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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 99 183 51160 Office: VERMONT SERVICE CENTER Date: MAR 16 2001

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:
[Redacted]

Public Copy

Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a hair salon. It seeks to employ the beneficiary permanently in the United States as a hair stylist. 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 filing date of the visa petition.

On appeal, counsel submits a brief and additional documentation.

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.

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 filing 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. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is May 15, 1997. The beneficiary's salary as stated on the labor certification is \$27,497.60 annually.

The petitioner submitted copies of its 1997 and 1998 Y.S. Corporation Income Tax Return. The 1997 tax return reflected gross

receipts of \$358,553; gross profit of \$232,572; wages paid of \$43,780; no depreciation; and a taxable income before net operating loss deduction and special deductions of -\$814. The 1998 tax form indicated gross receipts of \$206,070; gross profit of \$145,918; wages paid of \$31,651; and an ordinary income loss from trade or business activities of -\$31,453. The director denied the petition, noting that:

1. The petitioner has 5 employees.
2. The proffered wage/salary is \$13.22 per hour.
3. The petitioner paid \$43,780.00 in wages (line #13)
4. The petitioner had a net operating loss of \$1,759.00 (line #29).
5. No depreciation (line #21)
6. The letters from [REDACTED] and [REDACTED] assert that Line # 3 of Schedule A indicates that \$126,056.00 as a cost of labor.
7. A review of Schedule A, Line #2 indicates that \$126,056.00 were spent on purchases, and Line #3 indicates nothing was declared as the cost of labor.

The above listed facts do not indicate that the petitioner had the ability to pay the proffered wage/salary of \$13.22 per hour as of May 15, 1997, the date of filing. The petitioner has committed \$43,780.00 to employ 5 individuals, and the record does not support an additional annual expense of \$26,545.76 to pay the wage/salary of an additional employee (the beneficiary).

On appeal, counsel argues that:

The economic reality of this case is that there is a Momotaro group of two hair salons which are both owned and controlled by Mr. and Mrs. [REDACTED]. Please see a copy of their stock certificates. Both of the [REDACTED] are experienced business people in the hair salon industry in New York.

A cash surplus from one company is available to pay the expenses of the other on a day-to-day basis, and therefore, this court should reasonably consider the financial assets of the group in determining if it had the ability to pay the offered wage. The corporate tax returns of the group show revenue for the 1996 fiscal year at approximately \$823,000 and wage expenses over \$170,500. This would be more than enough to pay the beneficiary's wage.

Counsel's argument is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of its stockholders 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; 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). 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).

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 appeal is dismissed.