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U.S. Department of Homeland Security

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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass. 3/F

425 I Street N.W.

Washington, D.C. 20536



File: EAC 02 177 50206    Office: Vermont Service Center

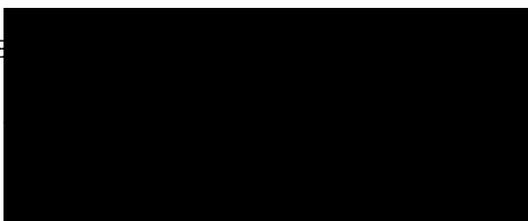
Date: **DEC 11 2003**

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 Citizenship and Immigration Services (CIS) 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a cosmetologist/stylist. 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 beneficiary did not have the requisite two years experience as a cosmetologist/stylist as required by the labor certification. The director further determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage.

On appeal, counsel argues that the evidence demonstrates the beneficiary has more than 13 years experience as a cosmetologist/hair stylist. Counsel further states the petitioner has been in business for over 43 years and was capable of paying the proffered wage in 2001 and continues to be able to do so at present.

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.

Furthermore, 8 CFR 204.5(1)(3)(ii) states, in pertinent part:

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification.

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 upon whether the beneficiary has the required two years experience and on the petitioner's ability to pay the wage offered as of the petitioner'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). The petitioner's priority date in this instance is April 27, 2001. The beneficiary's salary as stated on the labor certification is \$9.76 per hour or \$20,300.80 per year.

With the petition, counsel submitted a certificate of the beneficiary's completion of beauty school in Colombia, letters from beauty supply companies indicating the beneficiary was a former client, and a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return. The tax return reflected taxable income before net operating loss deduction and special deductions of negative \$20,493.

In a request for evidence (RFE) dated September 6, 2002, the director required additional evidence to establish that the beneficiary had the prerequisite experience for the position and that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until present. In response, counsel submitted copies of the petitioner's unaudited financial statements for 1997 and 1998.

The director determined that the evidence presented did not establish that the beneficiary possessed the two years experience as required by the labor certification. The director also 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 asserts that the beneficiary has almost 14 years of experience as a cosmetologist/stylist. With the appeal, counsel submitted a brief and statements from previous employers and customers attesting that the beneficiary has worked as a stylist almost continuously from 1985 until 1999. A review of the evidence submitted establishes that the beneficiary possessed the required two years experience prior to the filing of the ETA 750.

Counsel also states on appeal that the petitioner is a solid 43-year old business fully capable of paying the beneficiary the proffered wage. She states that an examination of petitioner's tax

returns and the personal returns and assets of the owner reveals the ability of the petitioner to pay the proffered wage in 2001 and continuing to present. With the appeal, counsel submitted copies of the petitioner's owner's Form 1040, U.S. Individual Income tax Return for calendar years 2000, 2001 and 2002 and evidence of his personal assets.

Contrary to counsel's assertion, CIS, formerly the Service or INS 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 shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage beginning on the priority date and continuing to the 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.