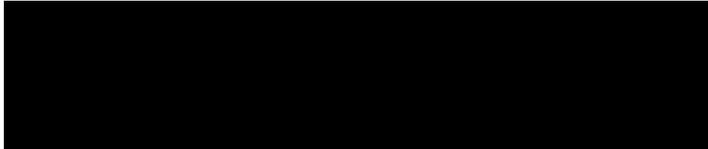


B6

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, 3/F
425 I Street, N.W.
Washington, DC 20536



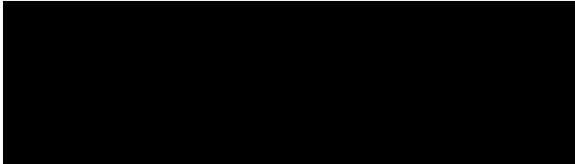
File: EAC 02 138 54099 Office: VERMONT SERVICE CENTER Date: **OCT 21 2003**

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.

Aileen E. Crawford for
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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 evidence and contends that it establishes 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 April 13, 2001. The beneficiary's salary as stated on the approved labor certification is \$515 per week or \$26,780 annually. The evidence in the record indicates that the petitioner has employed the beneficiary since 2000.

The petition was filed on March 20, 2002. As evidence of its ability to pay, the petitioner submitted unaudited financial statements for the years ending December 31, 2000 and December 31, 1999.

On May 29, 2002, the director requested further evidence relevant to the petitioner's ability to pay. He

noted that the documents already submitted by the petitioner did not represent audited financial statements.

The petitioner responded by again submitting copies of financial statements that were accompanied by a letter titled "Accountants' Compilation Report." This letter stated that the information presented in the attached statements was management's representation and did not represent audited or reviewed material. The petitioner also submitted copies of the beneficiary's W-2s for 2000 and 2001. They reflect that the petitioner paid the beneficiary \$15,505.07 in 2000 and \$21,419.13 in 2001.

The director denied the petition, noting that the petitioner's compiled financial statements do not represent credible evidence of the petitioner's ability to pay, as they are management representations only. We concur and further note that 8 C.F.R. § 204.5(g)(2) requires three types of primary evidence to establish a petitioner's ability to pay the proffered wage. As noted above, this evidence may be annual reports, audited financial statements, or federal tax returns. The petitioner submitted none of these forms of evidence.

On appeal, counsel submits copies of a 2000 and 2001 Form 1120 S, U.S. Income Tax Return for an S Corporation. The 2000 tax return bears the petitioner's name and federal tax identification number as stated on the Dept. of Labor's Application for Alien Employment Certification and on the immigrant visa petition. This tax return indicates that the petitioner declared \$639,692 in ordinary income, which covers the beneficiary's offered wage of \$26,780.

Although the 2001 corporate tax return similarly indicates a substantial ordinary income of \$691,582 it reflects a different federal tax identification number than the petitioner's and is filed under the name [REDACTED] which is not the name stated on the labor certification or the visa petition. On appeal, other than stating that the evidence clearly shows the petitioner's ability to pay the proffered wage, counsel offers no explanation or argument. It is noted that a corporation is a separate legal entity from its owners or stockholders. Consequently, any assets of its stockholders 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 Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).] In this case, the record contains no first-hand evidence of corporate or contractual documentation establishing the manner by which the petitioner can be considered to be the same entity as Titterington's Olde English Bake Shop Business Trust. It is the petitioner's burden to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has failed to resolve this question raised by the evidence submitted on appeal.

As the record stands, we cannot conclude that the tax returns submitted on appeal overcome the director's denial based on the petitioner's failure to demonstrate a continuing ability to pay the proffered wage as of the visa priority date of April 13, 2001.

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.