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U.S. Citizenship and Immigration Services

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[redacted]

MAR 04 2004

FILE: WAC 02 201 50254 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]

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 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, California 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 translation center. It seeks to employ the beneficiary permanently in the United States as a translator. 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, counsel submits additional information and asserts that the director failed to adequately review the petitioner's tax returns.[1]

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) also provides in pertinent part:

> (2) *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 the [CIS].

The sole issue on appeal is whether the petitioner has established its continuing ability to pay the beneficiary's offered salary. Eligibility in this case rests upon 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. 8 C.F.R. § 204.5(d). Here, the petition's priority date is January 12, 1998. The beneficiary's salary as stated on the approved labor certification is $20.87 per hour or $43,409.60 annually.

As evidence of its ability to pay, the petitioner submitted copies of its Form 1120 U.S. Corporation Income Tax Return for the years 1998, 1999 and 2000. It is noted that the federal tax employer identification number is the same as the number given on the visa petition. These tax records indicate that the petitioner was incorporated in 1991.

The information presented in the petitioner's 1998 corporate tax return shows that the petitioner declared a taxable income before net operating loss deduction (NOL) and other special deductions of $11,247. Schedule L of this tax

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[1] A Form G-28, Notice of Entry of Appearance of Attorney or Representative is in the record for "Alireza Rahmaty." Counsel on appeal is "Bita Hoffman;" however, there is no G-28 for this counsel, who also provides a different address. Because the name of appellate counsel's firm contains the name of Rahmaty, we will presume an association. Counsel is advised to provide address updates, name changes and a G-28 for any future representation.

return also reflected that the petitioner had $3570 in net current assets. The beneficiary's proposed salary could not be met out of the petitioner's net current assets or income.

The petitioner's 1999 Form 1120 federal corporate tax return shows that the petitioner declared a taxable income before the NOL and other special deductions of $11,761. Schedule L of the tax return shows that the petitioner had $28,647 in net current assets. The beneficiary's offered salary of $43,409.60 could not be covered by either the petitioner's net current assets or income.

The petitioner's 2000 corporate tax return reflects that the petitioner declared a taxable income before the NOL and other special deductions of $14,890. Schedule L indicates that the petitioner had $103,640 in net current assets. The petitioner's ability to pay the offered salary could be met by its net current assets during this year.

On September 26, 2002, the director requested additional evidence from the petitioner in support of its ability to pay the offered salary and evidence of the beneficiary's requisite two years of past work experience as a translator. The petitioner responded by sending documentation verifying the beneficiary's employment history and submitting copies of federal corporate tax returns for "California Gold Mortgage, Inc." The tax returns indicate that this entity was incorporated in 1996 and holds a different federal tax identification number than the petitioner's. The record also contains a copy of a state registration of a fictitious business name statement indicating that this entity began doing business in the petitioner's name on August 15, 2002, two months after the filing date of the petition. There is no persuasive evidence in the record in the form of corporate documentation establishing that these entities are the same. The AAO notes that the petitioner is organized as a corporation. 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). Thus, the petitioner cannot establish its ability to pay the proffered wage by using an unrelated corporation's tax returns such as that of California Gold Mortgage, Inc.

The director denied the petition following an evaluation of California Gold Mortgage, Inc.'s corporate tax returns for the years 1998 through 2001. The director's review indicates that the only year this entity demonstrated an ability to pay the offered wage was 2001, when its net current assets exceeded the beneficiary's offered salary. While the AAO does not concur with the use of California Gold Mortgage, Inc.'s tax returns as grounds for the director's denial, as noted above, the AAO agrees with the director's conclusion that the petitioner failed to demonstrate a continuing ability to pay the beneficiary's proposed salary of $43,409.60 as of the visa priority date of January 12, 1998.

On appeal, counsel resubmits California Gold Mortgage's corporate tax returns. Counsel contends that the petitioner's gross income, depreciation expense, and total assets should be considered when evaluating the petitioner's ability to pay.

In determining the petitioner's ability to pay the proffered wage, CIS (formerly INS) 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).

Counsel's assertion that the petitioner's total assets figure as shown on California Gold Mortgage's tax returns should be included in the calculation is also unpersuasive. Even if this entity was considered to be the petitioner, these figures do not include a consideration of total liabilities and do not represent readily available funds that could be used to meet the beneficiary's salary. As noted above, CIS will examine net income figures including, in some cases a petitioner's net current assets as monies that would be readily available to meet the proffered wage. The petitioner's net current assets as reflected in Schedule L of its corporate tax returns represent the difference between its current assets and current liabilities. It reflects resources that are cash or cash equivalents out of which the beneficiary's proposed salary could readily be paid. Similarly, only looking at a petitioner's total income does not reflect consideration of the expenses incurred in order to generate such income.

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered as of the priority date of the petition and continuing until the present.

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.