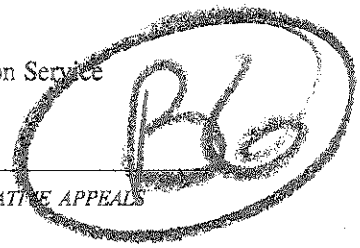
PUBLIC COPY

U.S. Department of Justice

Identifying data deleted to prevent unwarranted invasion of personal privacy

Immigration and Naturalization Service



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

[redacted]

File: EAC 01 153 51318 Office: Vermont Service Center Date: JAN 2 1 2005

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 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 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 that 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 restaurant and seeks to employ the beneficiary permanently in the United States as a specialty cook. 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 visa petition.

On appeal, 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 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 beginning on 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 January 13, 1998. The beneficiary's salary as stated on the labor certification is $17.43 per hour which, assuming a 40 hour work week, equals $36,254.40 annually.

With the petition, the petitioner submitted a copy of its 1997 Form

1120S U.S. Income Tax Return for an S Corporation. That tax return, which covers the 1997 calendar year, reflects no salaries and wages paid; and an ordinary income from trade or business activities of $18,601.

The director found that the petitioner had submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On August 19, 2001, the director requested additional evidence to establish that the petitioner had the continuing ability to pay the proffered wage beginning on January 13, 1998. The director specifically requested that the petitioner identify the incumbent in the proffered position, submit evidence of the salary paid to that employee, and document that the position was vacated.

In response, the petitioner's president submitted a letter. That letter states that the petitioner had been hiring temporary cooks, including the beneficiary, during the pendency of the instant petition. The letter further states that the amounts paid to those temporary cooks is included within the amounts claimed as Schedule A Labor expense during 1997, 1998, and 1999. That letter did not segregate the amounts paid to cooks from the amounts paid to other personnel, nor did it document any amount which would be freed by hiring the beneficiary on a full-time permanent basis.

With that letter, the petitioner's president submitted copies of the petitioner's 1998 and 1999 Form 1120S U.S. Income Tax Returns for an S Corporation. The 1998 tax return reflected salaries and wages paid of $0; and an ordinary income from trade or business activities of $23,384. The 1999 tax return reflected salaries and wages paid of $0; and an ordinary income from trade or business activities of $21,637.

The petitioner's president also submitted copies of the petitioner's quarterly tax returns for 1997, 1998, and 1999, and a 1997 Form W-2 wage and tax statement showing that the petitioner paid $6,570 to an employee during that year. The president stated that the W-2 form showed wages paid to a cook who worked for the petitioner prior to the beneficiary.

Further still, the petitioner's president submitted a letter from an accountant who stated that he prepared the petitioner's tax returns from 1989 to 1997. The accountant stated that, during that time, he entered wage payments on Schedule A Cost of Goods Sold, under the heading Cost of Labor, rather than on page one of the Form 1120S, under the heading Salaries and Wages.

The 1997 Schedule A reflects that the petitioner paid $130,846 for labor. The 1998 Schedule A reflects that the petitioner paid

$129,524 for labor. The 1999 Schedule A reflects that the petitioner paid $140,044 for labor.

On December 17, 2001, the director issued a decision in this matter. The director observed that the petitioner's income and current assets net of current liabilities in 1997, 1998, and 1999, were insufficient to pay the proffered wage. The director further observed that the petition states that the petitioner employs 22 people, and that the labor expense the petitioner claimed on Schedule A during each of those years is a very small amount when divided between 22 people. Finally, the director noted that the W-2 form which the petitioner submitted shows that the petitioner paid a previous cook only $6,570 during 1997. 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.

Counsel filed a motion to reconsider. Counsel stated that, due to a clerical mistake, the petitioner had misrepresented on the petition that it employs 22 people when, in fact, it employs only ten full-time employees. Counsel argued that for the director to compare the petitioner's wage expense to the number of employees was unjustifiable and unreasonable. Elsewhere in the motion, counsel stated that, during 1997, "The petitioner had paid wages and tips $238,167.37 to 10 full-time employees, part-time and temporary workers for calendar year 1997."

Counsel stated that the petitioner had hired a temporary cook, whose wages are available to pay the proffered wage, in addition to the petitioner's net income. Counsel further noted that the petitioner's Schedule L for 1997 showed that the petitioner had $6,797 in cash, and that this amount was also available to pay the proffered wage.

Counsel further noted that the petitioner received a loan of $49,896 during 1997 and stated that the money loaned was available to pay the proffered wage. Counsel stated that the current assets and liabilities on the 1997 Schedule L do not show a true picture of the petitioner's financial condition. Counsel urged that because the company's stock is held only by the petitioner's president and his wife, it ought not to be considered a liability for the purposes of this petition. Similarly, counsel urged that the loan from the president and his wife ought not to be included in petitioner's liabilities for the purposes of this petition.

On April 17, 2002, the director affirmed the previous decision denying the petition. The director noted that the petitioner's payroll analysis states that, during the four quarters of 1997, the

petitioner employed from eight to ten full-time employees and from fourteen to twenty-nine part-time workers. The director noted that the petitioner's 1997 profit, together with the amount shown on the W-2 form as having been paid to the petitioner's previous cook, is insufficient to pay the proffered wage.

On appeal, counsel submits a brief and argues that the evidence of record demonstrates the ability to pay the proffered wage. Counsel submits a photocopy of a letter from the petitioner's accountant explaining various entries on the petitioner's tax documents. The accountant also states that the president of the corporation and his wife, the sole shareholders in the petitioner/corporation, have other funds which they lend to the petitioner/corporation as necessary to cover corporate expenses. Counsel submits copies of tax data for the two shareholders of the petitioner/corporation.

Counsel also submits a copy of the beneficiary's social security statement. That statement indicates that the beneficiary earned $6,496 in 1997, $6,117 in 1998, $12,040 in 1999, and $16,554 in 2000, but does not indicate who paid the beneficiary those wages.

The record indicates that the petitioner's earnings were $18,601 in 1997, $23,384 in 1998, and $21,637 in 1999. In 1997, the petitioner's current liabilities exceeded current assets. The petitioner's current assets exceeded current liabilities by $6,183 in 1998. In 1999 liability again exceeded assets, this time by $3,854.

Counsel submits the beneficiary's social security statement as evidence of the beneficiary's declared earnings during the period this petition has been pending. Counsel states that all of the earnings shown on that statement were paid to him by the petitioner, but submits no evidence in support of that statement.

The central issue in this matter is the petitioner's ability to pay the proffered wage. As per 8 C.F.R. 204.5(g)(2), the petitioner must demonstrate that it was able to pay the wage as of the priority date, and has continued to be able to pay it until the present. Clearly, the petitioner's profits, $18,601 in 1997, $23,384 in 1998, and $21,637 in 1999, were available to pay that wage. In addition, in 1998, $6,183 was available from the assets of the corporation. We shall assume, arguendo, that all of the beneficiary's earnings were paid by the petitioner, although no evidence has been provided in support of that fact. The beneficiary's social security statement demonstrates that he earned $6,496 in 1997, $6,117 in 1998, and $12,040 in 1999. The total amount available to pay the proffered wage was $25,097 in 1997, $35,684 in 1998, and $33,577 in 1999. All fall short of the

proffered wage.

Counsel argues that an additional amount should be added to those totals, to account for the amount of money which would be available after the beneficiary replaces temporary employees. However, the beneficiary has been working for the petitioner since 1997. Whether making him permanent would obviate the jobs of any current employees is unclear. No evidence in support of that proposition has been submitted.

Counsel further urges that the amount of the wages of the previous cook is also available to pay the proffered wage. A W-2 form shows that the petitioner paid an employee $6,570 during 1997. The petitioner claims this is the previous cook, whom the beneficiary replaced.

That W-2 form indicates that the previous cook worked for the petitioner during 1997. The petitioner's president stated that the beneficiary began working for the petitioner in August of 1997. If the beneficiary replaced that previous cook, then some portion of the wages paid to the previous cook became available during 1997, when that previous cook no longer worked for the petitioner.

However, the petitioner has provided no evidence from which that amount may be computed. The petitioner did not state the amount of the previous cooks full yearly wage, although the director requested, on August 19, 2001, that the petitioner state and document that amount. Further, the petitioner submitted no evidence that the previous cook left his position, although the director requested, on August 19, 2001, that the petitioner provide evidence that the position was vacated.

In any event, because that previous cook was no longer employed by the petitioner in 1998 and 1999, his previous salary does not affect the computations for those years. Any additional funds which were available during those years should have been reflected on the petitioner's tax returns.

Further still, the petitioner states that he has been employing temporary cooks during the pendency of this petition. If he is permitted to hire the beneficiary on a permanent basis, the petitioner states that he would release some of those temporary cooks, and their wages would be available for payment of the proffered wage. Again, no evidence is in the record from which one might compute the wages which would be made available by this change. The number of hours per week the beneficiary currently works for the petitioner is not stated and the number of additional hours he might work is unknown. How much the petitioner pays the

temporary cooks per hour is also unstated. How much the petitioner might save on their wages cannot be computed from the information provided.

Finally, counsel argues that the loans from shareholders ought not to be considered as liabilities, and implies that additional loans would be forthcoming as necessary for the petitioner to meet its future obligations, including payment of the proffered wage. The issue in this matter is whether the petitioner/corporation, out of its own funds, has the ability to pay the proffered wage.

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 petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage as of January 13, 1998, the petition's 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.