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

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

File: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:

FEB 02 2004

IN RE: Petitioner:
Beneficiary:

[REDACTED]

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:

[REDACTED]

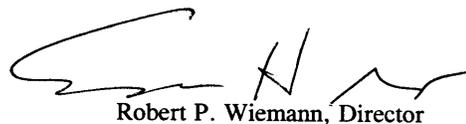
INSTRUCTIONS:

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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 petition and continuing.

On appeal, the petitioner submits a brief and an affidavit from the petitioner's general manager.

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, and continuing. Here, the petition's priority date is April 26, 2001. The beneficiary's salary as stated on the labor certification is \$2,500 a month which equates to \$30,000 per annum.

The petitioner initially submitted a copy of its Form 1120 for 2000, a copy of its Form 940-EZ Unemployment (FUTA) Tax Return for

2000, a copy of its Form 941 Employee's Quarterly Tax Return for 2001, and copies of Form W-2 and W-3 for employees for the year 2000.

In response to a request from the director for additional documentation, the petitioner submitted an unaudited Profit and Loss Statement for 2001, and copies of checking account statements for the period of December 2001 through April 2002. The petitioner's Form 1120 for 2000 showed a taxable income before net operating loss deduction and special deductions of -\$47,826.

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 accordingly. The director noted that the profit and loss statement which showed a net operating profit of \$21,425 for 2001 failed to establish the ability to meet the wage offered to the beneficiary.

On appeal counsel argues that the restaurant, though a corporation, is a family-owned business, and, as such, the family could take less money out of the business to help pay the beneficiary's salary. The affidavit from the general manager who is a family member also asserts this proposition.

Counsel's argument is not persuasive. The petitioning entity in this case is a corporation. Consequently any assets of the individual stockholders including ownership of shares in 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); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

The petitioner's Form 1120 for 2000 shows a taxable income of -\$47,826. The petitioner could not pay a proffered wage of \$30,000 a year out of this income.

Accordingly, after a review of the federal tax return and other evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the beneficiary's priority date and continuing.

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.