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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  
425 I Street, N.W.  
Washington, DC 20536

File: EAC 02 099 50375 Office: VERMONT SERVICE CENTER

Date: OCT 21 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:

**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 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 employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that other assets should be considered when determining the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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 January 4, 1999. The beneficiary's salary as stated on the approved labor certification is \$13.17 per hour or \$27,393.60 annually.

In support of its ability to pay the proffered wage, the petitioner submitted copies of its Form 1120 U.S. Corporation Income Tax Return for the years 1999, 2000, and 2001. The petitioner's 1999 return showed that its taxable income before net operating loss deduction (NOL) and other special deductions was \$2,395. Schedule L reflected that the petitioner's net current assets were -\$15,412.

The petitioner's amended 2000 corporate tax return indicated that it declared a taxable income before NOL deduction of \$14,725. Schedule L showed that it had -\$3,637 in net current assets.

The petitioner's 2001 Form 1120-A, U.S. Corporation Short-Form Income Tax Return indicated that the petitioner declared \$24,586 in taxable income before the NOL deduction. Schedule L of this return showed that the petitioner had \$2,484 in net current assets.

The petitioner also submitted corporate tax returns for a company named [REDACTED] for the tax years 1999 through 2001, as well as the individual tax returns for [REDACTED]. Counsel advises in a July 2, 2002 letter that [REDACTED] represents another business which is owned by the employer and whose income is available to cover the beneficiary's wage.

The director denied the petition, determining that the petitioner had not established its continuing ability to pay the proffered wage as of the priority date of the visa petition. He noted that the beneficiary's proposed salary could not be met by the petitioner's taxable income in either 1999 or 2000. We would add that neither the petitioner's taxable income of \$24,586 in 2001, nor its net current assets of \$2,484, was sufficient to meet the proffered wage. The director also found that current liabilities exceeded the petitioner's current assets for 1999 and 2000. The director additionally found that it could not consider the financial data of the owner's other business, [REDACTED] as it is a separate legal entity.

On appeal, counsel submits an affidavit by [REDACTED] asserting that as the sole shareholder of [REDACTED] corporations, he has sole responsibility for all monetary transactions and makes all decisions. It is not clear from this statement if [REDACTED] is the same entity as [REDACTED] however we note that on the 1999 tax return of [REDACTED] was listed as a 50% shareholder, not a 100% shareholder. Counsel argues that the assets of [REDACTED] I, as well as the personal assets of [REDACTED] should be considered when determining the petitioner's ability to pay the beneficiary's offered wage. Counsel submits various documents containing data relating to the personal finances of M [REDACTED] as well as [REDACTED]

In this case, the petitioner is organized as a corporation. As noted by the director, because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The same rationale applies to the personal assets of the shareholder. While Mr. Sabani may have decision-making power as a major shareholder of both entities, no evidence has been submitted to show that either of these corporations is contractually and legally liable for the other's debts or liabilities.

Based on the foregoing, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until 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.