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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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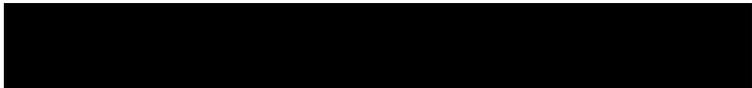


File:

Office: Vermont Service Center

Date: 06 DEC 2002

IN RE: Petitioner:
Beneficiary:



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:



*identifying 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 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 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 that 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, 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 grocery store. It seeks to employ the beneficiary permanently in the United States as a night manager. 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 priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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 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. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is December 30, 1997. The beneficiary's salary as stated on the labor certification is \$29.37 per hour or \$61,089.60 per annum.

Counsel submitted copies of the beneficiary's W-2 Wage and Tax Statement for the years 1997 through 2000 and copies of the

petitioner's 1996 through 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The W-2 for 1997 showed the beneficiary was paid \$10,528; the W-2 for 1998 showed the beneficiary was paid \$15,600; the W-2 for 1999 showed the beneficiary was paid \$15,600; and the W-2 for 2000 showed the beneficiary was paid \$15,600.

The tax return for calendar year 1997 reflected gross receipts of \$2,334,627; gross profit of \$231,529; compensation of officers of \$53,240; salaries and wages paid of \$40,778; and an ordinary income (loss) from trade or business activities of \$15,580. The tax return for calendar year 1998 reflected gross receipts of \$2,127,843; gross profit of \$242,251; compensation of officers of \$59,680; salaries and wages paid of \$42,586; and an ordinary income (loss) from trade or business activities of \$17,861.

The tax return for calendar year 1999 reflected gross receipts of \$2,796,892; gross profit of \$279,795; compensation of officers of \$64,683; salaries and wages paid of \$48,148; and an ordinary income (loss) from trade or business activities of \$30,349. The tax return for calendar year 2000 reflected gross receipts of \$3,492,939; gross profit of \$405,024; compensation of officers of \$146,350; salaries and wages paid of \$58,448; and an ordinary income (loss) from trade or business activities of \$213.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits copies of bank statements for Khevee Enterprises Inc. for the period from 1997 through 2001 and argues that:

The owner had other business endeavors and had many assets as shown in exhibit "C" and "D". Based on the owner assets and financial standing during the period of pedantry (sic) of the instant application, the owner could have used the funds that he took as compensation from the business to pay the offered salary if he needed to pay that amount of salary at that time. Clearly, the Officer's salary from this single business endeavor was not the owner's only means of income as shown by the evidence attached.

Counsel's argument is not persuasive. Contrary to counsel's primary assertion, the Service may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal

entity from its owners and stockholders. Matter of M, 8 I&N Dec. 24, 50 (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). Consequently, the assets of the petitioning corporation's sole shareholder cannot be considered in determining the corporation's ability to pay the proffered wage.

The petitioner's Form 1120S for calendar year 1997 shows an ordinary income of \$15,580. The petitioner could not pay a proffered salary of \$61,089.60 out of this income. Even if the wage paid of \$10,528 were added, the petitioner still could not pay the wage offered.

In addition, the petitioner's 1998 through 2000 federal tax returns continue to show an inability to pay the wage offered.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to 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.