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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[REDACTED]

File: WAC 02 032 56681 Office: California Service Center

Date:

**JUL 21 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.

*Robert P. Wiemann*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference 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 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 argues that the evidence submitted demonstrates the petitioner's 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 continuing ability to pay the wage offered 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 January 12, 1998. The proffered salary as stated on the labor certification is \$13.87 which equals \$28,849.60 annually.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. On March 13, 2002, the California Service Center requested evidence pertinent to that ability. Specifically, the Service Center requested, consistent with the requirements of 8 C.F.R. § 204.5(g)(2), that the evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date should be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted 1998 and 1999 Form 1040 joint income tax returns of the petitioner's owner and the owner's wife, and the petitioner's 2000 and 2001 Form 1120S U.S. income tax returns for an S corporation. Counsel also submitted the petitioner's DE-6 quarterly wage reports for all four quarters of 2001. The discussion of the case is somewhat complicated by the fact that the petitioner apparently went from being a sole proprietorship during 1999 to being an S corporation in 2000.

The 1998 Form 1040 of the petitioner's owner and the owner's wife shows an adjusted gross income of \$53,537. The accompanying Schedule C shows a profit during that year from the petitioning business of \$2,485.

The 1999 Form 1040 shows an adjusted gross income of \$147,016. The accompanying Schedule C shows a profit from business of \$6,339.

The 2000 1120S for [REDACTED] shows a loss of \$10,787 for that year. The accompanying Schedule L shows current assets of \$15,300 and current liabilities of \$2,903 at the end of that year, which yields net current assets of \$12,397.

The 2001 1120S for [REDACTED] shows a loss of \$10,650 for that year. The accompanying Schedule L shows current assets of \$15,921 and current liabilities of \$3,722 at the end of that year, which yields net current assets of \$12,199.

On June 19, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage during 2000 and 2001. The director noted that the income and assets of the petitioner during 2000 and 2001, during which time the petitioner was a corporation, may not be included in the calculation of the funds available to pay the proffered wage.

On appeal, counsel argued that the assets and income of the petitioner's owner, including income and assets of another company he owns, are available and should be included in the calculation of

the petitioner's ability to pay the proffered wage during 2000 and 2001. Counsel also appeared to argue that the petitioner's gross receipts or wages paid, rather than adjusted gross income and net current assets, should be considered in determining the petitioner's ability to pay.

With the appeal, counsel submitted copies of the 2000 and 2001 Form 1040 joint tax returns of the petitioner's owner and the owner's wife and copies of other tax returns which were previously submitted.

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).

As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders and their ability, if they wished, to pay the corporations debts and obligations, are irrelevant to this matter and shall not be further considered.

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, not gross receipts, 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, counsel's reliance on the amount of wages the petitioner paid is inapposite. No evidence was submitted to suggest that, had the petitioner been able to hire the beneficiary, he would have replaced another employee, whose wages would then have been available to pay the proffered wage. Absent such evidence, one cannot conclude that those wages, which were paid to other employees, were available to pay the proffered wage.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2000 and 2001. 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.