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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: EAC 02 078 50589 Office: VERMONT SERVICE CENTER Date: MAR 18 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 the Bureau of Citizenship and Immigration Services (Bureau) 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.

Ellen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont 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 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

On appeal, counsel submits an additional tax return and bank statements and asserts that the petitioner has demonstrated that it has the ability to pay the proffered wage.

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) 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.

The sole issue on appeal is whether the petitioner has demonstrated that it has the ability to pay the proffered wage. Eligibility in this case rests upon whether the petitioner has established that the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The priority date 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 February 8, 2001. The beneficiary's salary as stated on the labor certification is $16.25 per hour or $33,800 annually. The Dept. of Labor Form ETA-750 B submitted with the petition indicates that the petitioner has employed the beneficiary as a cook since 1996.

In this case, the petitioner initially submitted a copy of its Form 1120 U.S. Corporation Income Tax

Return for the tax year of 2000. The return was filed in the name of "Hudson River Resorts, Ltd.," with a federal employer identification number of 06-1313536. It contained the following information:

Gross receipts or sales	$ 920,506
Officers' compensation	(blank)
Salaries and Wages	110,487
Taxable income before Net operating loss deduction	- 143,036

Schedule L of this federal tax return reflected that the petitioner's net current assets were zero. The petitioner also submitted a copy of the beneficiary's 2000 W-2 showing that he was paid $11,700 in wages. The difference between the beneficiary's offered wage of $33,800 and the amount that he was actually paid in 2000 is $22,100.

On March 8, 2002, the director instructed the petitioner to submit additional evidence showing that it has the ability to pay the beneficiary's offered wage as of the February 8, 2001 priority date and continuing until the present.

In response, the petitioner resubmitted a copy of the beneficiary's 2000 W-2. The petitioner also provided a copy of the beneficiary's 2001 W-2 showing that he earned 32,298.90. A corporation named "WD McArthur & Company, Inc.", however, issued this W-2. It showed a different federal employer identification number and a different address than that given on the petition or on the 2000 corporate tax return previously submitted. The petitioner also offered a May 13, 2002 letter from Sam Burruano, an accountant. Mr. Burruano advised that the financial information contained in the letter was offered without audit or review. He stated that the 2001 corporate tax returns were not yet available for the petitioner. Mr. Burruano also stated that W.D. McArthur & Co. is a company with identical ownership to Hudson River Resorts. The letter presents "company" sales and payroll figures for the year ending December 31, 2001 and closes with the assertion that the difference between the beneficiary's offered wage and the amount that he was actually paid in 2001 was available to be paid from cash reserves.

In denying the petition, the director noted that the $22,100 necessary to meet the beneficiary's offered wage in 2000 was not available from the petitioner's income or assets as set forth on the 2000 corporate tax return. The director also concluded that the financial information presented on the beneficiary's 2001 W-2 could not be reliably evaluated in light of the absence of the 2001 corporate tax return and the unaudited information presented by the accountant's May 2002 letter.

We also note that the record contains no evidence of corporate or contractual documentation establishing the manner by which the petitioner corporation could be considered as the same entity as W.D. McArthur & Co. A corporation is a separate legal entity from its owners or stockholders. Consequently, any assets of its stockholders 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 Limited,* 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel,* 17 I&N Dec. 631 (Act. Assoc. Comm. 1980)].

The regulation at 20 C.F.R. § 656.30 also provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. If the employer/employee relationship changes, the validity of the approved labor certification may be affected. *See, e.g., Matter of United Investment Group,* Int. Dec. 2990 (Comm. 1985).

On appeal, counsel submits a copy of W.D. McArthur & Co.'s 2001 Form 1120S U.S. Income Tax Return for an S Corporation. It shows that this business had $2,903,483 in gross receipts/sales, no officers' compensation, $215,188 in salaries and wages, and an ordinary income of -$936,427. Its Schedule L reflected that it had -$718,710 in net current assets. An October 25, 2002 letter from Mr. Burruano indicates that the large loss incurred by this company was due to "substantial non-recurring charges resulting from the acquisition/reorganization of the three restaurant operations by W.D. McArthur & Co."

Even if W.D. McArthur & Co.'s financial information were considered to represent the petitioner's financial status, both tax returns for 2000 and 2001 showed substantial losses. Neither establishes that the difference between the beneficiary's offered wage and the wages actually paid to him were available from either the net current asset figures or the net income resources in each year. Whether the financial information set forth in the corporate tax returns represents uncharacteristically bad years is difficult to determine since there are no other tax returns available to evaluate

Counsel also offers copies of bank statements from "Hudson River Resorts Group Inc." in support of the petitioner's ability to pay the beneficiary's proffered wage. These statements show a January 31, 2001 ending balance of approximately $6500, and a December 31, 2001 ending balance of approximately $10,000. There is no evidence in the record to indicate that these balances somehow represent funds not already reflected in the tax returns contained in the record.

Based on the financial evidence contained in the record, it cannot be concluded that the petitioner has demonstrated its ability to pay the proffered wage as of the priority date of February 8, 2001 and continuing until 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.