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

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ADMINISTRATIVE APPEALS OFFICE  
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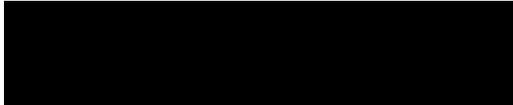
*RB*

MAR 11 2004



File: EAC 02 080 50370 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 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 (AAO) 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 an Italian 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel argues that the director erred in holding that the petitioner does not have the ability to pay the beneficiary's offered salary.

The appeal is dated October 1, 2002. It indicates that a brief and/or evidence would be submitted within thirty (30) days. Although the record contains a letter from counsel's office dated October 29, 2002, stating that illness will cause additional delay, the record shows that nothing further has been received in over twelve months.

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) also 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.

The basis of the appeal is whether the petitioner has established its continuing ability to pay the beneficiary's offered wage. Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January

09, 1998. The beneficiary's salary as stated on the approved labor certification is \$755.60 per week or \$39,291.20 annually.

The petitioner is organized as a corporation. It failed to submit evidence of its ability to pay the beneficiary's offered salary with the petition. On February 19, 2002, the director requested additional evidence from the petitioner to support its ability to pay the beneficiary's salary of \$755.60 per week. The director instructed the petitioner to submit financial information related to 1998. The director also requested any W-2, Wage and Tax statement for 1998 that the petitioner issued to the beneficiary. It is noted that the Part B of the approved labor certification indicates that the beneficiary has worked for the petitioner since 1990.

The petitioner's response to this request included a copy of the petitioner's Form 1120S, U.S. Income Tax Return for 1998, a copy of an additional 1998 Form 1120S of another restaurant, a letter from "GM Financial Group, Inc.", an accounting firm, and a brief "Statement of Financial Condition" of Theodoro & Bianca Bellulovich for the period ending December 31, 1998. The Bellulovichs appear to be the principal shareholders of the petitioner and "Doros Restaurant, Inc." named in the additional corporate tax return. It is noted that the completely blank front page of Doros Restaurant's tax return raises questions of credibility as to its financial representations. The petitioner did not submit any copies of the beneficiary's wage records.

The petitioner's Form 1120S shows that for 1998, it declared -\$73,407 in ordinary income. Schedule L of this tax return shows that the petitioner had \$17,800 in current assets and \$9,497 in current liabilities, resulting in net current assets of \$8,303.

The director denied the petition on August 30, 2002. He determined that the petitioner had not established its ability to pay the proffered wage as of the 1998 priority date of the visa petition. The director considered the 1998 ordinary income loss of \$73,407, as well as the balance sheet figures shown on Schedule L of the 1998 corporate tax return, concluding that these figures did not sufficiently demonstrate the petitioner's ability to pay. We concur. Neither the -\$73,407, nor the net current assets figure of \$8,303 could cover the proffered salary of \$755.60 per week or \$39,291 per year as shown on the petitioner's approved labor certification. Although the director did not request, nor did the petitioner submit financial data for any other year, it is noted that the regulations require that a petitioner demonstrate an ongoing financial ability to pay as of the visa priority date. As noted above, that date is January 9, 1998.

On appeal, counsel contends that the director should have considered the petitioner's owners' 1998 statement of financial condition that portrays the owners' net worth at over three million dollars. The regulation at 8 C.F.R. § 204.5(g)(2) requires evidence in the form of audited financial statements, federal tax returns or annual reports. While additional material may be considered, such documentation generally cannot substitute for those evidentiary requirements. It is further noted that the accounting firm's letter that accompanies this statement describes the statement as a compilation based solely on the representations of the individuals' whose financial data is presented. The letter also states that the Bellulovichs elected to "omit substantially all of the disclosures required by generally accepted accounting principles." In other words, the financial information was not reviewed or audited. As

such, this financial statement carries little evidentiary value in demonstrating the petitioner's ability to pay the offered salary.

It should also be noted that the petitioner is organized as a corporation. 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). Similarly, even if considered credible, the other restaurant's corporate tax return is not persuasive in demonstrating the petitioner's ability to pay the offered wage, because as a corporate entity, this business is separate and distinct from the petitioning corporation.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

The petitioner's tax return fails to demonstrate that the petitioner's ordinary income or net current assets could meet the proffered wage in 1998. After consideration of the argument presented on appeal and the other information contained in the record, we cannot conclude that the director erred in denying the instant petition based on the lack of evidence demonstrating that the petitioner had the ability to pay the beneficiary's proffered salary of \$39,291 per year as of the priority date of the visa petition.

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.