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U.S. Department of Justice
Immigration and Naturalization Service

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



File: WAC 00 237 56480 Office: California Service Center Date: 24 MAY 2002

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:



Administrative Appeals Office

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
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is involved in ice cream manufacturing and retailing. It seeks to employ the beneficiary permanently in the United States as a production supervisor. 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 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 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 October 23, 1995. The beneficiary's salary as stated on the labor certification is [REDACTED] per month or [REDACTED] per annum.

Counsel initially submitted insufficient evidence of the

petitioner's ability to pay the proffered wage. On November 7, 2000, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return. The tax return for fiscal year October 1, 1997 through September 30, 1998 reflected gross receipts of [REDACTED]; gross profit of [REDACTED] compensation of officers of \$0; salaries and wages paid of [REDACTED] and a taxable income before net operating loss deduction and special deductions of [REDACTED]. The tax return for fiscal year October 1, 1998 through September 30, 1999 reflected gross receipts of [REDACTED] gross profit of [REDACTED] compensation of officers of \$0; salaries and wages paid of [REDACTED] and a taxable income before net operating loss deduction and special deductions of [REDACTED].

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 submitted copies of the beneficiary's W-2 Wage and Tax Statement and copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return. The Form 1120 for fiscal year October 1, 1994 through September 30, 1995 reflected gross receipts of [REDACTED] gross profit of [REDACTED] compensation of officers of \$0; salaries and wages paid of [REDACTED] and a taxable income before net operating loss deduction and special deductions of [REDACTED]. The Form 1120-A tax return for fiscal year October 1, 1995 through September 30, 1996 reflected gross receipts of [REDACTED] gross profit of [REDACTED] compensation of officers of \$0; salaries and wages paid of [REDACTED] and a taxable income before net operating loss deduction and special deductions of [REDACTED]. The Form 1120 for fiscal year October 1, 1999 through September 30, 2000 reflected gross receipts of [REDACTED] gross profit of [REDACTED] compensation of officers of 0; salaries and wages paid of [REDACTED] and a taxable income before net operating loss deduction and special deductions of [REDACTED].

On appeal, counsel argues that the beneficiary has been employed by the petitioner since November of 1993. While counsel submits evidence that the beneficiary was paid the proffered wage from 1996 through 2000, the petitioner must show that it had the ability to pay the proffered wage at the time of filing of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. 204.5(g)(2).

Counsel further argues that the petitioner derives other sources of income from foreign companies which would be used to pay the

beneficiary's wages. 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. Therefore, the income from the petitioner's other investments may not be used as proof of ability to pay the proffered wage.

The petitioner's Form 1120-A for fiscal year October 1, 1994 through September 30, 1995 shows a taxable income of [REDACTED]. The petitioner could not pay a proffered wage of [REDACTED] per year out of a negative income.

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 at the time of filing of the petition.

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.