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

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U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 01 174 53340 Office: VERMONT SERVICE CENTER Date: SEP 15 2004

IN RE: Petitioner: [redacted]
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:

[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.

for

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a dry cleaning business. The petitioner sought to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

On January 15, 2002, the director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition, October 26, 2000.

The AAO dismissed the petitioner's appeal on November 4, 2002. The AAO reviewed the financial information contained in the petitioner's corporate federal tax return for 2000, the deposit slips of the petitioner, and the payroll entries of another entity called "Malaty Enterprises," as well as the arguments that the petitioner, through counsel, offered on appeal, and concluded that the petitioner had not established its continuing financial ability to pay the proffered wage of $20,530. The AAO noted that the evidence failed to establish why the financial resources of a separate entity, Malaty Enterprises, should be considered in the review of the petitioner's ability to pay the proffered wage.

On December 3, 2002, Counsel submitted additional evidence together with a statement requesting an additional 30 days to file a motion to reopen. Counsel's statement explains that he is attempting to better establish the relationship between Malaty Enterprises and the petitioner, [redacted] through instructing Mr. Elaty, the president of both entities, to obtain relevant information from the Virginia State Corporation Commission. Mr. [redacted] however sent an incorrect fee to the state agency, and counsel had not yet received the information. Counsel attaches the 2001 federal tax returns of both the petitioner and Malaty Enterprises in support of the petitioner's ability to pay the proffered salary, as well as 2001 profit and loss statement and balance sheet for both entities. The petitioner's 2001 tax return shows that it declared $2,416 in net income.

The regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

> *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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [CIS].

Counsel's basic assertion is that the petitioner, which is organized as a corporate entity under the employer identification number EIN 54-1519499, should be considered, for purposes of considering its financial ability to pay the proffered wage, the same entity as Malaty Enterprises, EIN 54-1648858. The address given on the tax

returns for the petitioner and Malaty Enterprises is the same and they both share the same principal shareholder. Counsel cites *Full Gospel Portland Church v. Thornburgh,* 730 F. Supp. 441 (D.D.C. 1988) in support of his rationale. In this case, however, both the petitioner and Malaty Enterprises are organized as separate corporate entities. As noted in the previous AAO decision, a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Consequently, CIS will not consider the assets of shareholders or of other enterprises or corporations when determining the petitioning corporation's ability to pay the proffered salary. It is further noted that although the AAO may consider the reasoning of *Full Gospel*, that decision is not binding in a matter, such as this case, which arises outside its jurisdiction. Moreover, the court in *Full Gospel* considered a parish and nationwide church relationship as similar to a new division of a business, concluding that the financial resources of both the local petitioner and nationwide church could be considered in determining a petitioner's ability to pay the proffered salary. In the instant matter, as noted above, the record does not establish that the petitioner is a division or even a wholly owned subsidiary of Malaty Enterprises, but has a separate corporate identity.

Although the same corporate address and principal shareholder are shared by both the petitioner and Malaty Enterprises, the evidence does not demonstrate that both entities' resources should be somehow merged in establishing one corporate entity's ability to pay the beneficiary's proffered wage offered by another corporate entity. No binding corporate or contractual documents are contained in the record to support such a conclusion. 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).

Moreover, it is noted that the intent to place the beneficiary on the payroll of Malaty Enterprises, as indicated by the petitioner's letter submitted on appeal, raises the issue as to whether the petitioner on the I-140 and the approved labor certification should be considered as the beneficiary's actual prospective U.S. employer. The regulation at 20 C.F.R. § 656.30(2) provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. If the employer/employee relationship changes, the validity of the approved labor certification may be affected. To be a valid job offer and establish the beneficiary's eligibility for a third preference classification, the job offer must be based on an offer of full-time permanent employment and the petitioner must qualify as the actual employer[1] of the beneficiary.

The regulation at 20 C.F.R. § 656.3 also provides a definition of an employer:

> *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 a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In *Matter of Smith,* 12 I&N Dec. 772, (Dist. Dir. 1968), a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients. The petitioner in *Smith* guaranteed a British secretary permanent, full-time employment with its firm for 52 weeks a year with fringe benefits. Client firms

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[1] In some circumstances, a petitioner may also qualify as a successor-in-interest to the original employer named on the approved labor certification. The petitioner has the burden to show that it has assumed the all the rights, duties, obligations, and assets of the original employer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

were billed by the petitioner for the services provided them. The petitioner was responsible for making contributions to the employee's social security, unemployment insurance programs, and worker's compensation, as well as for withholding state and federal income taxes. It was determined that the petitioner qualified as the actual employer of the beneficiary. *Id.* at 773.

In summary, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner establish a continuing ability to pay the proffered wage as of the priority date of October 26, 2000. In this case, the petitioner's reported net income in both 2000 and 2001 was not sufficient to pay the proffered annual wage of $20,530. It is also noted that the petitioner's net current assets[2] as reported on Schedule L of its 2000 and 2001 tax returns was also insufficient to cover the proffered wage. The evidence also raised the question as to whether the petitioner named on the I-140 is accurately represented as the beneficiary's actual prospective U.S. employer.

Upon review, counsel has been unable to present convincing additional argument or evidence to overcome the findings of the director and the prior AAO decision. The petitioner has not demonstrated its ability to pay the proffered wage as of the priority date of the petition.

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 motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition remains denied.

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[2] Net current assets represent the difference between current assets and current liabilities. It demonstrates the level of liquidity that a petitioner may possess at a given date. As an alternative method of demonstrating the ability to pay the proffered wage, if a petitioner's net current assets are sufficient to pay the proffered wage, CIS will consider it as credible evidence of the petitioner's ability to pay the proposed wage offer. In this case, Schedule L of the petitioner's 2000 tax return reflects that its net current assets were $13,884. In 2001, its net current assets were $5,661.