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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

[redacted]

File: EAC 00 204 51570 Office: VERMONT SERVICE CENTER Date: JAN 29 2003

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]

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 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. The subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen (motion). The motion will be granted, and the previous decisions of the director and the Associate Commissioner will be affirmed. The petition will be denied.

The petitioner is a supermarket firm. It seeks to employ the beneficiary permanently in the United States as a shipping and receiving supervisor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (Form ETA 750).

The director denied the visa petition because 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, the Associate Commissioner did not receive the brief and evidence promised in the notice of appeal, so stated, and dismissed the appeal. Counsel filed this motion to reopen and consider submissions, which the petitioner belatedly tendered.

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 CFR 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 priority 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 priority date is March 10, 1997. The beneficiary's salary as stated on the labor certification is $11.59 per hour or $24,107.20 per year.

Three (3) exhibits comprise the substance of counsel's motion:

A. Notarized Letter from Accountant certifying to identity of Ownership of SC Nostrand Food Corp. and HSM SuperMarket [sic] Inc.;
B. Notarized Letter from Accountant certifying attached Balance Sheets for both companies;
C. Tax Returns HSM Supermarket, Inc. (1997, 1998, 1999, 2000)

Counsel concludes that "… Viewing the submitted returns of the two companies … together there is sufficient income to pay the proffered wage" and requests that the petition be granted in all respects.

Counsel's contentions are not persuasive. The visa petition and the Form ETA 750 clearly identify the petitioner. The accountant's letter in exhibit A claims that a family owns both the petitioner and another corporation, namely, HMSM Supermarket Inc. (X). Counsel offers X's balance sheet and profit and loss statement (exhibit B) for six (6) months as of October 31, 2001 and X's Form 1120 U.S. Corporation Income Tax Returns for 1997-2000 (Exhibit C) to prove the petitioner's ability to pay the proffered wage.

The corporation is a separate and distinct legal entity from its owners and shareholders. Consequently, assets of its shareholders or of 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), Matter of Aphrodite Investments, Ltd., 17 I & N Dec. 530 (Comm. 1980), and Matter of Tessel, 17 I & N Dec. 631 (Act. Assoc. Comm. 1980). Therefore, exhibits A and C carry no weight to assess the ability to pay the proffered wage.

The accountant specifies that exhibit B is only for management guidance and withholds any opinion of the accompanying statements. It is simply another unaudited financial statement, such as required the Associate Commissioner to dismiss the appeal. It is of little evidentiary value, being based solely on the representations of management. 8 CFR 204.5(g)(2), which *see supra* p. 2. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

After a review of the documentation submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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 motion to reopen is granted, and the previous decisions of the director and the Associate Commissioner are affirmed. The petition is denied.