

B6

PUBLIC COPY

U.S. Department of Homeland Security

Citizenship and Immigration Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, Rm 3042

425 I Street, N.W.

Washington, DC 20536

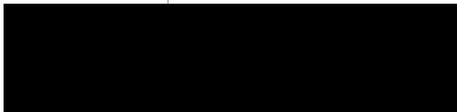


File: WAC 01 205 52546

Office: CALIFORNIA SERVICE CENTER

Date: DEC 16 2003

IN RE: Petitioner:
Beneficiary:



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)

ON BEHALF OF PETITIONER:



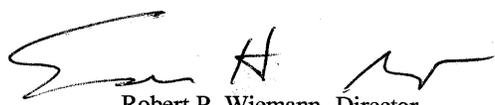
INSTRUCTIONS:

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian ethnic restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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). The petition's priority date in this instance is February 1, 1996. The beneficiary's salary as stated on the labor certification is \$1,957 per month or \$23,484 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated February 20, 2002, the director required

additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. If the petitioner chose to submit federal income tax returns, the RFE required all schedules and tables.

In response, counsel extracted only Schedules C from the 1996 and 1997 Form 1040, U.S. Individual Income Tax Return, of AV. The Schedules C reflected net losses for Taste of India of (\$5,027) in 1996 and (\$885) in 1997, less than the proffered wage. For 1997, also, Gurukirpa, Inc. (G, Inc.), a corporation, reported \$9,417 of taxable income before net operating loss deduction and special deductions on Form 1120S, U.S. Income Tax Return for an S Corporation. Ongoing returns of G, Inc. stated (\$16,410), a loss, in 1998, \$1,393 in 1999, and \$12,800 in 2000, also less than the proffered wage. Schedule L of these federal tax returns reflected current assets minus current liabilities, as net current assets. For 1997 to 2000, net current assets were a deficit, or less than the proffered wage. An unaudited financial statement for 2001 revealed a net loss of (\$13,318.32), less than the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

Counsel admits on appeal:

Even though the business did not generate sufficient positive cash flow for the year 1996 and 1997 to pay the [beneficiary's] wages as offered on the ETA 750, the employer had sufficient other funds to meet the salary requirement. As evidence of the employer's ability to meet the salary requirements, we are enclosing the employer's personal Tax Returns for the years 1996 and 1997, and personal bank statements. Employer, as an individual owner, is permitted to rely on his/her personal assets to meet the new [sic] business obligations.

In response to the RFE, the petitioner submitted only Schedules C of AV's Form 1040 tax returns for 1996 and 1997. Respectively, they reported losses from the restaurant of (\$5,027) and (\$885), less than the proffered wage.

The RFE specified tax returns with all schedules and tables. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before Citizenship

and Immigration Services (CIS), formerly the Service or INS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Counsel offers complete 1997 and 1998 Forms 1040 of AV and SV, but only on appeal. It is too late. Moreover, the Forms 1040 are irrelevant. The Immigrant Petition for Alien Worker (I-140) identifies the petitioner as a corporation, not an individual. Contrary to counsel's primary assertion, Citizenship and Immigration Services (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 or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The Forms 1040 of AV and SV cannot be accepted for the corporation. Counsel offers balances of various credit union and savings accounts for 1996-1998, but they do not represent assets of the corporate petitioner. The petitioner offers no evidence at all of the corporation's ability to pay the proffered wage at the priority date.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, the petitioner must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Counsel proposes to add depreciation and amortization into the loss for 1997, \$(5,027). See brief dated August 14, 2002, exhibit 1. Counsel's addition is not well taken. Once again, assets of shareholders cannot be considered as assets of the corporation. In any case, the sum, \$2,954, is less than the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay

the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

No probative evidence supports the petitioner's ability to pay the proffered wage at the priority date. If the new owner is the successor in interest of AV and SV, the new owner must prove the predecessor's ability to pay at the priority date, continuing, at least, until the change of ownership. A careful inspection of the record reveals that the petitioner made no such showing.

The petitioner never presented credible and complete evidence of any federal tax return, or of any asset, of AV and SV at the priority date. A credit union statement of SV then showed with a balance of \$6,134.43, less than the proffered wage. No monthly balance in 1996 exceeded \$9,884.19, less than the proffered wage.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

After a review of the entire record, 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 and continuing until the beneficiary obtains lawful permanent residence.

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.