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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

MAR 17 2004

FILE: WAC 02 162 50711 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for a 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 or professional. The petitioner is an Arabian horse business. It seeks to employ the beneficiary permanently in the United States as an Arabian horse trainer. 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 evidence asserting that it establishes the petitioner's ability to pay the proposed wage.

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 Service.

Eligibility in this case rests upon the petitioner's continued ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the Department of Labor's employment service system. Here, the petition's priority date is October 15, 1999. The beneficiary's salary as stated on the labor certification is $12.82 per hour or $26,665.60 per year based on a 40-hour week. The record indicates that the petitioner was established in 1999 and is organized as a corporation. It employs two people.

As evidence of its ability to pay, the petitioner initially submitted copies of the petitioner's majority shareholder's Form 1040, U.S. Individual Income Tax Return for 2000 and a cover copy of this individual's money market account, dated November 30, 2001.

On July 17, 2002, the director requested additional evidence of the petitioner's ability to pay the beneficiary's annual salary of $26,665.60 covering 1999 and 2001. The director instructed the petitioner to submit annual reports, federal tax returns with all schedules and tables, or audited financial statements. The petitioner, through counsel, responded by submitting the petitioner's majority shareholder's individual tax returns for 1999 and 2001 as requested.

On September 09, 2002, the director notified the petitioner that the previously submitted tax returns indicated that the petitioner had filed its tax returns as a corporation. The director then instructed the petitioner to submit copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for the years 1999 through 2001. The director also requested the petitioner to include the relevant copies of Schedule K, reflecting each shareholder's share of income.

The petitioner complied with the director's instructions and submitted the requested tax returns including the pertinent attachments and schedules. They reveal that the petitioner files its tax returns based on a standard calendar year. Schedule K for each year reflects that both of the two shareholders declared an ordinary income loss every year.

The 1999 corporate tax return shows that the petitioner declared an ordinary income of -$102,513. The petitioner's balance sheet figures set forth on Schedule L indicate that the petitioner had -$1 in current assets and declared $2,743 in current liabilities. The difference between these figures represents the petitioner's net current assets of -$2,744. Net current assets can be considered because they reflect the level of liquidity that the petitioner has as of the date of filing and are assets that can reasonably be expected to be converted to cash within the year less any encumbrances on the assets. Here, neither the petitioner's net current assets of -$2,744, nor its declared 1999 ordinary income of -$102,513 were sufficient to cover the beneficiary's proposed annual salary of $26,665.60.

The petitioner's 2000 corporate tax return reveals that the petitioner had -$110,264 in ordinary income. Schedule L shows that the petitioner declared no current assets and had $6,025 in current liabilities. Thus, its net current assets would be stated as -$6,025. Again, neither its ordinary income of -$110,264, nor its net current assets of -$6,025 were sufficient to meet the proffered wage of $26,665.60.

The petitioner's 2001 corporate tax return indicates that it had -$141,666 in ordinary income. Schedule L reflects that the petitioner had $6,373 in current assets and $1,922 in current liabilities, producing $4,451 in net current assets. Each figure representing the petitioner's ordinary income and net current assets was far short of the amount needed to meet the beneficiary's wage offer.

The director denied the petition, determining that the petitioner had not established its ability to pay the proffered wage as of the priority date of the visa petition and continuing until the present.

On appeal, counsel submits a letter from the petitioner's majority shareholder, Betty Flanagan, dated December 22, 2002. This letter presents arguments in support of the petitioner's continued financial ability to pay the proffered wage. The first assertion is that Ms. Flanagan has other personal assets and can provide money as needed. The appellate exhibits include copies of tax returns of another corporation in which Ms. Flanagan owns shares, as well as copies of Ms. Flanagan's individual tax returns that were submitted previously.

CIS will not consider the individual assets of the petitioner's majority shareholder. 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). Furthermore, there is nothing in the governing regulation at 8 C.F.R. § 204.5 that allows CIS to consider the assets or resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar v. Ashcroft,* (2003 WL 22203713 (D. Mass)). It is also noted that, depending on the specific arrangement, such a contribution to the corporation could be characterized as a liability if it constitutes a loan to be repaid.

Ms. Flanagan's letter also states that she has set up "a bank account which contains $77,000 for the exclusive use of the [petitioner] to pay [the beneficiary's] salary for the next three years." There is no indication from the letter or the attached copy of a bank deposit indicating whether this deposit takes the form of an revocable gift for a finite term, or as noted above, a loan to the petitioning corporation that must be repaid. The record also indicates that the transaction occurred on December 23, 2002. As previously stated above, 8 C.F.R. § 204.5 (g)(2) requires that a petitioner's ability to pay the beneficiary's proffered wage must be demonstrated beginning at the priority date and continuing until the beneficiary obtains lawful permanent residence. A loan and/or gift offered three years subsequent to the priority date do not establish that the petitioner had the continuing ability to pay as of October 15, 1999.

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. 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).

The most significant fact that Ms. Flanagan's letter reveals is that the petitioner has employed the beneficiary "as a contract laborer over the past three years." The materials submitted on appeal indicate that the petitioner paid the beneficiary; $20,852.11 (through December 21, 2002), $23,376.00 in 2001, $22,678.43 in 2000, and $5,675 in 1999. It is noted, however, that the beneficiary's wages for 1999 represented "help with garden and horses." As such, it is not clear how much of this amount was paid to the beneficiary for gardening services or for the job offered of horse trainer. Nevertheless, although the evidence shows that the difference of approximately $3,300 between the wages paid in 2001 and the proposed salary of $26,665.60 could be paid out of the petitioner's declared net current assets of $4,451 for that year, the $4,000 shortfall in 2000 could not be paid out of either the petitioner's ordinary income of -$110,264, or its net current assets of -$6,025. Finally, since the petitioner did not submit additional corporate financial information for 2002, such as an audited or reviewed financial statement, it is also unclear whether the petitioner's net income or net current assets could cover the $5,800 difference between the wages paid of $20,852.11 and the proposed salary of $26,665.60.

Ms. Flanagan's letter asserts that the petitioner provided non-cash compensation of housing to the beneficiary, and that this should be given consideration as part of the petitioner's ability to pay the proposed wage. A letter from a real estate firm evaluating the housing's rental value has been submitted on appeal. We do not concur. The proposed wage on an approved labor certification is expressed in U.S. currency and not a formula including the value of housing, but rather on a determination of the prevailing wage determined pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40. Further, the regulation at 20 C.F.R. 656.20 (c)(3) clearly provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis."

Ms. Flanagan also argues that an Arabian horse business takes time to develop and that it is often necessary "to operate at a loss until sufficient capital improvements can create a positive cash flow." This may be true, but in this case, the losses declared by the petitioner have steadily increased during the three years under discussion. As shown by the petitioner's federal tax returns, they have grown in 1999 from -$102,513 to -$141,666 in 2001. There is no

guarantee, as in most businesses, that a positive cash flow will ever develop. As stated in *Matter of Great Wall,* 16 I&N Dec. 143, 144-145:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Based on the evidence contained in the record and after consideration of the financial data and arguments 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.