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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, 3/F

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Washington, DC 20536

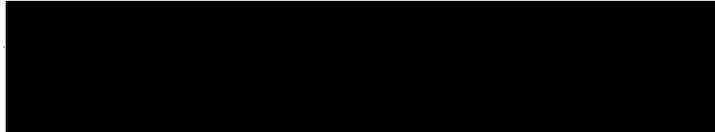


File: EAC 02 118 54072

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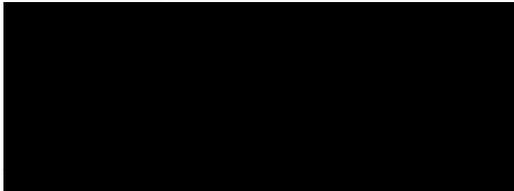
Date: DEC 17 2003

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 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 April 9, 2001. The beneficiary's salary as stated on the labor certification is \$12.50 per hour or \$26,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated June 27, 2002, the director required additional evidence to establish the petitioner's ability to pay

the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required the petitioner's federal income tax return, annual report or audited financial statement for 2001, as well as Wage and Tax Statements (Form W-2) or Form 1099 as evidence of wage payments to the beneficiary, if any, for 2001.

Counsel submitted, in response to the RFE, the 2000 Form 1120S, U.S. Income Tax Return for an S Corporation of Siganos Management Co., Inc., Employer Identification Number (EIN) 22-3093214 (SMI). SMI reported ordinary income from trade or business activities of \$1,030,652, equal to or greater than the proffered wage. A certified public accountant (CPA) stated that SMI was a management company for 46 separate corporations, viz., 45 restaurants and a retail clothing store. One George Siganos [GS] is said to own them all, entirely or in part. See the CPA letter dated May 13, 2002 (CPA letter 1). The petitioner's separate 2000 Form 1120S, filed with Form ETA 750, reflected a loss from trade or business activities of (\$55,393), less than the proffered wage. Schedule L showed current assets of \$75,742 minus current liabilities of \$54,049, or net current assets of \$21,693, less than the proffered wage. The petitioner filed its income tax return under EIN 22-3526765.

The director observed that the petitioner's ordinary loss and net current assets were not sums equal to or greater than the proffered wage and applied the rule that an S corporation is a separate legal entity. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage, and denied the petition.

On appeal, counsel submits another CPA letter dated October 17, 2002 (CPA letter 2), which refers to CPA letter 1 and volunteers that:

. . . the various companies owned and operated by [GS] paid management fees to SMI for services provided to [the petitioner] for administrative, purchasing and support services.

The management fee paid is a function of the profitability of the various companies and is determined annually. In the year 2001, [the petitioner] lost \$29,477 of which \$100,000 was paid in management fees as needed. [SMI] would forego any part of its fee if the cash flow dictated.

Since the petitioner stipulated the need for management fees of \$100,000 in 2001, the AAO scrutinized the record, but found no

contract to forego them. CPA letter 2 says that the abatement of fees is a condition subsequent "if the cash flow dictated." The record shows no "cash flow" that triggered the condition subsequent and produced an accounting entry at the priority date.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

No tax return, audited financial statement, or annual report of the petitioner reveals any income or assets sufficient to pay the proffered wage at the priority date. CPA letter 1 describes the following transaction:

Any corporation that has financial difficulties is subsidized by SMI. This is done by reducing management fees or through loans made by SMI or by [GS] personally.

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).

CPA letter 2, further, says that:

[GS] has been in business for twenty years and is aware that profits are a reflection of a successful operation. Accordingly, [the petitioner] has the financial ability to support [the beneficiary]. . . .

CPA letters 1 and 2 imply that Citizenship and Immigration Services (CIS), formerly the Service or the INS, might look to all the entities "owned entirely or in part by [GS]." Contrary to the primary assertion, CIS 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 petitioner has not produced its 2001 tax return, audited financial statement, or annual report as required by the RFE. The petitioner documented an extension only until September 16, 2002. The appeal was filed October 23, 2002 with additional evidence, but it did not include the specified evidence. CPA letters 1 and 2 amount to no more than unaudited financial statements. They are of little evidentiary value because they are based solely on the representations of management. See 8 C.F.R. § 204.5(g)(2), *supra*. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. For this additional reason, the petition may not be approved.

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 CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Finally, counsel contended, in response to the RFE, that the beneficiary would fill a newly created position and would not replace an existing employee. The Immigrant Petition for Alien Worker (I-140), however, states that the position is not a new one. Counsel does not explain that discrepancy, but pleads that the restaurant has greatly increased in size and needs more cooks. Counsel cites no authority that compels the approval of the petition based on the petitioner's need, without regard to the ability to pay the proffered wage at the priority date.

After a review of the federal tax returns, CPA letters 1 and 2, and 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 of the petition 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.