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U.S. Department of Homeland Security  
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Washington, DC 20536

U.S. Citizenship  
and Immigration  
Services



File: EAC 02 206 53979 Office: VERMONT SERVICE CENTER

Date: APR 13 2004

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 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 chef. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. 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 additional evidence and a statement from the petitioner's owner.

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.

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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on February 25, 1998. The proffered wage as stated on the Form ETA 750 is \$782.40 per week, which equals \$40,684.80 per year.

With the petition, counsel submitted a copy of the petitioner's 1997 and 1998 Form 1120S U.S. Income Tax Returns for an S Corporation. Those returns show that the petitioner reports

taxes based on a calendar year. Because the priority date is February 25, 1998, information on the 1997 tax return is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 1998 return shows that the petitioner declared ordinary income of \$505 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$14,488 and current liabilities of \$5,628, which yields net current assets of \$8,860.

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 December 30, 2002, requested additional evidence pertinent to that ability. The Service Center also specifically requested, if the petitioner employed the beneficiary during 1998, that it provide Form W-2 Wage and Tax Statements showing the amount of wages it paid to the beneficiary during that year. The Service Center noted that the 1998 return submitted failed to demonstrate the ability to pay the proffered wage.

In response, counsel submitted an additional copy of the petitioner's 1998 tax return. Counsel also submitted a copy of the 1998 Form 1040 joint tax return of the petitioner's owner and the owner's spouse.

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 April 28, 2003, denied the petition.

On appeal, counsel submits a letter, dated May 12, 2003, from the petitioner's owner. In that letter, the petitioner's owner asserts that the proffered wage will be paid out of the salaries previously paid to two part-time employees and to himself. With that letter, counsel provided 1998 W-2 forms showing the amounts the petitioner paid in wages to the two part-time employees and to the owner during that year. Counsel implies that hiring the beneficiary would obviate some or all of the wages the petitioner previously paid to the part-time employees and some or all of the wages it previously paid to the petitioner's owner.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>1</sup> or

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<sup>1</sup> The petitioner might demonstrate this, for instance, not by merely alleging, but by submitting evidence sufficient to demonstrate that the beneficiary would replace a specific named employee, whose wages would then be available to pay the proffered wage.

otherwise increased its net income<sup>2</sup>, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

Submission of the petitioner's owner's personal income tax return is not apropos. 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. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders and their ability, if they wished, to pay the corporation's debts and obligations, are 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, CIS 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 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 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 CIS should have considered income before expenses were paid rather than net income.

The priority date is February 25, 1998. The proffered wage is \$40,684.80 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1998, but only that portion which would have been due if it had hired the beneficiary on the priority date. On the priority date, 55 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 310 days. The proffered wage multiplied by

<sup>2</sup> The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

310/365<sup>th</sup> equals \$34,554.21, which is the amount the petitioner must show the ability to pay during 1998.

During 1998, the petitioner declared ordinary income of \$505. That amount is insufficient to pay the proffered wage. The petitioner ended the year with net current assets of \$6,540. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated the ability to pay the salient portion of the proffered wage during 1998.

On December 30, 2002, the Service Center requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date, the petitioner's 2002 tax return was unavailable, but the petitioner's 1999, 2000, and 2001 returns should have been available. The petitioner did not submit those returns or any other evidence of the petitioner's ability to pay the proffered wage during those years. The petitioner gave no reason for the failure to submit that evidence. The petitioner has failed to demonstrate the ability to pay the proffered wage during 1999, 2000, and 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, and 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.