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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 01 025 53755 Office: VERMONT SERVICE CENTER Date: JAN 27 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Administrative Appeals Office (AAO) on appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The prior decision of the AAO will be affirmed and the petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The AAO affirmed this determination on appeal.

Pursuant to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must:

> state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services, "CIS"] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must: "state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

On motion, counsel reiterates past legal discussions and asserts that the AAO incorrectly denied the petition because: (1) the petitioner's bank statements should be considered; (2) the petitioner's rental expense on its federal tax returns can be reduced in the future; and (3) the petitioner actually has been paying the beneficiary, although the petitioner has no evidence because such payment has been made "off the books" because of the beneficiary's illegal immigration status. Counsel's motion is a motion to reconsider for asserting incorrect application of law by CIS under 8 C.F.R. § 103.5(a)(3).

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.

The regulation at 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. Here, the petition's priority date is December 19, 1997. The beneficiary's salary as stated on the labor certification is $755.60 per week or $39,291.20 per annum.

The AAO affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence of its ability to pay the proffered wage as of the filing date of the petition.

On motion, counsel asserts that an owner/shareholder of the petitioning restaurant could forego rental income he receives as a property owner from the petitioning restaurant to apply towards paying the proffered wage.

Counsel's argument is not persuasive. The petitioning entity in this case is a corporation. Contrary to counsel's primary assertion, Citizenship and Immigration Services (CIS), formerly the Service or INS 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; AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Therefore, the potential future reduction of the petitioner's rental expenses based upon its owner(s)/shareholder(s) foregoing receiving an asset it already receives, payment for property rented, may not be considered as probative evidence of the petitioner's ability to pay the proffered wages.

Counsel further asserts that the bank statements submitted on appeal for the period from December 19, 1997 through October 30, 2000 establish the petitioner's ability to pay the proffered wage because of a running balance of $3,274.27. However, even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. 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). Thus, the petitioner's bank statements may not be considered as probative evidence of the petitioner's ability to pay the proffered wages.

Counsel also states that the petitioner has been employing and paying the beneficiary wages. The AAO would consider actual payment of wages as evidence of ability to pay the proffered wage; however, the petitioner has presented no evidence that such payments were actually made.[1] As stated above, 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, supra.*

In determining the petitioner's ability to pay the proffered wage, CIS [formerly the Service or INS] 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).

The tax return for calendar year 1997 shows an ordinary income of -$15,551. The petitioner could not pay a salary of $39,291.20 a year from this figure even if prorated for the twelve days remaining in December 1997 after the priority date was established. Additionally, the petitioner's net current liabilities outweigh its net current

[1] The petitioner has not presented W-2s, cancelled checks, the beneficiary's tax returns, or any other evidence of actual payment of wages.

assets and could not be applied towards paying the proffered wages.[2] Thus, the petitioner did not establish its ability to pay the proffered wages in 1997.

There is no tax return or any evidence submitted by the petitioner concerning its ability to pay the proffered wages in 1998. Thus, the petitioner did not establish its ability to pay the proffered wages in 1998.

The tax return for calendar year 1999 shows an ordinary income of $1,251. The petitioner could not pay a salary of $39,291.20 a year from this figure. Additionally, the petitioner's current assets are $49,149 and its current liabilities are -$29,244 resulting in net current assets of $19,905. The petitioner could not pay a salary of $39,291.20 a year from this figure either. Thus, the petitioner did not establish its ability to pay the proffered wages in 1999.

The tax return for calendar year 2000 shows an ordinary income of -$3,984. The petitioner could not pay a salary of $39,291.20 a year from this figure. Additionally, the petitioner's current assets are $56,017 and its current liabilities are -$28,897 resulting in net current assets of $27,120. The petitioner could not pay a salary of $39,291.20 a year from this figure either. Thus, the petitioner did not establish its ability to pay the proffered wages in 2000.

The petitioner must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. § 204.5(g)(2). Therefore, the petition may not be approved.

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 sustained that burden.

ORDER: The motion is granted. The AAO's decision of June, 2002, is affirmed. The petition is denied.

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[2] Net current assets are assets that can reasonably be expected to be converted to cash or a cash equivalent within the year less any financial encumbrances on the assets. Thus, if the petitioner could show net current assets that are greater than the proffered wage, it could evidence the ability to pay.