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

U.S. Citizenship and Immigration Services

JUN 15 2004

FILE: LIN 02 206 53350 Office: NEBRASKA SERVICE CENTER Date:

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: 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office 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 a skilled worker. The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican specialty cook. 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 asserts that it has the financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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) 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)]

The issue raised on appeal is whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. 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 27, 2001. The beneficiary's salary as stated on the labor certification is $11.82 per hour or $24,585.60 annually.

As evidence of its ability to pay, the petitioner initially submitted two copies of Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. These copies represent different restaurants. One of the tax returns appeared to be that of the petitioner's, based on the employer tax identification number and address. A letter accompanying these tax returns, dated April 5, 2002, indicates that "Teodoro Rodriguez" is the principal shareholder and owner of these two restaurants. Further examination of the tax returns reflects that Mr. Rodriguez holds 25.5 percent of the petitioning business and 87.5 percent of the other restaurant.

The information presented in the petitioner's 2001 Form 1120S income tax return shows that the petitioner declared $21,224 as ordinary income. Schedule L of this tax return also reflects that the petitioner had $14,172 in current assets and -$53,854 in current liabilities, resulting in –$39,682 in net current assets.

On July 5, 2002, the director requested additional evidence from the petitioner to support its ability to pay the beneficiary's proposed salary of $24,585.60. The director noted that the petitioner had initially submitted two different tax returns and instructed the petitioner to clarify the relationship between the various entities and to submit financial information in the form of federal tax returns, annual reports or audited financial statements.

In response, the petitioner's president, [redacted] submitted partial copies of corporate tax returns of a chain of Mexican restaurants sharing the petitioner's name but with different addresses and different employer identification numbers. [redacted] attached a letter explaining that he is the majority shareholder of all nine restaurants and that he views them as a whole, but that they are organized as separate corporations for tax purposes. He sent a copy of his Form 1040, U.S. Individual Income Tax Return for the year 2001, and offered it for consideration of the petitioner's ability to pay the proffered salary, as well as some data entry worksheets listing employees of "Torero Restaurant, Inc.," but no financial data. [redacted] also lists other beneficiaries who have had petitions filed on their behalf by the other restaurants.

The director denied the petition, finding that the petitioner had failed to establish that the separate corporate assets of the other restaurants were authorized for use by the petitioner to pay the beneficiary's proposed salary.

On appeal, the petitioner asserts that it has established its ability to pay. Although the appeal form, I290-B, indicates that additional evidence or argument would be submitted to the record, nothing further has been received.

In reviewing 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).

Here, the petitioner's declared income of $21,224 in 2001 was insufficient to cover the beneficiary's proposed salary of $24,585.60. The petitioner's net current assets of -$39,662 also reflected an inability to meet the proffered wage.

The petitioner and the other restaurants in which [redacted] holds shares are organized as 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). In the instant case, there is no persuasive documentary or corporate evidence establishing that any of the corporations or individual shareholders, other than the individual petitioning business named on the labor certification and the Immigrant Petition for Alien Worker (I-140), have a legal obligation to pay the beneficiary's proposed salary. In a similar case, 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." Aside from the inordinate burden that it would place on CIS to evaluate an entire chain of

separate businesses including any possible beneficiaries sponsored by each entity, it is also noted that nothing in the regulation at 8 C.F.R. § 204.5(c) suggests that a petitioner may be represented by multiple entities with different locations, legal identities, and employer identification numbers.

Based on the evidence contained in the record, the petitioner has not demonstrated its continuing financial ability to pay the proffered salary as of the priority date of April 27, 2001.

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.