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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 99 123 50100 Office: VERMONT SERVICE CENTER Date: **MAR - 7 2001**

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)

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

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FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant which seeks to employ the beneficiary as an Italian cook. 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 filing date of the visa petition.

On appeal, counsel states that the petitioner met its burden of proving its ability to pay the offered wage.

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 filing 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 filing date is November 12, 1997. The beneficiary's salary as stated on the labor certification is \$11.47 per hour or \$23,857.60 annually.

The petitioner submitted a 1997 Form 1120S, which indicated a net loss of \$6,396 in that year. The Schedule L indicated the petitioner had \$2,637 in current assets of which \$1,137 was in cash and \$5,836 in current liabilities. Consequently, the director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the

filing date of the petition and denied the petition accordingly.

On appeal, the petitioner stated that it met its burden of establishing its ability to pay the proffered wage based on documentation it submitted. The petitioner also argues that the director failed to consider all of the evidence submitted by the petitioner. According to the petitioner, the director incorrectly found that an S corporation is a separate entity from its owners in tax matters. The petitioner also states that the director incorrectly interpreted the facts under the current law. In addition, the petitioner states that the director's decision is inconsistent with court rulings and decisions of the Board of Immigration Appeals.

The petitioner argues on appeal that its taxable income in 1997 does not preclude the petitioner from establishing that it is able to pay the proffered wage. To support this claim, the petitioner cites 8 C.F.R. 204.5(g)(2). The petitioner also states that the income of the owner of the petitioner should be used to determine the petitioning corporation's ability to pay. In addition, according to the petitioner, the director failed to consider all material and relevant information contained in the supporting documentation.

The petitioner's argument is not persuasive. The fact that the petitioner shows a loss for the tax period that includes the priority date, establishes that the petitioner was incapable of paying the proffered wage at the time of filing.

The petitioner states that its owner's income should be considered in determining its ability to pay. The petitioner argues that the petitioning corporation is an S corporation solely owned by an individual, and that its income and losses are attributable to the owner. However, the petitioner is a corporate entity. 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. Therefore, the owner's personal bank statement may not be used as proof of 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).

A review of the 1997 federal tax return shows that the petitioner incurred a net loss of \$6,396 in that year. In addition, the Schedule L balance sheet shows that the petitioner had \$2,637 in current assets and \$5,836 in current liabilities. Therefore, the petitioner did not have sufficient current assets to meet existing liabilities. The director found that the petitioner's net income

and net assets were insufficient to pay the beneficiary the offered wage.

A review of the 1998 tax return shows that the petitioner earned a net profit of \$442 in that year, \$23,415.60 less than the offered wage. The Schedule L balance sheet shows the corporation had \$3,323 in current assets and \$6,150 in current liabilities, indicating that the petitioner did not have sufficient current assets to meet its current liabilities. The director found that the petitioner's net income and net assets were insufficient to pay the beneficiary the offered wage.

The petitioner states that the director failed to consider several factors that demonstrate its ability to pay the offered wage. Specifically, according to the petitioner, the director failed to consider the petitioner's track record since its establishment; the rate of increase of the employer's business; the fact that the employer paid \$15,500 to the beneficiary during 1997 for a different job; and the average monthly balance in the petitioner's bank account.

The petitioner is required to show that it has the ability to pay the proffered wage at the time the priority date established and continuing until the beneficiary obtains lawful permanent residence. Consequently, past or future trends are not probative in determining a petitioner's ability to pay the offered wage. What is pertinent is that the petitioner has the ability to pay at the time of the priority date. Speculative economic forecasts are irrelevant and of little merit in determining if the petitioner can meet its wage requirement.

The petitioner contends that it paid the beneficiary \$15,000 for a different job in 1997. However, there is nothing in the record to support this claim. The petitioner has failed to submit any documentation that shows the beneficiary was employed by the petitioner, or the amount of salary he received prior to 1999. Furthermore, the fact that the petitioner paid a salary to the beneficiary for a different position in no way supports its claim of ability to pay the beneficiary the proffered wage.

Moreover, even though the petitioner submitted its 1996 and 1997 commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return.

Upon review, the petitioner has been unable to present sufficient evidence to overcome the findings of the director. The petitioner has not established eligibility pursuant to section 203(b)(3) of the Act and the petition may not be approved.

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.