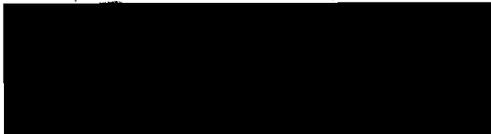


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

**identifying data deleted to
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invasion of personal privacy**

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



JUL 03 2003

File: EAC 00 282 55469 Office: VERMONT SERVICE CENTER Date:

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)

IN 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 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. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on the petitioner's motion to reopen (the motion). The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a bistro. It seeks to employ the beneficiary permanently in the United States as an executive chef. 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). Here, the petition's priority date is October 6, 1997. The beneficiary's salary as stated on the labor certification is \$55,000 per year.

On November 6, 2001, the director denied the visa petition because the petitioner did not have net income and net current assets to pay the proffered wage at the priority date, in particular, and

continuing until the beneficiary obtains lawful permanent residence. The director noted the petitioner's payment of \$62,060 in wages to the beneficiary in 1999, more than the proffered wage.

The petitioner appealed on December 7, 2001, and counsel submitted a brief with four (4) points, said to establish the petitioner's ability to pay the proffered wage. First, officers' compensation should be added back in to ordinary income as reported on the Forms 1120S, U.S. Income Tax Return for an S Corporation. Second, as the director acknowledged for 1999, payment of the wage to the beneficiary is evidence that it can be paid. Third, the gross income of two majority shareholders of the petitioner, at \$180,716, supported the ability to pay as their affidavit (shareholders' affidavit) expressed the intention to guarantee payment of the proffered wage. Fourth, counsel averred his knowledge of a third party who could pay it, too.

On May 29, 2002, the AAO dismissed the appeal (AAO decision). The AAO determined, as to the third and fourth arguments, that the petitioner was a corporation, and the intent of others to guarantee payment could not be considered. Contrary to counsel's primary assertion, the Service 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 can not be considered in determining the petitioning corporation's ability to pay the proffered wage.

As to counsel's first argument, the AAO decision mistook chefs' compensation to be at issue. Counsel had, on the other hand, hypothecated officers' compensation as available to pay the proffered wage in 1997. The argument is not persuasive, in either case, because no funds were retained then or for future use. Amounts spent elsewhere may not be used as proof of the ability to pay the proffered wage.

Counsel's second argument on appeal proposed that the payment of \$62,060 in one year, 1999, establish the essential fact, namely, the petitioner's ability to pay the proffered wage at the priority date, in particular. 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, it 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).

Consequently, the AAO decision determined that the petitioner did not have the ability to pay the proffered wage at the priority date of the petition and dismissed the appeal.

On June 29, 2002, the petitioner through counsel filed the motion. Its brief relies on three (3) premises, the first two (2) already addressed in the AAO decision.

First, counsel states that the amounts of salary paid by the petitioner to the beneficiary, plus the ordinary income of the petitioner, combined, equal or exceed the proffered wage for 1997 to 1999. The amounts and totals for the respective years include \$27,260 + \$14,390 = \$41,650 for the determinative 1997 priority date, less than the proffered wage. The record reflects amounts and sums of \$25,520, + 23,783 = \$49,303 for 1998, less than the proffered wage and \$62,060 + \$918 = \$62,978 for 1999, greater than the proffered wage.

Since the combined total at the priority date is less than the proffered wage, the petition may not be approved.

The motion raises the second point in an attorney's letter dated June 26, 2002 from [REDACTED] (attorney's letter). It, in turn, refers to a letter of June 26, 2002 from a certified public accountant (CPA letter). The attorney's letter renews the proposal to add back officers' compensation to construe the petitioner's ability to pay. It advises:

I have reviewed the [CPA] letter and based on the information contained therein and other information available to me from discussions with [REDACTED] I can confirm that in 1997, 1998, and 1999, [the petitioner] then had, and continues to have, the ability to pay the salary offered to [the beneficiary] of \$55,000 USD per annum.

Any decision to compensate the officers of [the petitioner], and any determination as to the amounts thereof, would generally be made by the Board of Directors.... Compensation of officers is, and has been, allocated by Mr. [REDACTED] based on the business needs of the company, which are first in priority over disbursements to officers.... As to the years at issue,

those funds were not needed for payment of [the beneficiary's] salary. However, if funds were needed for payment of [the beneficiary's or any other employee's] salary, they most certainly would have been allocated for the salary of [the beneficiary], a key employee of the corporation.

The second point is not persuasive. The AAO decision determined that the corporate veil would not be pierced to consider the assets of the corporation's owners, other corporations and different entities to satisfy the corporation's ability to pay the proffered wage. See, *supra*, at 3. The petitioner's employer identification number (EIN) appears on its federal tax returns and Forms W-2 for the wages that the petitioner paid to the beneficiary. Contrary to the assumption in the attorney's letter, no other EIN in the record matches and can be considered with the petitioner's.

The attorney's letter concedes that it relies on extramural discussions with an individual and the CPA letter. Reportedly, they reveal information and supersede decisions, which, the attorney's letter admits, are the province of the Board of Directors of the petitioner. Counsel provides no authority to justify this method of piercing the corporate veil. The CPA letter summarizes the inclusion of wages from different corporations and entities to justify the ability to pay the proffered wage to the beneficiary. It does not strengthen the attempt to pierce the corporate veil and cannot be considered.

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).

Counsel's motion makes a third point that:

In addition to operating as a well respected and well-established French Bistro, [the petitioner] provides various services to the other restaurants of Le Gamin Group. These services include the operation of a central kitchen from which [the petitioner] supplies food to all of the restaurants of the Group. [The petitioner then bills the various companies of the group for services rendered by [the petitioner] to the Group.

Beneficiary was offered the position of [chief executive chef]. The responsibilities of the offered position included performing specialized functions not

only for [the petitioner], but for all of the restaurants in the Group. This is evidenced in the [Form ETA 750], copy of which is annexed hereto, which sets for the specialized functions...

Counsel asserts that the terms of the Form ETA 750, in block 13, make the beneficiary the employee of all of the Group's members. Counsel concedes, however, that the petitioner billed the other members of the Group for its services. The distinct billing arrangement and EINs support the separate corporate structures.

The Form ETA 750 and the immigrant petition, Form I-140, show only one petitioner. Counsel repeatedly recites that other entities of the Group paid the beneficiary "as per the instructions of the petitioner." Counsel does not document such a power, nor would such a procedure alter the corporate structures so clearly delineated in this record. The Form ETA 750, in the final analysis, does not control corporate structure, but deals with qualifications of the beneficiary in block 13.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

After a review of federal tax returns, briefs, the attorney's letter, the CPA letter, and supporting documentation, 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 motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.