

**PUBLIC COPY**

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

*BL*

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

[REDACTED]

File: EAC 02 089 54033 Office: Vermont Service Center

Date: JUL 03 2003

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.

*Helen E Crawford*  
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 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 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 continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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 continuing ability to pay the proffered wage beginning on the priority date, 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 request for labor certification was accepted for processing on April 4, 2001. The proffered wage as stated on the labor certification is \$13.10 per hour which equals \$27,248 annually.

With the petition, counsel submitted copies of 2001 pay stubs showing amounts the petitioner paid to the beneficiary. The last of those pay stubs, which was for the pay period from October 14, 2001 to October 27, 2001, shows a Year-to-Date total of \$2,736 paid by the petitioner to the beneficiary.

Counsel also submitted a copy of the petitioner's 2000 Form 1120 U.S. corporation income tax return. That tax return shows that the petitioner declared a loss of \$4,458 as its taxable income before net operating loss deduction and special deductions for that year. The corresponding Schedule L shows that at the end of that year the petitioner had \$8,216 in current assets and \$2,223 in current liabilities, which yields net current assets of \$5,993.

In an accompanying cover letter, dated January 15, 2002, counsel stated that the petitioner has a business line of credit. Counsel did not state the proposition for which he submitted that information, but this office infers that counsel meant to imply that the line of credit might be used to pay the proffered wage.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on March 12, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested evidence of the amount available from the petitioner's line of credit, copies of the petitioner's 1998 and 1999 tax returns, and a copy of the petitioner's 2001 tax return if it had been filed.

In response, counsel submitted a letter dated April 14, 2002 from the petitioner's owner, and the petitioner's 1998, 1999, and 2001 Form 1120 U.S. corporation income tax returns.

The 1998 tax return shows that the petitioner declared a loss of \$5,598 as its taxable income before net operating loss deduction and special deductions for that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$6,229 and current liabilities of \$1,457, which yields net current assets of \$4,772.

The 1999 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,157 for that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$12,629 and current liabilities of \$2,429, which yields net current assets of \$11,670.

The 2001 tax return shows that the petitioner declared a loss of

\$25,738 as its taxable income before net operating loss deduction and special deductions for that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The letter from the petitioner's owner attributes the decline in the petitioner's income to the death of the petitioner's owner's wife, who previously worked at the restaurant, during 1999. The petitioner's owner states that prior to his wife's death in 1999 the restaurant was very successful.

Counsel also submitted evidence pertinent to two lines of credit. One of those lines of credit is a business line of credit available to the petitioner. The other is a personal line of credit available to the petitioner's owner. The evidence indicates that \$25,000 credit is available to the petitioner, and \$150,000 to the petitioner's owner.

On July 24, 2002, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel provided copies of pay stubs showing amounts the petitioner paid to the beneficiary during 2002. The last of those pay stubs, for the period from July 28, 2002 to August 10, 2002, shows a Year-to-Date total of \$5,472 paid to the beneficiary.

Counsel argued that both the business line of credit and the personal line of credit were available to pay the proffered wage. Counsel further argued that even if the personal line of credit may not be included in the calculation of the petitioner's ability to pay the proffered wage, the business line of credit still demonstrates that ability.

A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders 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&M Dec. 631 (Act. Assoc. Comm. 1980). Evidence pertinent to the finances of the petitioner's owner are irrelevant to this matter and shall not be further considered.

Even the business line of credit may not be included in the

computation of the ability to pay the proffered wage. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, the Bureau will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both Bureau and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *Aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054.

The priority date of the instant petition is April 4, 2001. As such, the financial information submitted pertinent to prior years is not directly relevant to the issue in this case, which is the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel submitted pay stubs showing wages the petitioner paid to the beneficiary during 2001. The last of those pay stubs shows that, as of October 27, 2001, the petitioner had received a total of \$2,736. No evidence has been submitted to show that the petitioner paid the beneficiary any more than that during 2001.

The proffered wage in this matter is \$27,248 per year. Having

demonstrated that it paid the beneficiary \$2,736 during 2001, the petitioner is obliged to show that, during that year, it was able to pay the beneficiary the balance of the proffered wage, \$24,512.

The 2001 tax return submitted shows that during that year the petitioner suffered a loss and had negative net current assets. The evidence submitted does not show that the petitioner had the ability to pay the proffered wage during 2001.

On appeal, the petitioner's owner asserts that his business suffered a downturn in business due to his wife's death in 1999. The petitioner's owner is correct that if he can show that his business suffered an uncharacteristically slow period due to identifiable temporary influences, then the petitioner's losses or uncharacteristically low income due to those transient factors might be overlooked. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

However, the evidence shows that during 1998, prior to the death of the petitioner's owner's wife, the petitioner suffered a loss. The record contains no evidence to show that the petitioner has ever posted a large profit. Other than the statement by the petitioner, the record contains no evidence that the petitioner was a thriving business before 1999 and suffered a downturn during or after 1999. Further, the record contains little reason to believe that hiring the beneficiary will solve the petitioner's business problems. Assuming the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2001. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, this office notes that the record contains no evidence of the work experience of the beneficiary. The labor certification states that the proffered position requires two years of experience in the job offered, that is, as a cook. 8 C.F.R. § 204.5(1)(3)(B) states that a petition for a skilled worker must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification. The petitioner has submitted no evidence that the beneficiary is qualified for the proffered position according to the terms of the labor petition.

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.

RECEIVED  
NOV 1 2 5003  
MILWAUKEE