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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: EAC 02 032 56375 Office: Vermont Service Center Date: JAN 2 6 2000

IN RE: Petitioner: [redacted]
Beneficiary:

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

IN BEHALF OF PETITIONER: [redacted]

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for

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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a manager. 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 financial ability to pay the beneficiary the proffered wage as of the priority date of the 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 ability to pay the wage offered as of 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 priority date is June 2, 2000. The beneficiary's salary as stated on the labor certification is $675 per 40 hour week, which equals $35,100 annually.

With the petition, counsel submitted a copy of the petitioner's 1999 and 2000 Forms 1120S U.S. Income Tax Return for an S

Corporation. The 1999 tax return, which covers the 1999 calendar year, reflects gross receipts of $152,282; gross profit of $152,282; compensation of officers of $11,000; salaries and wages paid of $12,000; and an ordinary income (loss) from trade or business activities of $5,985.

The 2000 tax return, which covers the 2000 calendar year, reflects gross receipts of $145,429; gross profit of $145,267; compensation of officers of $12,000; salaries and wages paid of $24,000; and an ordinary income from trade or business activities of $22.

The director found that the income tax returns submitted with the initial filing did not show sufficient profits or net current assets to pay the proffered wage. On December 31, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of June 21, 2000, and that it continued to have the ability.

In response, counsel submitted (1) copies of 2000 and 2001 Federal W-2 forms showing wage payments to the current manager of the motel, whom the beneficiary would replace; (2) a copy of the petitioner's 2001 Form 1120S U.S. Income Tax Return for an S Corporation; (3) a copy of the lease, demonstrating that the owner/landlord of the property is the same person who owns and is president of the petitioner/corporation; (4) the petitioner's bank statements from May, June, July, and December 2000, as well as December 2001; and (5) an affidavit from the president of the petitioner/corporation.

The affidavit from the president of the petitioner/corporation states that he anticipates that $24,000 would be available because the beneficiary would replace another employee who was being paid that amount. That affidavit further states that the petitioner/corporation pays $60,000 in rent, which is paid directly to the president of the corporation, and that the rent might be reduced as necessary to cover the proffered wage.

The 2000 and 2001 W-2 forms demonstrate that the petitioner is, as claimed, paying $24,000 to a current employee. Replacement of that employee would, in fact, free that amount.

The petitioner's 2001 tax return shows gross receipts of $157,881; gross profit of $157,881; compensation of officers of $12,000; salaries and wages paid of $24,000; and an ordinary income from trade or business activities of $2,549.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered

wage and denied the petition accordingly.

On appeal, counsel argues that the petitioner has established the ability to pay the proffered wage. Counsel notes, correctly, that $24,000 is available because the beneficiary would replace another employee who has been paid that amount. Counsel avers that the balance necessary to pay the proffered wage could be acquired. Counsel notes that the petitioner's assets grew from $14,000 in 2000 to $54,000 in 2001.

Counsel further notes that the petitioner's bank account contained an average balance of over $11,000, which counsel implies could be used to pay the balance of the petitioner's salary. Counsel reiterates the statement of the owner/president of the petitioner/corporation, that the rent paid to him by the petitioner/corporation could be lowered as necessary to pay the beneficiary's salary.

Finally, counsel asserts that the beneficiary's business is growing and will generate far more income after hiring the beneficiary, a qualified motel manager. Counsel cites Matter of Sonegawa, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the petitioner's reasonable expectation of increasing profits can establish the petitioner's ability to pay the proffered wage.

Of the approximately $54,000 in assets claimed by the petitioner on the 2001 Schedule L, over $43,000 is in the value of the real estate held by the corporation. In view of the fact that the president of the corporation owns the motel itself, and the petitioner pays rent for it, the interest held by the petitioner is presumably a leasehold interest in the property. However, whether the interest of the petitioner in that property is leasehold or freehold, it is not readily available to pay the beneficiary's wages, and will not be further considered. Only approximately $11,000 of the petitioner's assets are available to pay the proffered wage. Only net current assets (total current assets minus total current liabilities) may be considered when determining ability to pay, not total assets.

The amount contained in the petitioner's bank account is not necessarily available to pay the proffered wage either. The expenses of the corporation during 2001, for instance, were $152,069. That means that the petitioner's expenses were more than $12,500 monthly. Even though the petitioner maintained an average bank balance of over $11,000, that does not demonstrate that the petitioner had any additional funds to apply toward payment of the proffered wage after paying its monthly expenses.

The president/owner of the petitioner/corporation has stated that he could decrease the rent paid to him as necessary to pay the beneficiary. This amounts to a suggestion that the president/owner might agree to pay the expenses of the petitioner/corporation out of his own funds. The finances of the petitioner/corporation and those of the president/owner are separate for the purposes of this proceeding. The ability to pay the proffered wage must be established based on the petitioner's own funds. The Service 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. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of the individual stockholders including ownership of shares in 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; 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).

The evidence submitted by the petitioner does not establish that the petitioner had the ability to pay the proffered wage out of profits, nor out of its net current assets, nor out of the wages which it would save by replacing an employee with the beneficiary, nor out of all three taken together, in 2000, the year during which the labor petition in this matter was filed. Similarly, the evidence demonstrates that the profits, net current assets, and wages of the displaced employee would have been insufficient to pay the proffered wage in 2001.

Counsel asserts, however, that the business of the petitioner is growing, and will grow further if the petitioner is permitted to hire the beneficiary. Counsel cited Matter of Sonegawa, Supra. for the proposition that this expectancy should be considered in assessing the petitioner's ability to pay the proffered wage.

Matter of Sonegawa, 12 I&N Dec. 612 (Reg. Comm. 1967), however, 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.

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 is a new business, and has never posted a large profit. Assuming the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner has not established that it had sufficient funds available to pay the salary offered on the priority date and continuing to the present.

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.