

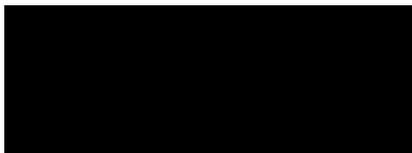
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
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Services

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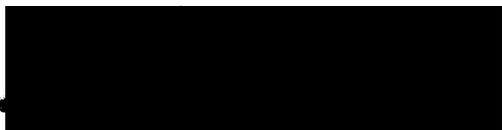
Office: VERMONT SERVICE CENTER

Date: JUL 07 2005

IN RE:           Petitioner: [Redacted]  
                  Beneficiary: [Redacted]

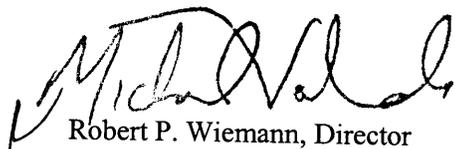
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference 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 is a bakery and eatery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, the counsel submits a brief and additional evidence.

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 nature, for which qualified workers are not available in the United States.

The regulation 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$11.90 per hour (\$24,752.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, copies of documentation concerning the beneficiary's qualifications, and, the beneficiary's passport information.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center on April 8, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Submit the 2001 ... income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax return ....

As an alternative you may submit annual reports for 2001 that are accompanied by audited or reviewed financial statements.

If your business reports income for tax purposes based on a fiscal year, submit the appropriate evidence that relates to the date of filing, 2001.

If the beneficiary was employed by you in 2001, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted a complied financial statement. The statement was qualified by the accounting service to disclose that the financial statement was prepared omitting "... all the disclosures and statement of cash flows ...." The request for Evidence did state that "in the alternative" annual reports can be submitted. The issue here is that the complied financial statements are not the same as an annual report. Despite counsel's calling it an annual report, the statements make clear that they are only "asserting statements."

Petitioner declined to submit any other document in response to the Service Center's Request for Evidence. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax return for year 2001. The tax return would have demonstrated the amount of taxable income the petitioner reported to the IRS and further revealed its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The director denied the petition on October 23, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel contends that the financial statement, as qualified, is sufficient for the purposes of proof of the ability of petitioner to pay the proffered wage. The director's objection to the financial statements was that, as an complied and not audited statement, the statement has "limited validity." Counsel cites no relevant legal precedent for his position, and, according to regulation,<sup>1</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined

Further, the statement contained omissions that the accountant forthrightly disclosed in his cover letter to the statement as prepared, to wit:

"Management has elected to omit substantially all the disclosures and statements of cash flows required by generally accepted accounting principles ...."

It is not possible to rely on such a statement that is not based upon an audit, is missing a component of every balance statement (i.e. cash flow data), and, is based not upon generally accepted accounting principles, but "... prepared on the accounting basis used by the Company for income tax purposes, which is a

<sup>1</sup> 8 C.F.R. § 204.5(g)(2), *Supra*.

comprehensive basis of accounting other than [sic than] generally accepted accounting principles.” What that methodology (i.e. “comprehensive basis of accounting”) is, and, its influence on the petitioner’s financials was not disclosed in the record of proceedings.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner’s ability to pay the proffered wage from the priority date through contribution of the personal assets of the owner of the business. 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 Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

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. The documentation now submitted by petitioner does not establish that petitioner had the ability to pay the proffered wage on the priority date.

**ORDER:** The appeal is dismissed.