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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



File: WAC 01 094 54054 Office: California Service Center

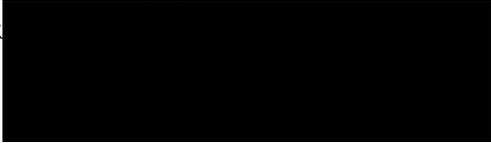
Date: **AUG 21 2003**

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



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 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 Acting Director, California Service Center. The Associate Commissioner for Examinations dismissed a subsequent appeal, affirming the Acting Director's decision. The matter is now before the Administrative Appeals Office on a motion to reopen and reconsider. The motion will be granted, the previous decisions of the Acting Director and Associate Commissioner will be affirmed, and the petition will be denied.

The petitioner is a bed and breakfast inn. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a specialty cook. The Acting Director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage during 1997, 1998, and 1999, and denied the petition on November 9, 2001.

On appeal, counsel argued that the Acting Director erred in failing to consider the difference between tax accounting and financial accounting. Counsel argued that the petitioner had the ability to pay the proffered wage during the salient years, notwithstanding that it reported a loss on its tax returns for 1997, 1998, and 1999. Counsel argued that the tax returns which the petitioner provided, and upon which the Acting Director relied, are a poor indicator of the financial position of the petitioner. Counsel also stated that the petitioning corporation owns valuable real property, which the Acting Director did not consider in its calculation of the ability to pay the proffered wage.

The Associate Commissioner affirmed the decision of the Acting Director, dismissing the appeal on July 8, 2002.

On August 7, 2002, counsel submitted copies of the personal tax returns of the president of the petitioning corporation and the president's spouse.

On motion, counsel argues that the Acting Director erred in failing to address explicitly each of the petitioner's arguments on appeal. Counsel further argues that the funds of the petitioner's owners should be included in the calculation of the petitioner's ability to pay the proffered wage. Counsel again argues that the petitioner's tax returns are a poor indicator of the petitioner's ability to pay the proffered wage. Finally, counsel argues that the petitioner projects future profits.

Counsel submitted various documents pertinent to the finances of the petitioner, to the finances of the petitioner's owners, and to

counsel's arguments. Among those documents is an accountant's compilation of the petitioner's profit and loss statements for the ten month period which ended October 31, 2001, and the twelve month period which ended December 31, 2002.

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 filed on June 27, 1997. The proffered salary as stated on the labor certification is \$10.72 per hour which equals \$22,297.60 annually.

The petitioner's projected future profits are speculative. Further, the decision of denial was based on the petitioner's apparent inability to pay the proffered wage during 1997, 1998, and 1999 and those projections, even if believed, cannot possibly show the petitioner's ability to have paid the proffered wage during 1997, 1998, and 1999.

The reports submitted by the petitioner's accountant emphasize that the associated profit and loss statements were produced pursuant to compilations, rather than audits. The accountant specified that he had compiled information provided by the petitioner and presented

it in the form of profit and loss statements, but that he had not audited or reviewed the financial statements and that he expressed no opinion or any other form of assurance pertinent to the accuracy of the information. As such, the unaudited balance sheet merely restates the petitioner's representations, and is not evidence of their veracity. Further, because those statements relate to 2001 and 2002, they are not directly relevant to the basis for the director's decision, that the petitioner failed to demonstrate the ability to pay the proffered wage during 1997, 1998, and 1999.

On appeal, counsel stated that the petitioner owns valuable real property, but failed to specify how the petitioner might use that real property to pay the proffered wage. Further, although counsel stated that the real property belongs to the corporation, counsel did not provide any documentation to support the contention that the petitioner, [REDACTED] owns any interest in property.

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 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).

As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered.

Counsel argues that the petitioner's tax returns do not show the true financial condition of the corporation. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax returns to demonstrate its ability to pay the proffered wage, but chose to. The petitioner might, in the alternative, have provided annual reports or audited financial statements, but chose not to. Having made this election, the petitioner shall not now be heard to argue that its tax returns, with which it chose to demonstrate its ability to pay the proffered wage, are a poor indicator of that ability.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 1997, 1998, and 1999. Therefore, the objection of the Associate Commissioner has not been overcome on motion.

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. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of is affirmed.
The petition is denied.