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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FEB 26 2004

FILE: WAC 02 206 50647 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional financial information.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

> (2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is May 27, 1998. The beneficiary's salary as stated on the labor certification is $11.55 per hour or $24,024 per year based on a 40-hour week. The visa petition indicates that the petitioner was established in 1993 and is organized as a corporation. The approved labor certification shows that the original U.S. employer's name was [redacted] The stamped DOL notation indicates that the U.S. employer's name was amended to "M&S Management, Inc.," as of March 2002. M&S Management is named as the petitioner on the visa petition.

The petitioner initially provided insufficient evidence in support of its ability to pay the beneficiary's annual wage offer of $24,024.

In response to the director's request for additional evidence related to the petitioner's ability to pay the proffered wage, the petitioner, through counsel, submitted an accountant's compilation report for a four-month period in 2000 related to "S&P Consolidated," copies of a payroll summary, worker's compensation and recap reports dated December 2001 that were issued in the petitioner's name, copies of unaudited financial statements covering a period from 1999 to 2001 relating to "S&P Fresh Ltd. No. 3," and a copy of an unaudited financial statement

dated December 31, 1998, from "Baja Fresh #3."

Also included in the petitioner's documentation is a letter, dated August 25, 1999, signed by counsel, the beneficiary, and [redacted] of M&S Management, Inc. It is addressed to the state labor certification office, but appears to contain original signatures. The letter states that the alien "is actually employed by M&S Management, Inc." Another letter, dated May 30, 2001, is also in the record. It is addressed to "whom it may concern" and is signed by Steven Funkhouser as a member of "S&P Fresh LLC." This letter asserts that the legal liability for all expenses, including labor, rests with the limited partnerships and the general partner, and that the petitioner is a "shell corporation" formed to obtain the best rates for health and worker's compensation insurance.

The director denied the petition, determining that the petitioner had failed to submit copies of annual reports, federal tax returns, or audited financial statements required by 8 C.F.R. § 204.5(g)(2). The director noted that the financial statements were not audited and as management's representations of its own financial health, held little evidentiary value.

On appeal, counsel resubmits copies of the unaudited financial statements of S&P Consolidated from the year 2000, and S&P Fresh Ltd. No. 3 from 1999 to 2001. Counsel also submits a copy of an unaudited financial statement of S&P Fresh Ltd. No. 3 from 2002, as well as copies of Form 1065, U.S. Partnership Return of Income for 1998 through 2002 filed by S&P Fresh Ltd. No. 3. Finally, counsel resubmits a copy of the "Funkhouser" letter, dated May 30, 2001. Counsel does not offer any specific explanation as to the significance of the additional documentation submitted on appeal.

Although the AAO concurs with the director's observations regarding the probative value of unaudited financial statements, this case raises more fundamental questions as to which entity should be regarded as the prospective U.S. employer empowered by 8 C.F.R. 204.5(c) to file an employment based petition on behalf of the beneficiary. The record simultaneously indicates that the petitioner is the "actual employer" but may also not be legally obligated to pay the beneficiary's wages as described in the Funkhouser letter. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho,* 19 I&N Dec. 582, 591-592. Counsel submits no rationale explaining why the financial data of other entities, such as S&P Ltd. No. 3, which have not identified themselves as the prospective U.S. employer, either on the approved labor certification or the visa petition, should be accepted as evidence of the petitioner's ability to pay the proffered wage. The assets of 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); *Matter of Tessel,* 17 I&N 631 (Act. Assoc. Comm. 1980). On the other hand, if an entity other than the petitioner has the legal obligation to pay the beneficiary's salary, as suggested by the evidence contained in the record, then it should more properly be considered the appropriate U.S. employer and should obtain a labor certification and file the visa petition.

Accordingly, based on the evidence contained in the record and after consideration of the information submitted on appeal, the AAO cannot conclude that the prospective U.S. employer has been sufficiently identified by the evidence contained in the record. As such, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition.

Beyond the decision of the director, the record fails to reflect that sufficient evidence supporting the beneficiary's past employment experience has been submitted. It is noted that the record contains three letters from previous employers. None of them specifically identifies the respective job the beneficiary performed during his employment with them, pursuant to the requirements of 8 C.F.R. § 204.5(g)(1).

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.