



U.S. Citizenship  
and Immigration  
Services

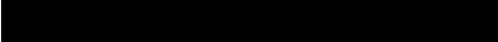
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FILE: WAC 02 205 51231 Office: CALIFORNIA SERVICE CENTER Date: **JAN 25 2005**

IN RE: Petitioner:   
Beneficiary: 

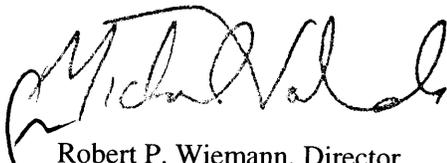
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is an automobile service station. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a foreign car mechanic. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date priority date of the visa petition, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 103.5(a)(2) states. in pertinent part:

*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion qualifies as a motion to reopen because counsel provided new evidence.

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 unavailable in the United States.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on May 17, 1999. The proffered wage as stated on the Form ETA 750 is \$18.36 per hour, which equals \$38,188.80 per year.

With the petition counsel submitted the 1999 Form 1120 U.S. Corporation Income Tax Return of Tsolin, Inc. dba Smog Pros, of the address from which the petitioner now operates. That return shows that the Tsolin, Inc. declared a loss of \$10,601 as its taxable income before net operating loss deduction and special deductions

during that year. The corresponding Schedule L shows that at the end of that year Tsolin, Inc. had current liabilities greater than its current assets.

Counsel also submitted the petitioner's 2000 and 2001 Form 1120S, U.S. Income Tax Return for an S Corporation.

The 2000 return shows that the petitioner declared a loss of \$20,196 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$124,204 and current liabilities of \$80,307, which yields net current assets of \$43,897.

The 2001 return shows that the petitioner declared a loss of \$44,814 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$104,002 and current liabilities of \$85,993, which yields net current assets of \$18,009.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on July 25, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports.

In response, counsel submitted copies of the tax returns previously submitted. Counsel also submitted the petitioner's California Form DE-6 reports for the last two quarters of 2001 and the first two quarters of 2002. Those reports show that the petitioner employed seven workers during the last two quarters of 2001 and the first quarter of 2002, and eight workers during the second quarter of 2002, but did not employ the beneficiary.

Finally, counsel submitted a copy of the first page of amended escrow instructions, dated March 27, 2000. Although those instructions purport to show that an interest in the petitioning business was to be sold the next day, it does not state what interest was to transfer.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 26, 2002, denied the petition.

On appeal, counsel submitted a letter, dated October 18, 2002, from the accountant of the previous owner of the petitioning business. That letter states that the petitioning business generated a loss during 1999 because of its depreciation deduction and an insurance increase. The accountant also stated that the petitioning business paid \$29,763 for outside labor during that year, by which he presumably meant contract labor performed by non-employees. The accountant implies, but does not state, that the beneficiary would have performed the services for which contract labor was used if the petitioning business had been able to employ him during 1999.

The accountant provides no evidence of the nature of the contract labor purchased by the petitioning business during 1999. The petitioning business' 1999 tax return shows no contract labor at Line 2 of Schedule A, Cost

of Labor. No line item on the petitioner's 1999 tax return is equal to \$29,763 during 1999. Counsel provided no documentary evidence in support of the accountant's assertion that the petitioner purchased contract labor during 1999 or of the nature of that alleged contract labor.

Counsel submitted another letter, dated October 17, 2002, from the petitioner's accountant. The accountant stated that the petitioner generated losses during 2000 and 2001 because it was permitted to depreciate and amortize costs of acquiring the business over a five-year period. The accountant observed that those deductions exceeded the amounts of the petitioner's losses during those years.

In a brief, counsel asserted that the letters from the two accountants demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The Director, AAO, noted that, even adding back to income the amounts of the petitioning business' depreciation and amortization and the amount of the increased insurance expense, the petitioning business still did not demonstrate that it was able to pay the proffered wage during 1999. The director found that, therefore, even if counsel's assertion that those expenses should be added back into income were reasonable, the petitioning business has not demonstrated the ability to pay the proffered wage during 1999.

Similarly, the director observed that, even adding the petitioner's depreciation deduction, its alleged contract labor expense, and its increase in insurance costs to its net income, the petitioner would not have demonstrated its ability to pay the proffered wage during 2002. The director dismissed the appeal on September 29, 2003.

With the motion, counsel submits a letter, dated October 15, 2003, from the petitioner's owner. In that letter, the petitioner's owner states that she has income and assets sufficient to pay the proffered wage. The petitioner's owner also implies that hiring the beneficiary would generate income beyond the amount of the proffered wage.

Counsel also submits evidence pertinent to other income and assets of the petitioner's owner and her spouse, unrelated to the petitioner, including unaudited financial statements, bank statements, and descriptions of real estate. Counsel submits a statement from the petitioner's owner, dated October 15, 2003, in which she promises to pay the beneficiary's salary from her own funds if necessary.

Counsel's assertion that the petitioner's depreciation and amortization deductions should be added back to the petitioner's income is unconvincing. Counsel is correct that those deductions do not represent specific cash expenditures during the year claimed. They are systematic allocation of the cost of long-term assets, tangible and intangible, respectively.

The depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While those expenses do not require or represent the current use of cash, neither are they available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See*

*also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its redistribution to other years as convenient.

Counsel has also implicitly asserted that a recent increase in the petitioner's insurance costs should be added back to the petitioner's income in determining its ability to pay the proffered wage. Counsel offered no authority or reasoning for this implicit assertion and this office is aware of none. The increase in insurance costs will not be construed as a fund available to pay wages.

Counsel and the petitioner's accountant have asserted that the petitioner paid for contract labor that the beneficiary, if then employed by the petitioner, would have performed. Counsel and the accountant provided no documentary evidence of those alleged labor costs. Counsel and the accountant provided no evidence that the labor that those alleged costs represent was such that the beneficiary could have performed it. Those unsubstantiated labor costs will not be included in the determination of the petitioner's ability to pay the proffered wage.

Counsel's reliance on the income and assets of the petitioner's owner as evidence of the petitioner's ability to pay the proffered wage is misplaced. The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else.<sup>1</sup> As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

A letter from the petitioner's owner implies that by employing the beneficiary the petitioner would have generated income in excess of his wages. If this could be demonstrated, rather than merely alleged or implied, it would show the petitioner's ability to pay the proffered wage. The mere allegation or implication, however, absent any evidence in its support, is insufficient.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage,

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<sup>1</sup> Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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. Texas 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The priority date is May 17, 1999. The proffered wage is \$38,188.80 per year.

During 1999 TsoLin, Inc. dba Smog Pros declared a loss. TsoLin, Inc. is unable to show the ability to pay any portion of the proffered wage out of its income. At the end of that year TsoLin, Inc. had negative net current assets. TsoLin, Inc. is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner provided no evidence that TsoLin, Inc. had any other funds available with which to pay the proffered wage during that year. The petitioner has not demonstrated that TsoLin, Inc. was able to pay the proffered wage during 1999.

During 2000 the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its income. At the end of that year the petitioner had net current assets of \$43,897. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had net current assets of \$18,009. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which it could have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 1999 and 2001. Therefore, the basis of the decision of denial, and of the AAO's dismissal of the appeal, has not been overcome on the motion.

An additional issue exists in this matter that was not discussed in the decision below. The Form ETA 750 was filed by Smolin, Inc. dba Arco Smogpros, of [REDACTED] The Form I-140

petition was filed by Siltal, Inc. dba Arco Smogpros of the same address in Pasadena. Siltal, Inc., the substituted petitioner, must demonstrate that it is entitled to pursue its petition based on a labor certification granted to Smolin, Inc., the original petitioner.

The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

The only evidence in the file pertinent to the sale of the petitioning business to the current petitioner is the document indicating that the sale of the petitioning business was to take place on March 28, 2000. Those escrow instructions did not indicate whether the sale encompassed all of the petitioning business' rights, duties, obligations, and assets. The petitioner has not demonstrated that it is the original petitioner's successor-at-interest within the meaning of *Matter of Dial Repair Shop*, *Supra*. Therefore, it has not demonstrated that the petition is based on a valid labor certification. The petition should have been denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

**ORDER:** The motion is granted. The AAO's decision of September 29, 2003 is affirmed. The petition is denied.