *See* 8 C.F.R. § 103.2(b)(14).

After a review of the 2000 fragment, 1997 and 2001 Forms W-2, and counsel's brief, 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.

Beyond both the RFE and the decision of the director, the petitioner may not have established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. In Part A, block 14, the petitioner indicated that the position of stable manager-thoroughbred racehorses required two (2) years of experience in the job offered. The supporting letter did not state precise beginning, ending, or inclusive dates of the beneficiary's experience, or that it was full-time. The correspondence does not comply with regulations found at 8 C.F.R. § 204.5(g)(1).

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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.

⁴ A pertinent regulation prescribes three (3) additional days in case of service by mail. *See* 8 C.F.R. § 103.5a(b).