U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

B6

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

File: LIN 02 068 50682 [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 16 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E. Crawford for
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a Spanish restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. 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.

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 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 as of 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is April 12, 2001. The beneficiary's salary as stated on the labor certification is $2,754 per month or $33,048 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated February 27, 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 required the petitioner's 2000 federal income tax return and such evidence as annual reports or audited financial statements, bank account statements or personnel records. The RFE, also, required evidence of two (2) years of experience in the job offered before the priority date.

Counsel submitted the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. It reflected an ordinary loss of ($219,465), less than the proffered wage. From Schedule L, the balance sheet, current assets of $102,931, less current liabilities of $231,503 yielded a deficit of net current assets, ($128,572), less than the proffered wage. Unaudited profit and loss statements showed, for the first four months of 2001, $401 and, for the two months of 2002, $9,251, less than the proffered wage. Bank account balances revealed consistent overdrafts.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

Counsel states on appeal:

> [The principal owner of the petitioner] explains in the enclosed declaration that the high costs associated in establishing [the petitioner] were the main reason for the negative income.... [The Bureau, formerly the Service] overlooked [the petitioner's] total assets of $710,534 in 2000 and focused only on depreciation.

In determining the petitioner's ability to pay the proffered wage, the Bureau [formerly the Service] 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. v. Sava*, the court held that the Bureau 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. 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. v. Sava*, 632 F.Supp. at 1054.

Counsel insists that high initial costs may result from a new business, and that the tax authorities may allow them. Once they have been paid, however, the funds are not readily available to disburse for the proffered wage. The bank account statements revealed no source of funds more than the financial records.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel urged the consideration of net income from unaudited statements for January to June 2002. It, too, was less than the proffered wage and did not establish the ability to pay the proffered wage at the priority date in any case.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Finally, counsel offers the affidavit of an owner of the corporate petitioner [redacted], and he avers that his willingness to increase his investment in the corporate petitioner. He encloses his Form 1065, U.S. Return of Partnership Income, of another business [redacted] which reflects ordinary income of $110,367 in 2000, but not at the priority date. He sold [redacted] for an alleged, but undocumented, profit in September 2001, after the priority date. Counsel contends that these resources prove the ability to pay the proffered wage at the priority date.

Contrary to counsel's primary assertion, the Bureau 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 can not be considered in determining the petitioning corporation's ability to pay the proffered wage.

After a review of the federal tax returns, unaudited financial statements, other entities' resources, [redacted] affidavit, and briefs, 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.

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.