U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 16 2004

IN RE: Petitioner: [redacted]

Beneficiary: [redacted]

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:

[redacted]

INSTRUCTIONS:

This is the decision 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO), on appeal. The appeal will be dismissed.

The petitioner is an automobile repair business. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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.

On appeal, counsel submits a brief and additional 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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's 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. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 6, 2001. The proffered wage as stated on the Form ETA 750 is $17.00 per hour, which equals $35,360 per year.

The petition and the Form ETA 750 both identify the petitioner as [redacted] The petition states that the petitioner has 3 employees and gross receipts of $150,000, and the Form ETA 750 states that the beneficiary will work at the same address.

With the petition, counsel submitted the Form ETA 750; two letters of experience for the beneficiary, which the director found contained conflicting information;[1] and the petitioner's 2000 U.S. Income Tax Return for an S Corporation. The Service Center sent a request for additional evidence (RFE), on May 13, 2002, seeking clarification of the discrepancies identified in the beneficiary's claimed experience, and requesting additional evidence of the beneficiary's ability to pay the proffered wage.[2]

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[1] Specifically, the Service Center noted that dates of the beneficiary's claimed employment, as specified in the letters, conflicted with each other, and with the information that had been provided on the ETA 750B signed by the beneficiary under penalty of perjury.

[2] The Service Center noted that the 2000 tax return showed a net loss of $26,554.

Counsel submitted a response to the RFE on August 8, 2002. The response consisted of a letter from counsel explaining the discrepancies in the dates of the beneficiary's employment history, and offering an explanation of why the petitioner's expectations of increased profits and ownership of other business interests demonstrated that the petitioner had the ability to pay the proffered wage. Counsel also submitted additional evidence in the form of two letters from one of the beneficiary's employer in Jordan, the first letter corrected the dates of the beneficiary's claimed employment, and the second letter specified the months the beneficiary appeared on the monthly payroll. In addition, counsel submitted the petitioner's corporate tax return for 2001, and in support of the contention that the owner would make available revenue from his other corporate interests, counsel submitted the corporate information relating to the business, and copies of the corporate tax returns for those entities. Finally, as evidence of the owner's willingness to personally guarantee the beneficiary's wages, counsel submitted a copy of a personal guaranty signed by the owner with respect to All Cars Auto, Inc.'s lease.[3]

The director issued a decision denying the petition on December 19, 2002. The director noted that the petitioner's 2000 tax return reflected a $26,554 net loss, $319 in depreciation, and current liabilities that were greater than current assets. The director concluded that neither figure demonstrated the petitioner's ability to pay the proffered wage. In addition, the director found that although the petitioner had submitted the employer's 2001 corporate tax return, that record, likewise, failed to demonstrate the petitioner's ability to pay the wage. With respect to the information submitted regarding the owner's additional corporations, the director noted that as separate legal entities, they could not be considered in determining the petitioner's ability to pay the wage. Finally, the director was unconvinced by the petitioner's claim of anticipated increases in revenue.

On appeal, counsel makes several arguments in support of the appeal. First, counsel argues that the director erred in relying simply on a comparison between the petitioner's taxable income for the "tax years 2001 and 2002" and the proffered wage. (Counsel's Brief at pp.2-3.) According to counsel, the director erred by assuming that the beneficiary's wage would be paid out of the taxable income, when it would be paid out of the petitioner's total income before deductions. Counsel goes on to state that the net income would be the amount remaining after deductions, including officer compensation. For 2001, counsel notes that the total income was $183,986, which included $96,250 in salaries and wages; an amount which counsel argues significantly exceeds the proffered wage of $35,360. (Counsel's Brief at p.3.)

Second, counsel argues that several factors indicate that the petitioner can reasonably assume that its business will continue to increase, thus generating sufficient income to pay the beneficiary. Counsel cites the fact that the petitioner had recently terminated its franchise agreement with its franchisor, thus making an additional $22,000 per year. Having been freed from restrictions imposed by its franchise agreement, counsel argues that the petitioner can offer more comprehensive repair services which will presumably generate greater income. Additionally, counsel argues that the petitioner plans to take advantage of the beneficiary's experience in the repair of European vehicles, thus becoming a specialized repair shop, resulting in greater profitability as consumer demand is great. (Counsel's Brief at 3.) Counsel cites to *Matter of Sonegawa.* 12 I&N Dec. 612 (Comm. 1967).

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[3] According to the information submitted, the petitioner is owned by Nasser Alquza, who is reflected on the petitioner's 2000 and 2001 tax returns as the owner of 100% of the company stock. Likewise, the tax returns for the owner's other companies also reflect that he is the sole shareholder of those corporations.

The AAO is not persuaded by counsel's arguments. Before addressing counsel's contentions, however, we will address an error in the director's decision regarding the factors considered in assessing ability to pay. The director's decision takes into account depreciation. This office disagrees with that approach.

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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, 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 CIS should have considered income before expenses were paid rather than net income.

The Service Center included the petitioner's depreciation deduction in the calculation of the funds available to pay the proffered wage. This office disagrees with that approach. A depreciation deduction does not represent specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It 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 the expense does not require or represent the current use of cash, neither is it 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*, Supra at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054. 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 it as a fund available to pay the proffered wage.

The AAO is likewise unpersuaded by counsel's argument that the petitioner's owner may rely upon the income generated by his other corporate holdings. Counsel contends that because the owner exercises control over all of the businesses, "the combined income could clearly fund [the beneficiary's] wage." (See Counsel's Response to the RFE at p.3.)

The petitioner's owner may be able to lend funds of one of his corporations to another as is convenient to his purposes. However, he has not demonstrated that any of his individually incorporated restaurants would be obliged to pay the debts and obligations of any of the others if the restaurant became unprofitable or the payment became inconvenient otherwise. A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders, including the income and assets of other companies which they own, cannot be considered in determining the petitioning corporation's, ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980);

and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980). As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter. Finally, CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

The principal argument upon which the beneficiary relies on appeal is that the petitioner can reasonably rely upon significant increases in income due to certain business decisions. First, counsel argues that the petitioner's decision to sever his franchise agreement will lead to increased revenues. Second, the petitioner plans to shift the focus of his dealership from oil changes and minor repairs, to more comprehensive repair services, taking advantage of the beneficiary's skills in the repair of European cars for which there is great demand. Counsel cites to *Matter of Sonegawa,* 12 I&N Dec. (1967), arguing that the petitioner is in a similar circumstance. However, counsel has not demonstrated any facts that demonstrate that the petitioner is in a comparable position to the petitioner in *Matter of Sonegawa.* We note that the petitioner has only been in existence since late 1999/early 2000, unlike the petitioner in *Matter of Sonegawa,* whose business had been in existence for many years.

While counsel raises various factors that he claims will lead to an increase in the petitioner's income, the assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). While it is entirely possible that counsel's contentions are correct, no objective evidence is contained in the record that could support these statements. For example, while counsel argues that the petitioner's termination of the franchise agreement will save approximately $22,000 in franchise fees and will free the petitioner from restrictions on the type of services offered, the franchise agreement itself is not contained in the record. Furthermore, although counsel makes various assertions regarding the petitioner's business plans, no evidence from objective sources, or even the petitioner himself has been offered which could provide evidence of the reasonableness of the petitioner's expectations. Consequently, counsel's assertions regarding the expected increase in revenues are merely speculation.

The priority date is April 6, 2001. The proffered wage is $35,360 per year. During the 2000 and 2001 tax years, the petitioner declared a loss of $26,554 and $15 net income, respectively.[4] Furthermore, there is no evidence indicating that these were uncharacteristic years, and it is noted that the petitioner has only been in existence since 1999. An examination of the net current assets for each of those years is similarly unhelpful for the petitioner, as the net current assets were ($2,616) for 2000, and $1,027 for 2001. The petitioner has not demonstrated the ability to contribute any amount toward paying the proffered wage out of its income or net current assets. The petitioner, therefore, has not demonstrated that it was able to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The appeal is dismissed.

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[4] We note that while counsel contends that the absence of franchise fees will contribute to the petitioner's ability to generate additional income, the record reflects that while franchise fees were paid in 2000, none were paid in 2001 yet the petitioner was only able to generate $15 in net income.