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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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



APR 09 2003

File: LIN 01 203 51228 Office: Nebraska 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:



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.

Robert P. Wiemann
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 its chief cook. 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 May 28, 1998. The proffered salary as stated on the labor certification is \$10.98 per hour which equals \$22,838.40 annually.

With the petition, counsel submitted a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for the 1998 calendar year. That tax return reflects a taxable income before net operating loss deduction and special deductions of \$2,047. The company's current assets at the end of that year were \$8,246 and its current liabilities were \$2,696. The difference of \$5,550 is the petitioner's net current assets.

The Nebraska Service Center issued a Request for Evidence on July 26, 2001. The petitioner was requested to submit evidence of its continuing ability to pay the proffered wage beginning on the priority date. Specifically, the petitioner was requested to provide copies of its 1999 and 2000 income tax returns.

In response, counsel submitted the petitioner's 1999 and 2000 Form 1120 corporate income tax returns as requested. The 1999 return states that the petitioner's taxable income before net operating loss deduction and special deductions during that year was \$10,426. The value of the petitioner's current assets at the end of that year was \$15,000 and the value of the petitioner's current liabilities was \$3,044, yielding a value of \$11,956 for its net current assets.

The 2000 return states that the petitioner's taxable income before net operating loss deduction and special deductions that year was \$816, and that its current liabilities exceeded its current assets.

Counsel also submitted an affidavit pertinent to the petitioner's owner's personal finances, and attesting that his funds are available for use in paying the petitioner's expenses. Counsel submitted an account statement pertinent to the petitioner's bank statements.

On November 7, 2001, the Director, Nebraska Service Center, found that, without recourse to the personal finances of the petitioner's owner, the petitioner was unable to pay the proffered wage during 1998, 1999, and 2000. The director further found that, because the petitioner is a corporation, the petitioner's owner's funds should not be considered in the determination of the petitioner's ability to pay the proffered wage. The director denied the petition.

On appeal, counsel asserts that the director erred in refusing to consider the personal funds of the petitioner's owner in computing the petitioner's ability to pay the proffered wage. Counsel submits additional documentation pertinent to the personal finances of the petitioner's owner and cites a previous decision of the Service for the proposition that funds other than those of the petitioner may be considered in calculating the ability to pay the

proffered wage. While 8 C.F.R. § 103.3(c) provides that Service (now Bureau) precedent decisions are binding on all Service (Bureau) employees in the administration of the Act, unpublished decisions are not similarly binding. Although the decision cited is not a precedent decision, the argument that the petitioner's owner's personal funds may be considered is addressed below.

Counsel also argues that the amount of the petitioner's depreciation deduction should be included in the computation of the funds available to pay the proffered wage.

Finally, counsel argues that the viability of the petitioner's operations may also be demonstrated by a continued increase in the petitioner's business and profits. Counsel noted that the petitioner has changed locations. Counsel stated that the superior location with more seating creates an expectancy of greater profits in the future, and that this expectancy should also be factored into the computation of the petitioner's ability to pay the proffered wage. In support this contention, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

A depreciation deduction, while not a cash expenditure in the year claimed, represents value lost as buildings and equipment deteriorate. Although buildings and equipment are depreciated, rather than expensed, this represents the expense of buildings and equipment spread out over a number of years. The diminution in the value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The deduction expense is an accumulation of funds necessary to replace perishable equipment and buildings, and is not available to pay wages.

Counsel's argument that the personal funds of the petitioner's owner should be included in the computation of the petitioner's ability to pay the proffered wage is unpersuasive. The Bureau may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. The very basis of corporate law is that a corporation is a separate legal entity, distinct from its owners and shareholders. 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). The assets of the petitioning corporation's sole shareholder cannot be included in the computation of the petitioning corporation's ability to pay the proffered wage.

Counsel's citation of *Matter of Sonogawa*, *Supra.*, is inapposite. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), relates to

petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case, the petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Counsel is correct that, if the losses during some years and very low profits during others are uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining ability to pay the proffered wage. Here, the petitioner has submitted no evidence that it has ever posted a large profit, or even a profit large enough to pay the proffered wage. Further, counsel did not state whether the larger space in a better location was accompanied by a concomitant increase in rent. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, and with or without the new location, is speculative.

The only funds which will be considered in the computation of the petitioner's ability to pay the proffered wage are the petitioner's own funds as shown on the petitioner's own tax returns. Those returns demonstrate that the petitioner was unable to pay the proffered wage during 1998, 1999, and 2000 out of earnings, assets, or both. Therefore, the petitioner has not established that it 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.

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