U.S. Department of Homeland Security

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Citizenship and Immigration Services

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

File: [redacted] Office: Nebraska Service Center Date:

IN RE: Petitioner:
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.

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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center denied the preference visa petition. A subsequent untimely appeal by the petitioner was treated as a motion to reopen by the director. The motion was granted and the director reaffirmed his prior decision. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical laboratory management firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing the labor certification.

On appeal, counsel states that the petitioner established its ability to pay because it and Doctors General Laboratory, Inc. have been operating as a single entity, wholly owned by one person.

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 petitioner'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 petitioner's priority date in this

instance is June 23, 1998. The beneficiary's salary as stated on the labor certification is $61,921.60 per year.

With the petition, counsel submitted a copy of a check to the beneficiary paid by the petitioner and dated April 30, 2002 in the amount of $1,909.18. Attached to the bottom of the check copy is a copy of what appears to be payroll information indicating the beneficiary received a bimonthly salary of $2,381.60. No other evidence exists of this in the record, and it is less than the proffered wage. Counsel also submitted unaudited profit and loss statements for the petitioner for the year 2001 and for January through May 2, 2002, and copies of statements from Smith Solomon Barney that appear to be from a money market checking account.

In a request for evidence (RFE) dated August 15, 2002, the director requested copies of the petitioner's federal tax return from the years 1998 through 2001. In response, counsel submitted Form 1099-MISC, Miscellaneous Income, for the beneficiary for the years 1999 through 2001 and the petitioner's 1999 and 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. Counsel also submitted a January through October 2002 unaudited profit and loss statement for Doctors General Laboratory, Inc., and that corporation's Form 1120S for the years 1998 through 2001. Counsel stated in his response that the petitioner and Doctors General Laboratory, Inc. were "sister" companies, operating as a single entity and both wholly owned by a single individual. He also stated that the petitioner was "merely a payroll service for Doctors General Laboratory, Inc., and that the latter company "has always been able to pay [the beneficiary's proffered] salary . . . since any of its operating shortfall is made by Doctors General Laboratory, Inc." In a separate letter, the president of petitioner writes that the petitioner is a wholly owned subsidiary of Doctors General Laboratory, Inc., and that the beneficiary, while "nominally employed by [the petitioner] . . . has always worked under the supervision of Doctors General Laboratory."

The director determined that the petitioner had not established that it was a wholly owned subsidiary of Doctors General Laboratory, Inc., which would then allow that company's assets to be used to meet the proffered salary. The director further determined that the evidence submitted by the petitioner did not establish that it had the ability to pay the proffered wage as of the date of filing the labor certification.

On appeal, counsel asserts that the evidence submitted "demonstrates that the beneficiary worked at the premises of Doctor's General Laboratory, Inc. (DGL) and that DGL reimbursed the petitioner for the beneficiary's wages and, indeed, the wages of all of its employees."

Counsel is in error, as the record does not establish the facts he alleges, nor does he submit additional evidence to support those alleged facts. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Absent such evidence, CIS will not look beyond the petitioner's assets to determine its 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 cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The Forms 1099-MISC show the petitioner paid the beneficiary substantially less than the proffered wage in 1999, 2000 and 2001. Additionally, the petitioner's Forms 1120S for the years 1999 through 2001 reflect negative ordinary income or loss from trade or business activities. Counsel cites dicta in *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir 1989) for the proposition that CIS should consider more than the company's "balance sheet." However other courts have accepted CIS's reliance on federal income tax returns as a basis for determining a petitioner's ability to pay. *See e.g., 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)); *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.); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Evidence submitted as proof of ability to pay also included unaudited profit and loss statements. Such statements are of little evidentiary value as they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2) neither states nor implies that an unaudited document is competent evidence of a petitioner's ability to pay the proffered wage. Counsel submitted no evidence of the petitioner's ability to pay the proffered wage in 1998.

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage in 2001 and continuing until present. Therefore, the petitioner has not established that it has had the continuing ability to pay

the proffered salary 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. The petitioner has not met that burden.

ORDER: The appeal is dismissed.