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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC 02 173 51799 Office: VERMONT SERVICE CENTER Date: AUG 03 2004

IN RE: Petitioner: [redacted]
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:

[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.

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 a European automobile repair shop. It seeks to employ the beneficiary permanently in the United States as an office manager. 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 April 30, 2001. The beneficiary's salary as stated on the labor certification is $30,638 per year.

Counsel initially submitted insufficient evidence of the petitioner's 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 to the present. The RFE exacted, for 2001 to the present, the petitioner's federal income tax return with schedules and attachments, its annual report, or its audited financial statement, or, in the alternative, Wage and Tax Statements (Forms W-2) or Form 1099, as evidence of wage payments to the beneficiary.

The petitioner submitted its 2001 Form 1120, U.S. Corporation Income Tax Returns. It reflected no taxable income before net operating loss deduction and special deductions, i.e., $0, less than the proffered wage. The director noted that the omission of Schedule L from the 2001 federal income tax return prevented the consideration of net current assets to support the ability to pay the proffered wage.[1] Submissions included no evidence of the payment of wages to the beneficiary.

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[1] The difference of current assets minus current liabilities equals net current assets. 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.

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 March 17, 2003.

On appeal, counsel states that a brief and evidence may follow within 30 days, but more than 17 months have elapsed, and the AAO has received none.

On the appeal form, counsel states several matters deemed essential, advising that:

> . . . [There are] many deductions and expenses that equate to $0 profit/loss. Several of these expenses and deductions are over $34,000 in rent which is paid to the owner Eurocar 2000 as landlord and is a form of compensation in addition to over $13,000 in dividends paid directly to the owner of [the petitioner].

Counsel, evidently, contends that rent receipts and dividends, reported on the personal income tax return of the business owner, is available to pay the obligations of the petitioning corporation. Contrary to counsel's primary assertion, Citizenship and Immigration Services (CIS), formerly the Service or INS, may not "pierce the corporate veil" and look to the assets of the corporation's owner 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). 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.

Finally, counsel discerns error in the finding that the petitioner could not pay the proffered wage, in that:

> This is based on [CIS's] rather simplistic reading of the Petitioner's tax return that indicates that the Petitioner has a net profit/loss of $0 and that the Petitioner has never paid wages to this Beneficiary who is so far ineligible to work in the U.S. . . . In addition, there are depreciable assets of the company which equate to a form [of] net gain. These items are the real (sic) profit of [the petitioner].

Counsel's contention contradicts controlling authorities. 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.

After a review of the federal tax return and appeal, 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 the scope of this decision lies another issue, whether the petitioner has 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.

The Form ETA 750, in Part A at item 15, indicated that the position of office manager required that the beneficiary "must speak German to interact with owner/head mechanic who speaks limited English." The record, as presently constituted, contains no evidence that the petitioner qualified this beneficiary, born in England, in that particular area. The director did not request evidence on this point, or discuss it, so that the consequent doubt is not a basis of this decision.

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.