U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: EAC 01 234 52691 Office: Vermont Service Center Date: APR 09 2003

IN RE: Petitioner: [redacted]
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: [redacted]

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 the Bureau of Citizenship and Immigration Services (Bureau) 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.

Ellen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The director subsequently dismissed a motion to reopen. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a retailer of nuts. It seeks to employ the beneficiary permanently in the United States as a nut processing supervisor. 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.

On appeal, counsel submits a brief.

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 continuing ability to pay the wage offered beginning on the priority date, 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 request for labor certification was accepted for processing on October 30, 2000. The proffered salary as stated on the labor certification is $1,114.88 per week which equals $57,973.76 annually.

With the petition, the petitioner submitted a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation covering the 2000 calendar year. That tax return shows that the petitioner declared an ordinary income of $10,447 during that year. Schedule L shows that, at the end of that year, the petitioner's current assets were $9,016, and its current liabilities were $267, yielding net current assets of $8,749.

In an accompanying letter, a co-owner of the petitioner states that, because he and his wife own the petitioning corporation, they could provide funds as necessary to pay the proffered wage. As support for that statement, the co-owner provided various documents pertinent to his financial situation and that of his wife.

Because the petitioner's income and net current assets during 2000 were insufficient to pay the proffered wage, the Vermont Service Center requested, on September 26, 2001, that the petitioner provide additional evidence pertinent to its continuing ability to pay the proffered wage beginning on the priority date.

Specifically, the petitioner was requested to submit its bank statements for January 2000 through September 2001. The Service Center also informed the petitioner that, because the petitioner is a subchapter S corporation, and its shareholders are not obliged to pay its debts, the assets of the shareholders are irrelevant to the determination of the ability of the petitioner to pay the proffered wage.

In response, the petitioner submitted the petitioner's checking account statements for September 2000 through February 2001, along with some statements pertinent to the finances of the man and wife who own the petitioning corporation.

The petitioner also submitted information pertinent to the formation of a subchapter S corporation and a letter, dated December 20, 2001, from a consulting service. That letter notes that profits from a subchapter S corporation pass directly to shareholders without being subjected to corporate taxation. From that, the consultant deduces that the shareholders are legally obliged to pay the corporation's debts.

Finally, the petitioner submitted a letter, dated October 18, 2001, from an accountant. That accountant noted that profits of an S corporation pass directly to the shareholders without incurring corporate tax liability. The accountant also stated that,

> . . . if the corporation is in financial difficulty, the corporate shareholders must lend the corporation the

funds it needs or borrow from a lending institution to keep the corporation solvent.

On April 5, 2002, the Director, Vermont Service Center, issued a decision in this matter. The director noted that the materials provided by the petitioner state that one of the advantages of electing subchapter S corporate status is that the personal assets of the shareholders are protected from the debts and obligations of the corporation, that is; that shareholders are not obliged to pay the expenses of the corporation.

The director found that the petitioner had submitted insufficient evidence to show that the income and assets of the petitioner, that is, the assets of the petitioning corporation itself, are sufficient to pay the proffered wage, and denied the petition.

Subsequently, the petitioner filed a Form I-290 Notice of Appeal. Because that form was untimely filed, it was treated as a Motion to Reopen. With that motion, the petitioner submitted various documents pertinent to the operation of its business. Those documents tend to establish that the petitioner is in the business of selling nuts, but otherwise have no direct bearing on the salient issue, the ability of the petitioner to pay the proffered wage.

The petitioner also submitted a letter, dated May 7, 2002, from the consultant who previously submitted the letter of December 20, 2001, which letter was described above. In the more recent letter, the consultant stated that the petitioner expects greater profits in the future as a result of moving to a new location. The consultant also mentioned the accountant's letter of October 18, 2001, as evidence that the shareholders of a subchapter S corporation are obliged to pay the debts of the corporation. In addition, the consultant argued that the petitioner is not obliged to demonstrate the ability to pay the entire annual wage at one time, and that some other calculation of the ability to pay must be utilized, though he did not state what that other formula should be.

On August 7, 2002, the Director, Vermont Service Center, affirmed the previous decision, noting that the petitioner had submitted no new evidence of its ability to pay the proffered wage and had not, therefore, overcome the basis of the previous decision.

On appeal, the petitioner submits photocopies of news articles pertinent to the petitioner's business. The petitioner submits a letter from its new accountancy firm, stating that the petitioner's business has grown 40 percent per year and cannot maintain that

growth without hiring experienced help.

The petitioner also submits yet another letter from the consultant mentioned above. In this letter, dated September 3, 2002, the consultant notes that the petitioner's owners paid for an expansion of the petitioner's business, by which he apparently meant that the owners lent the petitioner money for an expansion. Once again, the consultant cited the accountant's letter of October 18, 2001.

The assertion that the petitioner's profits will increase as a result of hiring the petitioner is speculative. No part of that anticipated increase in profits will be included in the calculation of the funds available to pay the proffered wage.

Most of the petitioner's remaining arguments are for the proposition that the assets of the petitioner's owners should be included in the calculation of the ability of the petitioner to pay the proffered wage.

The accountant's letter of October 18, 2001 implied that shareholders of an S corporation are obliged to pay the corporation's debts. As that accountant is certainly aware, that is manifestly false and contrary to the very basis of corporate law. Further, that the petitioner's owner has recently opted to lend money to the petitioner for an expansion and a move to a new location does nothing to change this basic tenet of corporate law.

A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders 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&M Dec. 631 (Act. Assoc. Comm. 1980).

As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders and their ability, if they wished, to pay the corporations debts and obligations, are irrelevant to this matter and shall not be further considered.

The final argument submitted by the petitioner is that the petitioner need not show the ability to pay the proffered wage all at once. In that statement, the petitioner is correct. As was stated above, however, 8 C.F.R. § 204.5(g)(2) requires that the petitioner, using its annual reports, federal tax returns, or

audited financial statements, demonstrate its ability to pay the proffered wage. The petitioner submitted neither audited financial statements nor annual reports, and the petitioner's tax returns appear to demonstrate that the petitioner was unable to pay the proffered wage during 2000.

The petitioner failed to submit sufficient evidence that the petitioner had the continuing ability to pay the proffered salary beginning on the priority date.

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.