

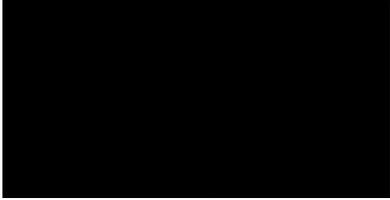


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: EAC 01 174 53340 Office: VERMONT SERVICE CENTER Date: NOV - 4 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:
[Redacted]

PUBLIC COPY

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
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 dry cleaning business. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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 October 26, 2000. The beneficiary's salary as stated on the labor certification is \$9.87 per hour or \$20,529.60 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition. On September 17, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of October 26, 2000.

In response, counsel submitted copies of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. It reflected gross receipts and gross profit of \$160,207; salaries and wages of \$22,666; and a taxable income before net operating loss deduction and special deductions of \$6,043.

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, the petitioner's owner goes on record and declares, "...Malaty Enterprises & Prime Investments Inc. are both holding companies for Prime Cleaners & all payroll is transacted through Malaty Enterprises. Enclosing copies of Malaty Enterprises payroll."

Neither the payroll entries of Malaty Enterprises nor the deposit slips of Prime Investments Inc T/A Prime Cleaners demonstrate a relationship between the organizations. Counsel offers none. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I & N Dec. 190 (Reg. Comm. 1972).

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).

Counsel, citing Masonry Masters, Inc. v. Thornburg, 875 F. 2d 898, 903 and Matter of Sonogawa, 12 I & N Dec. 612, urges in his brief at pages 2-3:

... The 2000 tax return shows a net income only \$4000 less than the offered wage. The tax return is but only [sic] a "snapshot" as stated in *Masters Masonry* [sic]

and the fact that the net profit does not exceed the offered wage does not preclude the granting of a visa. The hiring of a tailor will increase the profitability of the petitioner's business. That is the realistic reason for hiring her. Furthermore, the petitioner did establish that at the time of filing the petition it showed a substantial income.

Counsel's argument is not persuasive.

Matter of Sonogawa, supra, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in Sonogawa had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in Sonogawa was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in Sonogawa, nor has it been established that the year 2000 was an uncharacteristically unprofitable year for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that her reputation would increase the number of customers.

The petitioner's Form 1120 for the year 2000 shows taxable income

of \$6,043. The petitioner could not pay a proffered wage of \$20,530 per year out of this income. Unaudited 2000 payroll and deposit slips were submitted as proof of the petitioner's ability to pay the wage. However, they have little evidentiary value as they are based solely on the representations of management. 8 C.F.R. 204.5(g)(2), already quoted above in part, states:

Evidence of this ability [to pay the proffered wage] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. ... In appropriate cases, additional evidence ... may be submitted by the petitioner... (emphasis added).

This regulation neither states nor implies that unaudited statements may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. The petitioner's unaudited data reveal no income more than did the tax returns.

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.