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Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



File: WAC 01 283 55116 Office: California Service Center

Date:

AUG 06 2003

IN RE: Petitioner:
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:



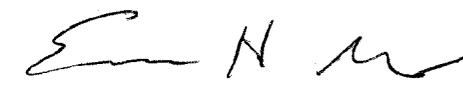
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. The petitioner states that the petitioner's name is Ito'y Sariling Atin Restaurant and that its address is 12232 Artesia Boulevard, Artesia, California. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on 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 continuing ability to pay the proffered wage beginning on the priority date, 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 request for labor certification was accepted for processing on April 13, 2001. The proffered salary as stated on the labor certification is \$13.87 per hour,

which equals \$28,849.60 annually.

With the petition, counsel submitted an unaudited balance sheet purporting to show the assets and liabilities of the Ito'y Atin Restaurant as of June 30, 2001, and its income and expenses during the six month period ending on that same date. Because that balance sheet is unaudited, it is not competent, pursuant to 8 C.F.R. § 204.5(g)(2), to show the petitioner's ability to pay the proffered wage and its contents may not be considered.

Because the evidence submitted did not satisfy the requirements of 8 C.F.R. § 204.5(g)(2), the California Service Center, on February 6, 2002, requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. Specifically, the Service Center requested a copy of the petitioner's 2001 tax return and copies of the petitioner's California Form DE-6 for the previous four quarters.

In response, counsel submitted a letter dated March 28, 2002. In that letter, counsel stated that the petitioner had no tax returns available as it had only been in business since June 1, 2001.

With that letter, counsel submitted a copy of the California Form DE-6 quarterly wage statement of Ito'y Sariling Atin III Restaurant, of 12232 Artesia Boulevard, for the third quarter of 2001 and a copy of the same restaurant's Form 941 quarterly tax return for the same period. Those documents show that the petitioner did not employ the beneficiary during that quarter and that it paid \$17,031.24 in wages during that quarter.

Counsel also submitted monthly statements of the checking account of [REDACTED] Inc, of [REDACTED] and a letter from the bank, dated February 12, 2002 and addressed to [REDACTED] stating the balance of that company's accounts on that day.

On May 30, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage.

On appeal, counsel states that the petitioner, the Ito'y Sariling Atin Restaurant, is a sole proprietorship, and that the income and assets of the owner should, therefore, be included in the calculation of the petitioner's ability to pay. Counsel provides copies of monthly statements of the bank account of the petitioner's owner and the owner's spouse.

Counsel asserts that the petitioner's owner also owns another restaurant, which has the ability to pay the proffered wage. Counsel submits the 2001 Form 1120 U.S. Corporation Income Tax Return of [REDACTED] Inc., of [REDACTED] apparently a different restaurant with a similar name. The only indications in the record that the petitioner's owner also owns that other restaurant are counsel's assertion and the similarity in the names.

Counsel provides monthly account statements for the [REDACTED] card. One of those statements is addressed to [REDACTED]. Which of the two restaurants that account pertains to is unknown to this office.

Counsel provides an unaudited balance sheet purporting to show the assets and liabilities of the Sariling Atin restaurant as of December 31, 2001, and its unaudited profit and loss statement for 2001.

Counsel also provides some portions of the 2001 Form 1040 individual income tax return of the petitioner's owner, including Schedule C, Profit or Loss from Business (Sole Proprietorship). That Schedule C shows that the petitioner's owner operates an unidentified restaurant as a sole proprietorship, and that it contributed a net profit of \$15,510 toward the owner's income during that year.

Because counsel did not provide page one of the petitioner's owner's tax return, the petitioner's owner's net income is unknown to this office. Even if the net profit shown on that Schedule C were to be considered in determining the petitioner's ability to pay the proffered wage, that net profit was insufficient, in itself, to pay that wage during 2001. Further, even if the income and assets of the petitioner's owner were to be considered in determining the petitioner's ability to pay the proffered wage, counsel has offered no evidence of the petitioner's owner's net income during 2001.

Counsel provided a deed showing that the petitioner's owner and the owner's wife purchased a property on April 6, 1998. Counsel submitted no evidence pertinent to the value of that property or the extent to which it may be encumbered. As such, even if the assets of the petitioner's owner were to be considered in determining the petitioner's ability to pay to proffered wage, no evidence of the petitioner's owner's equity in that property exists in the record, and the amount of the owner's equity can play no role in determining the petitioner's ability to pay the proffered wage.

Counsel argues that the petitioner's bank balances, evidenced by the bank statements, demonstrate the ability to pay the proffered wage. Further still, counsel states that the petitioner has a credit line of \$20,000 which could be used to pay the proffered wage, but offers no evidence of that assertion.

Finally, counsel cites a recent non-precedent decision, the facts of which he asserts are similar to the facts of the instant case. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Although counsel flatly asserts that the petitioner, [REDACTED], is a sole proprietorship, the petitioner's bank statements refer to it as [REDACTED], which denotes a corporation. Those accounts give the address of that corporation as [REDACTED] the same address stated on the petition. Evidence in this matter indicates that the petitioner is a corporation, notwithstanding counsel's assertion that it is a sole proprietorship, and counsel has provided no evidence to the contrary.

A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders, including other 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&M Dec. 631 (Act. Assoc. Comm. 1980). The personal finances of the petitioner's owner will not be considered.

Counsel's reliance on the petitioner's bank statements is inapposite. Bank statements show the balance on a given date, and cannot show a sustainable ability to pay a proffered wage. In any event, only three types of documents are recognized by 8 C.F.R. § 204.5(g)(2) as competent evidence of the ability to pay the proffered wage, and bank statements are not among them.

Counsel also asserted that the petitioner could use its line of credit to pay the proffered wage. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner

must show the ability to pay the proffered wage out of its own funds. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner is obliged to show its ability to pay the proffered wage using copies of annual reports, the petitioner's federal tax returns, or audited financial statements. Those are the only three types of evidence competent to show the petitioner's ability to pay the proffered wage. No annual reports or audited financial statements have been submitted in this case. Demonstrating the petitioner's ability to pay the proffered wage, then, depends entirely on the federal tax returns counsel has submitted.

Counsel submitted a Form 1120 corporate tax return for a different restaurant. That corporation and restaurant may belong to the petitioner's owner, but, as was stated above, absent evidence that the petitioner is a sole proprietorship, the petitioner's owner's assets cannot be considered in the determination of the petitioner's ability to pay the proffered wage.

The Schedule C of an unidentified restaurant was submitted. Given the evidence showing that the petitioner is a corporation, counsel's failure to address that discrepancy in the evidence, and counsel's failure to demonstrate, or even allege, that the figures shown on that Schedule C pertain to the petitioner, this office will not find that Schedule C, Profit or Loss from Business (Sole Proprietorship), pertains to the petitioner. Counsel has not submitted any tax information which can be shown to pertain to the petitioner.

The petitioner has submitted no evidence competent to show its ability to pay the proffered wage. 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.