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U.S. Department of Homeland Security

Citizenship and Immigration Services

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*ADMINISTRATIVE APPEALS OFFICE*
*CIS, AAO, 20 Mass, 3/F*
*425 I Street, N.W.*
*Washington, D.C. 20536*

[redacted]

File: EAC 02 015 53134 Office: Vermont Service Center Date: FEB 02 2004

IN RE: Petitioner:
Beneficiary: [redacted]

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]

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 Citizenship and Immigration Services (CIS) 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, Director
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Administrative Appeals Office (AAO) on appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted. The petition will be denied.

The petitioner is a restaurant. It 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. The AAO affirmed this determination on appeal.

On motion, counsel submits new documentation. Pursuant to 8 C.F.R. § 103.5(A)(2), a motion to reopen must: "state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Counsel's new evidence is a letter from the petitioner's certified public accountant which states that the shareholders of the petitioning entity have financed the loss in net income by investing in the business. Counsel has met the regulatory requirements for reopening based on the submission of new evidence. Thus, the motion is granted.

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 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, and continuing. Here, the petition's priority date is January 9, 2001. The beneficiary's salary as stated on the labor certification is $18.89 per hour or $39,291.20 per annum.

The AAO affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence of its ability to pay the proffered wage as of the filing date of the petition.

Counsel's new evidence on motion to reopen is a letter from the petitioner's accountant, Eric K. Waller, who states that "[t]he 2000 loss of $221,000 and the 2001 loss of $125,000 were completely funded by investments from the owners of the company in an amount approximating $1,235,000 and a third party loan in the amount of $80,000." Mr. Waller goes on to state that the owners of the company will continue to fund losses as necessary until the company is self-sufficient.

Counsel's reliance upon the accountant's statements to prove the petitioner's ability to pay the proffered wage is not persuasive. Counsel does not cite legal authority. As noted in the AAO's prior decision, the petitioning entity in this case is a corporation. 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). Thus, a statement by an accountant, and not even the petitioning restaurant's owners or shareholders themselves, that financial obligations will be subsidized by individuals and not the corporation, is insufficient evidence of the petitioner's ability to pay.

The tax return for calendar year 2000 shows an ordinary income of -$221,369. The petitioner could not pay a salary of $39,291.20 a year from this income.

The petitioner must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. § 204.5(g)(2). Therefore, the petition may not be approved.

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 sustained that burden.

**ORDER:** The motion to reopen is granted, and the AAO's decision of November 7, 2002, is affirmed. The petition is denied.