PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

MAR 1 4 2004

File: LIN 02 184 52342 Office: NEBRASKA SERVICE CENTER Date:

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 employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) 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 Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican food specialty 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 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 erred in his finding that the petitioner failed to demonstrate its ability to pay the beneficiary's offered salary.

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.

The basis of the appeal is whether the petitioner has established its continuing ability to pay the beneficiary's offered wage. Eligibility in this case rests upon the petitioner's 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 employment service system of the Department of Labor. Here, the petition's priority date is January 8, 2001. The beneficiary's salary as stated on the approved labor certification is $11.82 per hour or $24,585.60 annually.

As evidence of its ability to pay the beneficiary's salary, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the calendar year of 2001. This tax

return indicates that the petitioner declared -$2,902 as ordinary income. Schedule L of the petitioner's 2001 tax return shows that the petitioner had $5,518 in current assets and $4,355 in current liabilities. The difference between these figures reflects that the petitioner's net current assets were $1,163.

On July 29, 2002, the director indicated that the petitioner's 2001 tax return did not demonstrate the petitioner's ability to pay the offered salary and requested additional evidence from the petitioner pursuant to the requirements set forth at 8 C.F.R. § 204.5(g)(2).

The petitioner responded by resubmitting a copy of its 2001 corporate tax return.

The director denied the petition on September 4, 2002. He determined that the petitioner had not established its continuing ability to pay the proffered wage as of the January 8, 2001 priority date of the visa petition. The director considered the petitioner's ordinary income of -$2,902 reported in its 2001 corporate tax return and concluded that this figure did not sufficiently demonstrate the petitioner's ability to pay. We concur and would further note that the petitioner's 2001 net current assets of $1,163 were also insufficient to meet the proffered salary.

On appeal, counsel argues that the beneficiary is receiving $11.15 per hour or 94% of the proffered wage. In support of this assertion, counsel submits two copies of the beneficiary's payroll record for the period beginning August 1, 2002 and ending August 31, 2002. These pay stubs reflect that the petitioner had paid the beneficiary $12,429.60 as of August 31, 2002.

Although we concur with counsel's assertion that the petitioner is not obligated to actually pay the proffered wage until after lawful permanent resident status is granted, the petitioner must demonstrate the continued ability to pay the proffered salary as of the visa priority date. Here, the petitioner's payment of $12,429.60 in wages to the beneficiary is not persuasive, standing alone, to establish this ability in 2002 or previously. As of August 31, 2002, this would represent a shortfall of $3,960.80 when compared to the proffered salary of $16,390.40 prorated to August 31, 2002. The record does not contain any 2002 corporate evidence, pursuant to 8 C.F.R. § 204.5(g)(2), that would demonstrate how the petitioner would account for this shortfall.

The evidence submitted on appeal consists of a copy of the petitioner's principal shareholder's personal 2001 income tax return and W-2, a statement of personal monthly expenses of the principal shareholder, and two of the principal shareholder's personal bank statements dated July and August 2002. This evidence cannot be considered in this case because the petitioner is organized as a corporation. A corporation is a separate and distinct legal entity. *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, 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.

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).

In this case, neither the petitioner's 2001 ordinary income of -$2,902 nor its net current assets of $1,163, as set forth on its corporate tax return, were sufficient to cover the proffered salary as of the visa priority date. The financial information subsequently submitted to the record also did not demonstrate the petitioner's ability to pay the beneficiary's proposed salary.

Based on the evidence contained in the record and after consideration of the financial information and argument presented on appeal, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered salary 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.