

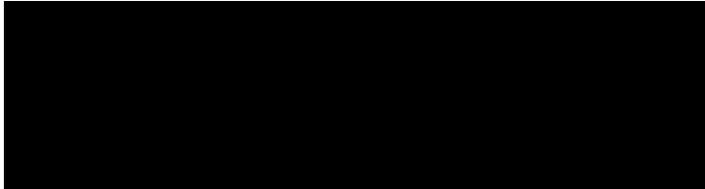
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**U.S. Department of Homeland Security
Citizenship and Immigration Services**

*ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536*



File: EAC 02 124 50402 Office: VERMONT SERVICE CENTER

Date: APR 07 2004

IN RE: Petitioner:
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:



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.

[Signature]
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 and denied the petition accordingly.

On appeal, counsel submits a statement 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 nature, for which qualified workers are not available in the United States.

The regulation at 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on April 9, 2001. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, which equals \$26,000 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. That return shows that the petitioner declared a loss of \$55,393 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had \$66,465 in current assets and \$54,049 in current liabilities, which yields net current assets of \$12,416.

This office notes that, because the priority date is April 9, 2001, evidence of the petitioner's income during 2000 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on June 4, 2002, requested additional evidence pertinent to that ability. The Service Center also specifically requested a complete copy of the petitioner's 2001 federal income tax return or, in the alternative, annual reports accompanied by audited or reviewed financial statements for 2001. The Service Center also inquired

whether the proffered position is a newly created position. If not, the Service Center requested that the petitioner provide evidence of the wage paid to the incumbent and evidence that the position has been vacated.

In response, counsel submitted a letter, dated June 11, 2002. In that letter, counsel stated that the position is a newly created position.

Counsel also submitted a letter, dated May 13, 2002, from the petitioner's accountant. That letter states that [REDACTED] is another company owned by the petitioner's owner. The accountant further states that [REDACTED] manages the petitioner's owner's various corporations and is paid an annual fee by each of those corporations. The annual fee is determined annually and may vary. The accountant further stated that [REDACTED] subsidizes any of the petitioner's owner's corporations with financial difficulties. The accountant further stated that [REDACTED] 2001 tax return was not yet completed and provided a copy of its 2000 return and a copy of a Form 7004 Application for an extension of time until September 16, 2002 to file SMI's 2001 return.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 11, 2002, denied the petition. The director noted that, as the evidence does not show that [REDACTED] is obliged to pay the petitioner's debts, its income cannot be included in the determination of the petitioner's ability to pay the proffered wage.

On appeal, counsel asserts that "[The petitioner] has the ability to pay the proffered salary to the beneficiary." In support of that contention, counsel submits another letter, dated October 29, 2002, from the petitioner's accountant. That letter states that the petitioner paid \$120,000 in management fees during 2000 despite a loss of \$55,393 and paid \$100,000 for management during 2001 despite a loss of \$29,477. The accountant continued:

If [the petitioner] had additional salaries, these costs would be covered by a decrease in management fees as needed. I believe that [REDACTED] would forego any part of its fee if the cash flow dictated.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. The accountant's statement that he believes that SMI would reduce the petitioner's management fees as necessary to pay the proffered wage is insufficient to oblige SMI to do so. The petitioner's owner is not obliged to pay the petitioner's debts out of his own funds. The income and assets of the owner, therefore, including other companies he owns, and his ability, if he wished, to pay the petitioner's debts and obligations, is irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed the beneficiary.

If the petitioner does not establish that it paid the beneficiary an amount equal to or greater than the proffered wage during that period, the AAO will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns in determining a petitioner's ability to pay a proffered wage. *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 INS, now CIS, had properly relied on 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 INS, now CIS, should have considered income before expenses were paid rather than net income.

The priority date is April 9, 2001. The proffered wage is \$26,000 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 98 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 267 days. The proffered wage multiplied by $267/365^{\text{th}}$ equals \$19,019.18, which is the amount the petitioner must show the ability to pay during 2001.

On July 4, 2002, the Service Center asked the petitioner to provide a copy of its 2001 tax return or its annual report with audited or reviewed financial statements. At that time the petitioner's accountant stated that the 2001 return of [REDACTED] which the Service Center did not request and which is irrelevant to this proceeding, was incomplete. The petitioner did not provide the requested copy of its tax return or annual report, and neither the petitioner, nor counsel, nor the accountant gave any reason for the failure to provide that requested return or report. Even if the petitioner had provided [REDACTED] tax returns, the record of proceeding contains no probative evidence corroborating its relationship to the petitioner.

Despite the Service Center's direct request, the petitioner provided no competent evidence pertinent to its ability to pay the proffered wage during 2001. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). The petitioner has not demonstrated its ability to pay the proffered wage, nor any portion of it, during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage 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.