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

U.S. Citizenship and Immigration Services

B6

[redacted]

JUN 15 2004

FILE: EAC 03 055 52698 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as an unskilled worker. The petitioner is a staffing and payroll services firm. It seeks to employ the beneficiary permanently in the United States as a cocktail server. The petitioner described its business activity as a "night club" on the ETA-750A. On Schedule K of its tax returns, the petitioner described its business as a "payroll service."[1] As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner submits additional information relating to two other companies and maintains that their respective financial data should be considered in the determining the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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) also provides 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. . . . 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 [Citizenship and Immigration Services (CIS)].

Eligibility in this case is based upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is April 13, 2001. The beneficiary's salary as stated on the labor certification is $9.20 per hour or $19,136 per year, based on a 40-hour week. The visa petition indicates that the petitioner was established in 1986 and has 53 employees. The record reflects that it is organized as a corporation and employed the beneficiary for approximately eight months in the year 2000.

At the outset, it is noted that other than the instant case, the petitioner has petitioned for six other alien beneficiaries. CIS' electronic records show that one petition was approved. The petitioner states that one

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[1] It is noted that misrepresentation on the labor certification is grounds for invalidation of the labor certification. 20 C.F.R. § 656.20.

petition was withdrawn. The remaining four petitions were denied and are on appeal.[2] They all share the same priority date of April 13, 2001. Three petitions are for room attendant positions at an annual salary of $16,931.20 and the other position is for cocktail servers at an annual salary of $19,136 per year. As the petitioner has requested approval for multiple beneficiaries with the same priority date, it must establish its continuing ability to pay all additional wage offers beginning as of April 13, 2001. To the extent that the petitioner has actually employed an individual beneficiary as of, and subsequent to the priority date, credit will be given to the actual wages paid to the beneficiary.

As evidence of its ability to pay in this case, the petitioner initially submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. This corporate tax return suggests that the petitioner files its returns based on a standard calendar year. In 2001, it declared a taxable income before net operating loss (NOL) and other deductions of -$3,817. Besides net income, the corporate tax return shows the petitioner's current assets and current liabilities on Schedule L. The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the tax year. CIS will consider net current assets as well as a petitioner's net income because it reflects a petitioner's liquidity as of the date of filing. It represents cash or cash equivalent assets that would reasonably be available to pay the proffered salary during the year covered by the Schedule balance sheet. As indicated on Schedule L of the petitioner's 2001 corporate tax return, it declared $500 in current assets and no current liabilities, resulting in $500 in net current assets.

On September 11, 2003, the director requested additional evidence from the petitioner to establish its ability to pay the proffered wage from the priority date of April 13, 2001 and continuing to the present. The director also instructed the petitioner to submit copies of the beneficiary's Wage and Tax Statements (W-2s) for 2001 and 2002, if the petitioner employed the beneficiary during that time.

In response, the petitioner did not submit any copies of W-2s issued to the beneficiary, but offered additional detail about the nature of its business in a cover letter, dated September 25, 2003. In that letter, the petitioner advised the director that the employees "working for [the petitioner] are farmed out to the two businesses," [redacted] The petitioner further represented that it primarily administers the payroll and pays any other required expenses such as state and federal payroll taxes, workers compensation and unemployment insurance, after collecting the respective funds from either Windsor Hall, Inc. or Wesley Hotel, Inc. The petitioner also submitted copies of its 2000 and 2002 corporate federal tax returns. They contain the following information:

Year	Net Income Before NOL And Other Deductions	Current Assets	Current Liabilities	Net Current Assets
2000	$4,097	$4,438	-0-	$4,438
2002	312	812	-0-	812

The director denied the petition, concluding that the petitioner had failed to establish its continuing ability to pay the beneficiary's proffered salary. The director found neither the petitioner's net income, nor its net current assets were sufficient to cover the beneficiary's proposed salary of $19,136 during any of the relevant years.

On appeal, the petitioner submits copies of the 2001 and 2002 corporate federal tax returns of Windsor Hall,

[2] EAC 03 055 52666, EAC 03 055 52873, EAC 03 055 52767 and EAC 03 055 52802 were appealed.

Inc. and Wesley Hotel, Inc. The petitioner asserts that their financial resources should also be considered in evaluating the petitioner's ability to pay the beneficiary's proffered annual wage of $19136.20. The petitioner states that the five applicants "will work for [the petitioner]" but will be placed at one of these two entities. During the winter season, all five will be working at the Wesley Hotel.

The petitioner's assertion that these other federal tax returns should be considered is not persuasive. In this case, it is noted that the petitioner represented as the prospective U.S. employer on the approved labor certification and on the Immigrant Petition for Alien Worker (I-140) is "Vineyard Management Group, Inc.," and not one of these other entities. As the prospective U.S. employer, the petitioner bears the burden to show its ability to pay the proffered wage. Neither the statutory nor regulatory provisions relevant to employment based immigrant petitions provide for multiple or co-employers. The regulation at 20 C.F.R. § 656.3 further identifies an "employer" in relevant part as follows:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. (Original emphasis).

In *Matter of Smith*, 12 I&N Dec. 772, 773 (Dist. Dir. 1968) it was found that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary. In this case, although the petitioner has not provided any contractual documentation further defining the relationship between the petitioning business and [redacted], similar to *Matter of Smith,* the available evidence relating to the petitioner's role in compensating the beneficiary, supports the conclusion that the petitioner should be considered as the beneficiary's actual employer. A contrary finding would bring into question the validity of the representations identifying the petitioner appearing on the labor certification and I-140.

As neither [redacted] can be considered as the beneficiary's actual employer, their financial documentation submitted on appeal will not be considered. It is further noted that the petitioner has presented no corporate or contractual proof that they bear an obligation to pay the beneficiary. As the court in *Sitar v. Ashcroft,* 2003 WL 22203713 (D. Mass) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The record clearly indicates that the petitioner, Wesley Hotel, Inc. and Windsor Hall, Inc. are three separate corporations. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of M,* 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.,* 17 I&N Dec. 530 (Comm. 1980). For the same reasons, CIS will not consider the unaudited financial statements of Wesley Hotel, Inc. or Windsor Hall, Inc., which the petitioner submitted on appeal.[3]

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[3]The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner submit either annual reports, federal tax returns, or *audited* financial statements in support of its continuing ability to pay the proffered wage.

It is further noted that 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. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

As concluded by the director, the petitioner's net income of -$3,817 and $312 in 2001 and 2002, respectively, was substantially less than the beneficiary's wage offer of $19,136. Similarly, the petitioner's net current assets in both years were clearly insufficient to cover the beneficiary's wage offer of $19,136. As discussed above, CIS will not consider the federal tax returns of other corporate entities in evaluating a corporate petitioner's ability to pay the proffered wage.

Based on the evidence contained in the record and after consideration of the assertions further presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until the present.

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.

(Emphasis added). The regulation neither states nor implies that unaudited financial statements may be submitted in lieu of the required evidence.