



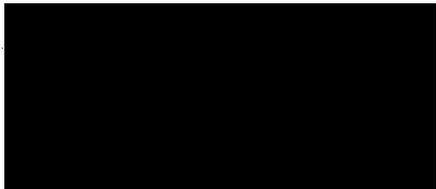
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FILE: LIN 02 192 53610 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
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 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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) 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 Chinese gourmet restaurant. It seeks to employ the beneficiary permanently in the United States as a (Mandarin/Szechwan) chef. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor. The director determined that the petitioner had failed to establish that it had the continuing financial ability to pay the beneficiary's proffered wage as of the visa priority date.

On appeal, counsel submits additional evidence and asserts that the director misinterpreted the petitioner's 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)(2) also provides 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. . . . 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.

In this case, eligibility for the visa classification rests upon whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. 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 March 21, 2001. The beneficiary's salary as stated on the labor certification is \$17.23 per hour or \$35,838.40 per year. The record indicates that the petitioner is organized as a corporation and has five employees.

As evidence of the petitioner's ability to pay the beneficiary's proposed salary of \$35,838.40, the petitioner, through counsel, initially submitted copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for the years 1997 through 2001. They reflect that the petitioner files its tax returns on a standard calendar year basis. In a cover letter accompanying the initial filing, counsel states that these tax returns support the petitioner's ability to pay the proffered salary. Counsel provides no additional clarification. It is noted that the petitioner declared losses as ordinary income in three out of these five years. Nevertheless, as the visa priority date is March 21, 2001, the 2001 tax return is the most relevant, since the petitioner must demonstrate its ability to pay the beneficiary's wage offer beginning at the visa priority date and continuing until the beneficiary obtains

lawful permanent resident status. The petitioner's 2001 corporate tax return shows that the petitioner declared ordinary income of \$1,116. Schedule L of the tax return reflects that the petitioner's current assets are \$8,085 and its current liabilities are \$6,353. The difference of \$1,732 represents the petitioner's net current assets. CIS will consider a petitioner's net current assets as a source to pay a beneficiary's proffered salary because it identifies the level of liquidity that a petitioner has as of the filing date. It represents the amount of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Net current assets are the difference between the petitioner's current assets and current liabilities. In this case, neither the petitioner's ordinary income of \$1,116, nor its net current assets of \$1,732 are sufficient to cover the beneficiary's wage offer of \$35,838.40.

With the original filing, counsel submits a letter from the petitioner's principal shareholder, which is a verbatim copy of counsel's letter. It states that he is negotiating a lower rent and that the beneficiary's services will increase business. It also asserts that the principal shareholder will cease his duties as a chef after the beneficiary is hired and devote his time to improving inventory administration that will result in increased sales. A letter from a tax advisor, "Charles Daud," dated May 1, 2002, accompanied by an unaudited statement of the petitioner's income and expenses covering the first quarter of 2002 is also submitted with the petition. Finally, a copy of a portfolio statement for the period ending March 31, 2002 is provided. The account is held individually by the petitioner's principal shareholder and one other individual. As of March 31, 2002, it was valued at approximately \$73,500.

In a request dated August 5 2002, the director required additional evidence to establish the petitioner's continuing ability to pay the proffered wage as of the priority date of March 21, 2001. The director advised the petitioner that he must include his latest annual report, federal tax returns, or "audited financial statements." (Original emphasis). The director stated that the petitioner may include other evidence such as profit/loss statements, bank account records, or personnel records.

Included in counsel's response was a copy of a signed, undated, amended 2001 corporate tax return in the petitioner's name. This tax return indicates that the petitioner's ordinary income is \$16,121 and its net current assets are \$7,999. The AAO notes that in some cases, evidence that the petitioner creates after CIS points out deficiencies will not be considered independent and objective evidence. A letter, dated October 21, 2002, from a certified public accountant, "Nephi Bierwolf", accompanies this amended tax return. Mr. Bierwolf also submits a statement of the petitioner's operations and balance sheets covering the period from January 1, 2002 to July 31, 2002, as well as a "Statement as to Ability to Pay Offered Wage." Mr. Bierwolf explains that in his statement relating to the petitioner's ability to pay the proffered wage, he has added back non-cash expenses such as depreciation and amortization, as well as officer's compensation, which he asserts won't be paid when the new chef is hired. He concludes that the result of \$39,405 represents sufficient funds to cover the beneficiary's salary.

In his denial, the director found that the original 2001 tax return's net income of \$1,611 was less than the offered wage. The director did not directly address the representations of the amended tax return and Mr. Bierwolf's assertions. The director did note that the petitioner's projection of increased business based on the beneficiary's skills was essentially speculative and that the record contained no evidence that a decrease in rent had substantially affected the business or that the petitioner's principal shareholder had shifted duties. The AAO notes that the regulation at 8 C.F.R. § 204.5(g)(2) requires that the ability to pay the proffered wage be established as of the priority date and continuing until the beneficiary obtains lawful permanent resident status. Officer's compensation and other salary/wage deductions are not generally considered to be resources available to compensate the beneficiary because they represent funds already expended by the petitioner. As stated in *Matter of Great Wall*, 16 I&N Dec. 143, 144-145:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts

hinged upon probability and projections, even beyond the information presented on appeal.

On appeal, counsel asserts that because the director did not directly address Mr. Bierwolf's conclusions regarding the petitioner's ability to pay, then the director's denial was erroneous. Counsel resubmits copies of the petitioner's amended 2001 tax return and Mr. Bierwolf's materials and includes a duplicate letter from the petitioner's principal shareholder that echoes counsel's appellate brief. While the director's decision might have been more informative in addressing the objections to Mr. Bierwolf's assertions, the AAO cannot disagree with the director's conclusion that the petitioner has not demonstrated its continuing ability to pay the proffered salary. Neither the original 2001 federal tax return, nor the amended one offered by the petitioner, reflects sufficient ordinary income or net current assets to meet the beneficiary's proposed wage offer.

It is noted that unaudited financial statements generally have little probative value relating to a petitioner's ability to pay the proffered wage because they are based solely on the representations of management. The regulation at 8 C.F.R. § 204.5(g)(2) neither states nor implies that an unaudited document may be substituted for annual reports, federal tax returns, or audited financial statements. Regarding Mr. Bierwolf's assertion that depreciation and amortization should be added back to the taxable income, it is also noted that in examining the petitioner's ability to pay the proffered wage, CIS will review the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). 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*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

It is further noted that CIS will not consider the individual stock portfolio of the petitioner's principal shareholder. A corporation is a separate and distinct entity from its owners or shareholders. Thus, the assets of other corporations or enterprises will not be considered in determining the petitioning corporation's ability to pay the beneficiary's wage offer. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958); *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate a continuing financial ability to pay the proffered salary as of the visa priority date. In this case, following a review of the evidence contained in the record, the AAO cannot conclude that the petitioner has persuasively shown that it has had this continuing financial ability to pay the proffered wage.

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.