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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, D.C. 20536



File: EAC 02 077 52785 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**

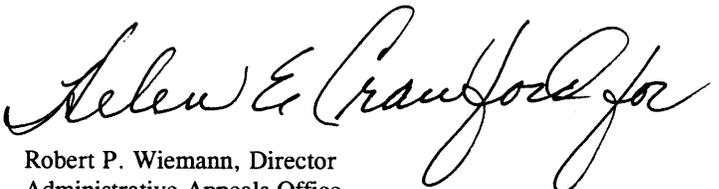
INSTRUCTIONS:

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 specialty 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 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 the petitioner's financial information establishes its ability to pay the beneficiary's 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) provides 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 June 8, 1998. As noted by the director, the beneficiary's salary as stated on the labor certification is \$17.43 per hour or \$36,254.40 annually.

The petition initially included no evidence of its ability to pay the offered salary to the beneficiary as of the visa priority date and continuing until the beneficiary's receipt of lawful permanent residence. The director requested further evidence on February 19, 2002, specifically including the petitioner's 1998 tax return.

In response, the petitioner submitted two documents. One was a letter signed by [REDACTED] "payroll manager" and submitted under the letterhead of [REDACTED]. The letter states that the petitioner has been in business since April 1990 and that its income tax return for the year 2000 shows a low profit. It also states that the beneficiary has been working for it as a specialty cook on a temporary basis since 1999. The other document submitted in response to the director's request for further evidence is a draft of a Form 1120 U.S. Corporation Income Tax Return for the tax year of 2001. This tax return is submitted under the name of [REDACTED]. It contains financial data indicating that this company had gross receipts/sales of \$641,934; officers' compensation of -0-; salaries and wages of \$113,322, and a taxable income before net operating loss deduction (NOL) and special deduction of \$56,487.

The director denied the petition, concluding that the petitioner had not submitted any financial information establishing its ability to pay the proffered wage as of the priority date of the petition, June 8, 1998. The director noted that the petitioner had not submitted any financial information for the year 1998.

On appeal, counsel simply states that the "employer" owned various restaurants and requests reconsideration of the case. Counsel submits two letters dated October 7, 2002 and one dated October 4, 2002. They are all under the letterhead of [REDACTED] and signed by [REDACTED] as "payroll manager" on two and as "general manager" on one of the letters. One letter states that the company had "100 employee or worker" and a "total gross income of approximately 1 million." Another letter states that [REDACTED] has been established since 1995 and is part of a family-owned restaurant chain. It also states that it has "incorporated [the beneficiary] as part of our training staff." The third letter represents that [REDACTED] owns eight other restaurants including the petitioner and attaches a New York City planning department restaurant guide advertising these restaurants. Nothing in the brochure indicates that these businesses are related. We note that there are no submissions of corporate or contract documents establishing the relationship of the petitioner to any of these entities. There is also no evidence submitted indicating how much the beneficiary has been paid. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof. *Matter of Treasure Craft of California*, 14&N Dec. 190 (Reg. Comm. 1972).

Also included on appeal are copies of three 2001 corporate tax returns filed in the names of [REDACTED] and [REDACTED]. None of these tax returns contain any reference to the petitioner. Counsel also submits two 1998 business tax returns. One is a Form 1120-A U.S. Corporation Short-Form Income Tax Return in the name of [REDACTED] indicating that this company had \$-34,439 taxable income before net operating loss deduction and \$5860 in net current assets. The other is the same form of corporate tax return and is in the name of [REDACTED]. It shows \$562 in taxable income before NOL and special deductions and \$13,510 in net assets. Neither tax return or their attachments contains any reference to the petitioner. We note that neither establishes the ability to meet the beneficiary's salary as of the priority date of the visa petition. We also note that the financial assets of these corporations cannot be used to establish the petitioner's ability to pay the proffered

wage. A corporation is a separate and distinct 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; AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980).

Based on the evidence contained in the record and the foregoing discussion, the petitioner has not demonstrated that it remains a viable business employer, nor has it established its ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status.

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.