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U.S. Department of Homeland Security

Bureau of Immigration and Citizenship Services

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

JUL 21 2008

File: EAC 01 125 52691 Office: Vermont Service Center Date:

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

The petitioner is a retail seafood store. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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 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 submits a brief.

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 wage offered 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 accepted for processing on January 12, 1998. The proffered salary as stated on the labor certification is \$10.57 per hour which equals \$21,985.60 annually.

With the petition, the petitioner submitted a copy of the petitioner's 1998 and 1999 Form 1120S U.S. Income Tax Returns for an S Corporation. The 1998 tax return reports that during that calendar year, the petitioner incurred a loss of \$105. The 1999 return states that during that year the petitioner reported a profit of \$11,150.

On August 15, 2001, the Vermont Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. Specifically, the petitioner was requested, if it had been employing the beneficiary during 1998, to submit a Form W-2 showing the wages he was paid during that year. Further, if the proffered position was not a new position, the petitioner was requested to identify the incumbent in the position, to document the wages paid to that employee, and to document that the position was vacated. Finally, the petitioner was requested to submit copies of Form 941 for the period since the priority date.

In response, the counsel submitted a letter from the petitioner's owner in which he stated that during 1997 and 1998 the proffered position was split into two part-time positions. During that period, four employees, one of whom was the owner's wife, held those two positions. During 1997, the petitioner paid \$21,664 in wages to the people holding those positions. During 1998, the petitioner paid \$21,148 to the people holding those positions. In support of that contention, the petitioner provided 1997 and 1998 Form W-2 wage and tax statements. Counsel also submitted Form 941 quarterly returns for 1997 and 1998.

Because the priority date of the petition is January 12, 1998, financial data pertinent to 1997 is not directly relevant to the petition and shall not be further addressed.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition on August 2, 2002.

On appeal, counsel submitted a letter from the petitioner's owner. In that letter, the owner stated that he had employed the beneficiary during 1998 and paid him \$29,953, an amount greater than the proffered wage but, because the beneficiary had no valid social security number, paid him in cash and did not report his wages. Therefore, no Form W-2 is available to show that alleged payment.

The petitioner's owner also states that he owns another company, [REDACTED] which charges the petitioner a management fee, which is used to pay two other employees. To

document this assertion, counsel submitted the 1998 Form 1120 corporate income tax return of [REDACTED] and the unaudited balance sheets of that company and the petitioner. The petitioner implied that the management fee paid by the petitioner to [REDACTED] is actually part of the petitioner's payroll, and that the amount of that fee was also available to pay the proffered wage.

In his cover letter, counsel noted that the petitioner's reported payroll exceeded the proffered wage. Counsel states that, had the beneficiary had a valid social security number, the amount paid to other employees would have been available to pay the beneficiary.

A corporation is a legal entity separate and distinct from its owners or stockholders. Assets of the individual stockholders, including ownership of other corporations or other corporations' earnings or assets, 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). The amount of the management fee paid to Tevlin Management Company during 1998 will not be included in the calculation of the fees which were available during that year to pay the proffered wage.

The petitioner's owner avers that the petitioner actually did employ the beneficiary during 1998 and paid him an amount in excess of the proffered wage. The petitioner's owner stated that the difference between store sales in 1998 (\$381,053) and the gross receipts reported on the petitioner's tax return (\$351,100) is equal to the amount the petitioner paid to the beneficiary during that year. (\$29,953)

The petitioner's owner did not provide evidence of the actual store sales he now claims. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, the employment history now urged by the petitioner's owner, that the beneficiary held the proffered position during 1998, directly contradicts his earlier statement in this matter, that the position was filled during 1998 by specific, named part-time employees, including the owner's wife, and not including the beneficiary.

On appeal, counsel urges that the petitioner's reported payroll during 1998 exceeded the proffered wage and that, if the petitioner had been permitted to hire the beneficiary, the beneficiary would

have replaced those other workers, and their wages would have been available to pay the proffered wage. That assertion contradicts the simultaneous assertion by the petitioner's owner, that he did, in fact, employ the beneficiary during 1998. If the beneficiary actually worked for the petitioner during 1998, then how his obtaining work authorization would have permitted the petitioner to replace other workers with him, and to free more funds to pay the proffered wage, is unclear.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). In the absence of any such objective evidence, counsel's assertion that the beneficiary could have replaced other workers during 1998 shall not be further considered.

The petitioner's 1998 tax return states that the petitioner suffered a loss of \$105. The petitioner's 1999 return reports profit of only \$11,150. The petitioner has presented no credible evidence of any other funds which were available to pay the proffered wage during 1998 and 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered salary beginning on the priority date.

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.