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U.S. Citizenship
and Immigration
Services



File: EAC 02 201 52468

Office: VERMONT SERVICE CENTER

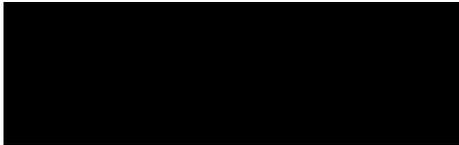
Date: APR 13 2004

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.

Robert P. Wiemann

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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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, the petitioner's 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 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, 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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$9.25 per hour, which equals \$19,240 per year. Part B of the Form ETA-750 states that the petitioner has employed the beneficiary since January 1998.

With the petition, counsel submitted a letter, dated January 24, 2002. In that letter, counsel stated he was submitting the

petitioner's "Tax Return for 1998-99, and 2000." The petitioner's tax returns, however, were not included with that submission. Counsel did submit copies of 1998 and 1999 Form W-2 Wage and Tax Statements showing that the petitioner paid the beneficiary \$8,600 and \$23,900 during those years, respectively.

Counsel also submitted the Consolidating Balance Sheets of the petitioner and J&M Dutchess Management, Incorporated (J&M) for the petitioner's 1998, 1999, and 2000 fiscal years. The petitioner's fiscal year runs from March 1 of the nominal year to the last day of February of the following year. Those balance sheets segregate the income and assets of the petitioner from the income and assets of J&M, and also show consolidated figures for both companies.

The fiscal year 1998 statement of operations shows that the petitioner sustained a net loss from operations of \$58,756 during that fiscal year. The balance sheet shows that on February 28, 1999, the end of that fiscal year, the petitioner had current assets of \$109,642 and current liabilities of \$21,718, which yields net current assets of \$87,924.

The fiscal year 1999 statement of operations shows that the petitioner sustained a net loss from operations of \$77,071 during that year. The balance sheet shows that on February 29, 2000, the end of that fiscal year, the petitioner had current assets of \$89,034 and current liabilities of \$36,111, which yields net current assets of \$52,923.

The fiscal year 2000 statement of operations shows that the petitioner sustained a net loss from operations of \$47,220 during that year. The balance sheet shows that on February 28, 2001, at the end of that year the petitioner had current assets of \$91,924 and current liabilities of \$84,301, which yields net current assets of \$7,623.

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 November 12, 2002, requested additional evidence pertinent to that ability. The Service Center also specifically requested a complete copy of the petitioner's 1998 tax return including all schedules and attachments, or reviewed or audited financial statements for that year.

In response, counsel submitted a copy of the petitioner's 1998 Form 1120 U.S. Corporation Income Tax Return. During its 1998 fiscal year, the petitioner declared a loss of \$32,709 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L was not included with that 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 April 23, 2003, denied the petition.

On appeal, counsel submits a copy of the Consolidating Balance Sheet of the petitioner and J&M for the petitioner's 2001 fiscal year, as well as copies of the balance sheets previously submitted. The 2001 statement of operations indicates that the petitioner enjoyed a net income from operations of \$13,390 during that year. The balance sheet shows that on February 28, 2002, the end of that fiscal year, the petitioner had current assets of \$471,860 and current liabilities of \$20,000, which yields net current assets of \$451,860.

In a letter, dated May 22, 2003, submitted with the appeal, counsel states the petitioner's sole stockholder is also the sole stockholder of J&M. Counsel further states that J&M has the discretion either to collect or return its management fees. In support of that latter assertion, counsel submits the minutes of the board of directors of J&M, dated August 21, 1990, at which J&M was accorded that option.

In the brief¹, counsel asserts that, during the 1998, 1999, 2000, 2001, and 2002 calendar years, the petitioner enjoyed net income of \$69,470, \$83,986, \$115,830, \$44,958, and \$13,390, respectively. This office notes that, because the petitioner reports taxes on a fiscal year ending on the last day of February, the tax return submitted contains no figures pertinent to calendar years. Because the consolidating financial statements of the petitioner and J&M are also based on the fiscal year, they also do not contain the petitioner's net income during calendar years. Counsel provided no other evidence pertinent to the petitioner's income and assets. Counsel's statements pertinent to the petitioner's income during the stated calendar years are unsupported assertions. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel further asserts but, again, provides no evidence to demonstrate, that the policy of J&M and the petitioner making payment of management fees optional at J&M's election has withstood an IRS audit. In so stating, counsel appears to imply that the income and assets of J&M, or at least the management fee to which it is entitled, should be considered in the determination of the petitioner's ability to pay the proffered

¹ The document referred to is an unsigned, unattributed two-page document. Because it contains assertions pertinent to the basis of the denial of the instant petition, this office assumes it is the brief of counsel in this matter.

wage.

If the policy of the petitioner and J&M has withstood an audit, as counsel alleges, that indicates that it is apparently consistent with the tax code. It is not, however, a convincing argument for including the income and assets of J&M, or the management fees to which it is entitled, in the determination of the petitioner's ability to pay the proffered wage.

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, including other corporations they own, and the owners or stockholders' ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter. That J&M may opt to forego management fees to which it is entitled is insufficient to alter the basis of corporate law. The petitioner must show the ability to pay the proffered wage out of its own funds.

In the decision of denial, the director included the amount of the petitioner's 1998 depreciation deduction in the calculation pertinent to the petitioner's ability to pay the proffered wage during that year. This office does not agree with that treatment of the petitioner's depreciation deduction.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1080 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The expense may not now be shifted to some other year nor treated as a fund available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income 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*, *Supra* at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, *Supra*; *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 Immigration and Naturalization Service, now CIS, 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 CIS should have considered income before expenses were paid rather than net income.

In this case, counsel has submitted both financial statements and a tax return. Because of legitimate differences in reporting income and expenses on tax returns and reporting them on financial statements, the net income on a company's tax return usually differs, sometimes dramatically, from the net income shown on its financial statements for the same period. Income actually received on a given day may be reported during that year on a financial statement, for instance, but may have been reported on a previous year's tax return. Therefore, although the petitioner may rely on either tax returns or financial statements to demonstrate its ability to pay the proffered wage, it may not alternate from one to the other during various years. To do so would likely misrepresent its net income by either over-counting or under-counting income or expenses.

In this case, the petitioner submitted only one tax return. That is the return pertinent to its 1998 fiscal year. If the petitioner chose to rely on its tax return to demonstrate the ability to pay the proffered wage, it would be unable to show the ability to pay the proffered wage during any other period. The petitioner would not, therefore, have demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The petitioner must, therefore, rely on its financial statements to demonstrate its ability to pay the proffered wage.²

² This office notes that the financial statements submitted were reviewed by an accountant, but were not produced pursuant to an audit. Reviewed financial statements are not among the three types of preferred evidence of the ability to pay the proffered wage listed at 8 C.F.R. § 204.5(g)(2). The reviewing accountant expresses no opinion pertinent to the accuracy of the figures on a reviewed financial statement. Therefore, this office ordinarily would not accord great credibility to a reviewed statement. In this case, however, the Service Center, in the November 12, 2002 request for evidence, listed reviewed financial statements as one of the acceptable kinds of

The petitioner's 1998 fiscal year 1998 began on March 1, 1998. The petitioner submitted no financial statements pertinent to the period from the priority date until February 28, 1998. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of either its income or its net current assets during that period.

A 1998 W-2 form in the record shows that the petitioner paid the beneficiary \$8,600 during that calendar year. Because the petitioner claimed on the Form ETA-750, Part B to have employed the beneficiary since January of 1998, some portion of that income was apparently paid to the beneficiary during the period from the priority date to February 28, 1998. How much might have been paid to the beneficiary cannot be determined from the evidence of record.

The fiscal year 1998 statement of operations covers the period from March 1, 1998 through February 28, 1999. The statement shows that the petitioner sustained a net loss \$58,756 during that period. The petitioner has not demonstrated that it would have been able to pay any portion of the proffered wage out of its income during that year. The petitioner finished that fiscal year, however, with net current assets of \$87,924. The petitioner has demonstrated that its net current assets during 1998 were sufficient to pay the proffered wage.

The fiscal year 1999 statement of operations shows that the petitioner sustained a net loss \$77,071. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner finished that fiscal year, however, with net current assets of \$52,923. The petitioner has demonstrated that its net current assets during 1999 were sufficient to pay the proffered wage.

The fiscal year 2000 statement of operations shows that the petitioner sustained a net loss \$47,220. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner finished that fiscal year with net current assets of \$7,623, an amount insufficient to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its fiscal year 2000 out of its net current assets. The petitioner did not submit any evidence of wages it actually paid to the beneficiary during its fiscal year 2000. The petitioner has not demonstrated that any other funds were available to it with which to pay the proffered wage during its 2000 fiscal year, and has

evidence of the ability to pay the proffered wage. Under these circumstances, in the interest of fairness, this office is loath to discount the credibility of the reviewed financial statements.

not, therefore, demonstrated the ability to pay the proffered wage during that fiscal year.

The fiscal year 2001 statement of operations shows a net income \$13,390. That amount is insufficient to pay the proffered wage. The petitioner finished that fiscal year, however, with net current assets of \$451,860. The petitioner has demonstrated the ability to pay the proffered wage during its fiscal year 2001 out of its net current assets.

The petitioner failed to submit evidence sufficient to demonstrate that it was able to pay the proffered wage during the period from the priority date to March 1, 1998. The petitioner also failed to submit evidence sufficient to demonstrate that it was able to pay the proffered wage during its 2000 fiscal year. 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.