PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

B6

U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: EAC 02 140 52566 Office: Vermont Service Center Date: MAR 12 2004

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 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a head cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing the labor certification.

On appeal, counsel states that the director's decision goes against the weight of the evidence, and that the petitioner could, has and continues to have the ability to pay the proffered wage.

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 petitioner'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. The petitioner's priority date in this instance is April 26, 2001. The beneficiary's salary as stated on the labor certification is $20 per hour or $41,600 per year.

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

In a request for evidence (RFE) dated June 15, 2002, the director requested evidence to establish the petitioner's ability to pay the proffered wage as of the date the labor certification was filed. In response, counsel submitted a copy of the petitioner's 2001 Form 1120S, which reflected ordinary income from trade or business activities of negative $2,402. Counsel also submitted a statement from the petitioner's accountant, a copy of the petitioner's bank report showing the balance as of September 9, 2002, and financial records and income tax returns of the petitioner's owner.

The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage on the priority date of the visa petition.

On appeal, counsel asserts that the quarterly wage reports show that the petitioner paid wages of $39,000 to $45,000 each quarter and considering the turnover rate in the restaurant business, those wages could have been used to pay a permanent full time employee. Counsel further asserts that the petitioner's corporate checking account shows monthly balances that only once fell below $12,000 during 2000 and 2001, and that except for that one month, the bank balances exceed the monthly payment that would have been paid to the beneficiary.

Counsel also cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and an AAO decision to support her arguments that net income alone should not determine the petitioner's ability to pay the proffered wage. Counsel cites *O'Connor v. Attorney General of the United States*, 1987 WL 18243 (D. Mass.) for the proposition that personal assets and assets of other businesses must be considered in determining the ability to pay.

With the appeal, counsel submits additional evidence in the form of the petitioner's state quarterly wage reports for the last two quarters of 2001 and a computer printout of wages for the second quarter of 2001, and the petitioner's monthly bank statements from January 2001 through August 2002.

None of counsel's arguments have merit. Although counsel states that the turnover rate for personnel was such that those wages could have been used to pay a permanent employee, the record does not reflect the position or duties of the terminated employees, whether or not they were full-time employees or whether the beneficiary could have replaced them. Furthermore, in support of

the petition and to establish the beneficiary's experience, the petitioner states the beneficiary has worked for the petitioner since 1998. However, his name does not appear on the quarterly wage reports nor does the petitioner give any other evidence that the beneficiary works for it. This raises the issue of whether the beneficiary meets the experience requirement of the labor certification.

Matter of Sonegawa, supra, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioner in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. 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 national magazines. Her clients included several high profile individuals including 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa,* nor has it been established that the petitioner has had uncharacteristically unprofitable years.

Despite counsel's arguments to the contrary, CIS 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 and shareholders. *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). 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.

The *O'Connor* case cited by counsel is distinguishable on the facts as the petitioner in that case was a sole proprietor.

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage in 2001 and continuing until present. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

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.