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**U.S. Department of Homeland Security**

Citizenship and Immigration Services

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

[redacted]

File: EAC 02 130 54510 Office: Vermont Service Center Date: MAR 0 9 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 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a supermarket. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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 continuing ability to pay the beneficiary the proffered wage from the time of filing the labor certification.

On appeal, counsel states that the petitioner "generally" had the ability to pay the prevailing wage in 1998; however "the petitioning entity or its main shareholder" underwent a major expansion in that year, causing a "temporary drop in available funds."

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 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. The petitioner's priority date in this

instance is January 14, 1998. The beneficiary's salary as stated on the labor certification is $10.50 per hour or $21,840 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return. The tax return reflects taxable income before net operating loss deduction and special deductions of $37,997, more than the proffered wage.

In a request for evidence (RFE) dated April 5, 2002, the director requested the petitioner to establish it had the ability to pay the proffered wage as of the priority date, specifically requesting the 1998 federal income tax return and, if the beneficiary was employed by the petitioner, a copy of her 1998 Form W-2, Wage and Tax Statement. In response, counsel submitted the petitioner's 1998 Form 1120 and copies of petitioner's monthly bank statements from March 1998 to December 1998. Counsel states the bank statements indicate the petitioner had an average balance of $19,603. The petitioner's 1998 tax returns show a taxable income before net operating loss deduction and special deductions of $1,769.

The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage on the priority date of the visa petition.

On appeal, counsel states that the petitioner is a small closely held corporation with one main shareholder. Counsel asserts that funds were transferred from the petitioner through the main shareholder to purchase another similar firm, and that these "short figures on the accounting" were due to the main shareholder's planned expansion. Counsel further asserts that the liquid assets of both businesses should be considered in determining whether the petitioner can pay the proffered wage.

Counsel's assertions are unpersuasive. He indirectly acknowledges that all of the funds used to purchase the new business may not have come from the petitioner, yet he fails to state how much of the petitioner's cash assets were actually used in the purchase. Further, nothing in the record supports that any assets of the petitioner were used in the purchase. Assertions by 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).

Additionally, none of that explain or affect the amounts reported on the 1998 Form 1120. As pointed out by the director, the petitioner could not have paid the proffered wage from either taxable income or net current assets.

Counsel also states that the petitioner paid out substantial wages during 1998 "and depending on the turnover rate," some of those funds may be applied towards the proposed wage. This assertion is without merit. Counsel does not establish with evidence that the petitioner experienced a turnover "rate," which employees were involved and whether they were replaced, or whether the beneficiary could have been the replacement. Furthermore, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Counsel also asserts that the earning capacity of the new corporation should also be considered since the companies are under the control of one shareholder. Counsel undermines this assertion by stating the income "theoretically" may be applied towards the petitioner "if accounting procedures allow[sic] it." 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), *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. Indeed, counsel states the reason petitioner exists is to protect the shareholder personally.

With the appeal, counsel submitted a copy of the petitioner's 2001 Form 1120. The return reflects taxable income before net operating loss deduction and special deductions of $96,545, more than the proffered wage. However, the petitioner must establish its ongoing ability to pay since 1998, the priority date.

Counsel asserts that 1998 was not a model to determine the petitioner's ability to pay the proffered wage. However, counsel's analysis as to why this is so is not persuasive. No evidence was submitted of petitioner's 1997 earnings, the year it was incorporated, or of its 1999 earnings.

In determining the petitioner's ability to pay the proffered wage, CIS 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 petitioner's taxable income before net operating loss deduction and special deductions for 1998 was $1769 and its net current liabilities outweighed its net current assets. Thus, the petitioner could not pay the proffered wage in 1998 from either its taxable income or its net current assets. The petitioner did not present evidence of and thus has not proved its ability to pay the proffered wage in 1999. The petitioner's taxable income before net operating loss deduction and special deductions for 2000 was $37,997. The petitioner's taxable income before net operating loss deduction and special deductions for 2001 was $96,545. Thus, the petitioner could pay the proffered wage for 2000 and 2001.

While the petitioner demonstrated its ability to pay the proffered wage in 2000 and 2001, there is no evidence of its ability to pay in 1999. Additionally, the petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate its 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 1998 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.