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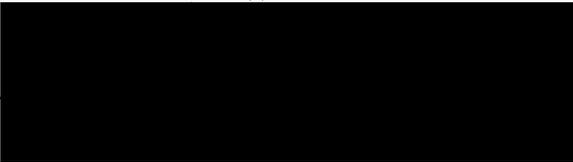
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U.S. Citizenship  
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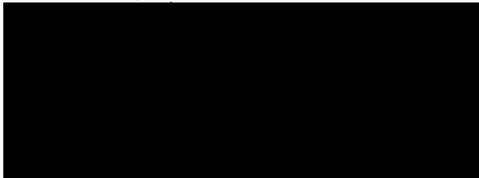
Petitioner:



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

**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 an import and export firm. It seeks to employ the beneficiary permanently in the United States as an import and export manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and accordingly denied the petition.

On appeal, counsel states that the director erred by failing to consider all of the financial documents in the record as well as the resources of other corporations affiliated with the petitioner.

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:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the day the Form ETA 750 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 priority date in the instant petition is June 19, 1996. The proffered wage as stated on the Form ETA 750 is \$1,372.70 per week, which amounts to \$71,380.40 annually. On the Form ETA 750B, signed by the beneficiary on June 13, 1996, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1991, to have two employees, and to have a gross annual income of \$220,000.00. The evidence indicates that the petitioner is structured as a corporation.

In support of the petition, the petitioner submitted the following: a copy of the beneficiary's birth certificate issued June 7, 1996; a copy of a letter dated May 16, 1996 from a former employer of the beneficiary in Turkey confirming the beneficiary's experience with that company as an export assistant manager from May 1998 to June 1992; a copy of a letter dated May 20, 1996 from another employer of the beneficiary in Turkey confirming the beneficiary's employment with that company as an import and export manager from June 1992 to May 1996; a copy of an I-94 card for the beneficiary showing an entry into the United States at New

York City on May 29, 1996; copies of the first pages of the U.S. individual income tax returns of the beneficiary and his wife for 1997 (Form 1040A), 1998 (Form 1040) and 1999 (Form 1040A); a copy of an Internal Revenue Service transcript of the U.S. Individual Income Tax Return (apparently Form 1040 or Form 1040A) of the beneficiary and his wife for 1998; and copies of two checks dated November 1, 2001 and December 1, 2001 from the petitioner to the beneficiary, each in the amount of \$751.89.

The director found the evidence submitted to be insufficient to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore on June 19, 2002 the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted a letter dated September 11, 2002 and the following evidence: a copy of the beneficiary's Form W-2 Wage and Tax Statement for 1997 showing compensation received from the Kilice Corporation; copies of the beneficiary's Form W-2 wage and tax statements for 1999, 2000 and 2001 showing compensation received from the petitioner; an additional copy of one page of the Internal Revenue Service transcript of the U.S. Individual Income Tax Return of the beneficiary and his wife for 1998; a letter dated September 5, 2002 from a doctor in West Orange, New Jersey, attesting to the beneficiary's having received brain surgery on February 26, 2001, causing his inability to work for five months; copies of Form W-2 wage and tax statements for the petitioner's employees for 1995; copies of the petitioner's Form 1120 U.S. corporation tax returns for 1995, 1996 and 2000; a copy of the petitioner's Form 4562 depreciation and amortization schedule for 2001; a copy of the petitioner's Form CT-3 New York State General Business Corporation Franchise Tax Return for 2000; a copy of the petitioner's New York Form CT-5 Request for Six-Month Extension to File for 2000; a copy of the petitioner's Form CBT-100, New Jersey Corporation Business Tax Return for 2000; copies of schedules supporting the petitioner's New Jersey Form CBT-100 New Jersey Corporation Business Tax Return for 2001; a letter dated September 3, 2002 from the First Union National Bank, of Clifton, New Jersey, attesting that the petitioner's account with that bank is in good standing, with an available balance of \$101,502.72; color promotional materials describing products sold by the petitioner; informational materials on corporations comprising the Beta Group; a copy of an agreement dated February 1, 1993 between the petitioner and Beta International, Inc.; a copy of a cost-sharing agreement dated December 10, 1990 between Beta International, Inc. and Beta International, S.A.; a copy of a letter of reference for Beta International, S.A. dated September 9, 2002 from CBC Banque, S.A. of Brussels, Belgium; copies of Form 1120 U.S. corporation tax returns for Kilice Corporation for 1996 and 1998; copies of Form 1120-F U.S. income tax returns of a foreign corporation for Invest Team, N.V. for 1996 and 1998; and copies of bank statements for an account of Invest Team, N.V. at KBC Bank, New York, New York, for July and August 2001.

In a decision dated October 29, 2002, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits additional evidence consisting of a bank statement for a business checking account of the petitioner at First Union National Bank for the month of August 1996; an information sheet on the offices of Beta International, S.A.; and additional copies of several documents previously submitted for the record.

Counsel states on appeal that the director erred by failing to consider bank statements of the petitioner for 1996 and 2002, and by failing to taking into account a financial support agreement between the petitioner and the head office of the international group of corporations of which the petitioner is a part.

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 instant case, the petitioner established that it employed and paid the beneficiary beginning in the year 1999. The Form W-2 wage and tax statements in the record show the following amounts paid by the petitioner in compensation to the beneficiary: \$3,346.66 in 1999, \$9,999.96 in 2000 and \$9,999.96 in 2001. Each of those amounts is less than the proffered wage, therefore the evidence on the compensation paid by the petitioner to the beneficiary fails to establish the petitioner's ability to pay the proffered wage during the relevant time period. Since the proffered wage is \$71,344.00, the petitioner must show that it can pay the remainder of the proffered wage for each year, which is \$67,997.34 in 1999, \$61,344.04 in 2000 and \$61,344.04 in 2001.

For the years when the beneficiary was not employed by the petitioner, the petitioner must establish its ability to pay the entire proffered wage, beginning with the year of the priority date, 1996, and continuing until the beneficiary obtains lawful permanent residence. The record contains copies of two checks from the petitioner to the beneficiary in November and December 2001, each in the amount of \$751.89. But the record does not establish that those checks are payroll checks, nor does it establish the total amount paid by the petitioner to the beneficiary that year.

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 the Immigration and Naturalization 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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.*, 632 F. Supp. at 1054.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before the net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns indicate that the petitioner's tax year runs from December 1 until November 30 each year. For example, the petitioner's 1995 tax return covers the period from December 1, 1995 until November 30, 1996. The petitioner's tax returns show the following amounts as taxable income on line 28: -\$31,196.00 for the 1995 tax year; -\$56,205.00 for the 1996 tax year, and -\$13,098.00 for the 2000 tax year. Since each of those figures is negative, they fail to establish the petitioner's ability to pay the proffered wage in those years. Moreover, no tax returns of the petitioner for its 1997, 1998, or 1999 tax years were submitted for the record. As of the October 29,

29, 2002 date of the director's decision, the petitioner's 2001 tax year had not yet been completed, which ran from December 1, 2001 to November 30, 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -\$34,687.00 for the beginning of the 1995 tax year; -\$58,111.00 for the end of the 1995 tax year; -\$109,356.00 for the end of the 1996 tax year; and -\$101,147.00 for the end of the 2000 tax year. Since each of those figures is negative, they also fail to establish the ability of the petitioner to pay the proffered wage in those years. Moreover, as noted above, no tax returns of the petitioner for its 1997, 1998, or 1999 tax years were submitted for the record.

Counsel asserts that the petitioner's financial resources include those of its affiliated corporations, referred to in the evidence as the Beta Group. The evidence indicates that the headquarters corporation of that group is Beta International, S.A., of Brussels, Belgium. The legal obligation of that corporation for the liabilities of the petitioner is based in two agreements submitted as evidence. The first agreement is a cost-sharing agreement dated December 10, 1990 between Beta International, S.A., and Beta International, Inc., of Rutherford, New Jersey. The second agreement is one dated February 1, 1993 between Beta International, Inc. and the petitioner, in which Beta International, Inc. assigns its rights under the prior agreement to the petitioner. Although the second agreement does not explicitly use the legal term "assign," the substance of the agreement appears to be an assignment of legal rights to the petitioner.

The terms of the December 10, 1990 cost-sharing agreement provide for division of operational responsibilities between the parties in the areas of financing, sales, marketing, and administration. The page order of the copies of the agreement in the record appears to be incorrect. The second page of each copy apparently should be placed after the two following pages, so that it should be the fourth page. The operative cost-sharing language in the agreement states that "BETA INTERNATIONAL S.A.' will support the 'BETA INTERNATIONAL, INC.' activities in order to compensate the latter company for its [sic] assistance in the sale and marketing activities in North America." The agreement continues with a proviso, "[b]oth Parties agree unconditionally that this compensation will exist out of a fixed amount of 60.000 USD (sixty thousand dollars) a year."

The proviso is relevant to the instant petition, because even if the cost-sharing agreement is considered as evidence of the petitioner's ability to pay the proffered wage, the amount of the cost sharing available to the petitioner from Beta International, S.A., under that agreement is limited to \$60,000.00 per year. That amount is \$11,344.00 less than the proffered wage of \$71,344.00. Therefore, even assuming that the February 1, 1993 agreement created a legally-enforceable assignment of rights under the December 10, 1990 agreement to the petitioner, the December 10, 1990 agreement fails to establish the petitioner's ability to pay the proffered wage.

Moreover, aside from the dollar limitation in the cost-sharing agreement, the record lacks evidence that Beta International, S.A. has the financial resources needed to pay the proffered wage as of the priority date and

continuing until the beneficiary receives lawful permanent residence. Although the record contains informational material about Beta International, S.A. and its affiliated corporations, that material contains little financial information about Beta International, S.A. The only document directly relevant to that issue is a copy of a letter of reference for Beta International, S.A. dated September 9, 2002 from CBC Banque, S.A. of Brussels, Belgium. That letter states, “[t]he SA BETA INTERNATIONAL has important credit facilities (4,400,000) with our bank and its commitments are fully complied with.” No further information is found in the record concerning the financial resources of Beta International, S.A. Therefore the evidence fails to establish that the resources of Beta International, S.A. would be sufficient to pay the proffered wage during the relevant time period.

The record contains tax returns for Kilice Corporation and for Invest Team, N.V., but the record contains no evidence indicating the relationship between either of those corporations and the petitioner. The petitioner is a corporation. 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. It is further noted that there is nothing in the governing regulation at 8 C.F.R. § 204.5 that allows CIS to consider the assets or resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar v. Ashcroft*, 2003 WL 22203713 at \*3 (D. Mass. Sept. 18, 2003).

The record also contains a letter dated September 3, 2002 from the First Union National Bank, of Clifton, New Jersey attesting that the petitioner’s account with that bank is in good standing, with an available balance of \$101,502.72. Although that amount is greater than the proffered wage of \$71,344.00, that letter fails to establish the petitioner’s ability to pay the proffered wage in prior years, beginning with the year of the priority date, 1996.

For the foregoing reasons, the evidence submitted prior to the director’s decision fails 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

In his decision the director correctly analyzed the compensation paid to the beneficiary and the taxable income on line 28 of the petitioner’s tax returns in the record. For the years 1995 and 1996 the director correctly calculated the petitioner’s net current assets. The director made a slight error in calculating the net current assets of the petitioner for 2000, by including in current assets the amount of \$120.00, the figure for the value after depreciation of buildings and other depreciable assets. However, the director’s error on that point did not affect the director’s analysis, since the director’s figure for net current assets for 2000 and the correct figure were both negative. The director correctly concluded that the tax returns failed to establish the petitioner’s ability to pay the proffered wage during the relevant period. The director also correctly declined to consider financial evidence pertaining to corporations other than the petitioner. The director’s decision to deny the petition was therefore correct, based on the evidence in the record before the director.

On appeal, counsel submits additional evidence consisting of a bank statement for a business checking account of the petitioner at First Union National Bank for the month of August 1996; an information sheet on the offices of Beta International, S.A.; and additional copies of several documents previously submitted for the record. Since the petitioner had adequate notice in the proceedings before the director of the need for evidence concerning the petitioner’s ability to pay the proffered wage, the evidence newly submitted on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988). Nonetheless, even if the evidence

submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director.

The bank statement submitted on appeal shows information for a single month and is therefore insufficient 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 information sheet on the offices of Beta International, S.A. includes no financial information about that corporation. Therefore the evidence newly submitted on appeal fails to overcome the decision of the director.

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.