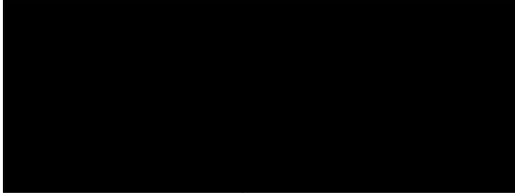


U.S. Department of Homeland Security
Citizenship and Immigration Services

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



File: EAC 01 118 53318 Office: VERMONT SERVICE CENTER

Date: APR 26 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: SELF-REPRESENTED

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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, 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 appears to have retained representation. The petitioner's ostensible representative filed a Form G-28, Notice of Entry of Appearance in this matter. That notice does not state that the representative is an attorney. Further, that putative representative's name does not appear on the roster of accredited representatives. The record contains no indication that the petitioner's putative representative is authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

The petitioner is a delicatessen. It seeks to employ the beneficiary permanently in the United States as a pastry baker. As required by statute, an approved Form ETA 750, Application for Alien Employment Certification, 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, the petitioner's purported representative submits a brief.

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. Here, the Form ETA 750 was accepted on March 13, 2000. The proffered wage as stated on the Form ETA 750 is \$550 per week, which equals \$28,600 per year.

With the initial petition, the purported representative submitted the petitioner's 1998 and 1999 Form 1120S U.S. Income Tax Returns for an S Corporation. The 1998 return shows that the petitioner declared \$16,976 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$19,004 and no current liabilities, which yields net current assets of \$19,004.

The 1999 tax return shows that the petitioner declared \$5,082 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$19,943 and current liabilities of \$3,153, which yields net current liabilities of \$16,790.

This office notes that, because the priority date is March 13, 2000, financial information pertinent to 1998 and 1999 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The purported representative also submitted an affidavit, attested to on February 24, 2001, from the petitioner's owner. The owner stated that he has the ability to provide additional funds from his own income and assets as necessary to pay the proffered wage. The petitioner's owner provided evidence pertinent to his own assets.

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 August 7, 2001, requested additional evidence pertinent to that ability. The Service Center also specifically requested the petitioner's 2000 income tax return and 2000 and 2001 Form W-2 Wage and Tax Statements if the petitioner employed the beneficiary during those years.

In response, the purported representative submitted a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation. That return states that the petitioner had ordinary income of \$2,214 during that year. The accompanying Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In a cover letter, the purported representative referred to the affidavit of February 24, 2001, in which the petitioner's owner stated that he has personal funds at his disposal to pay the proffered wage if necessary. The purported representative submitted no W-2 forms.

On December 18, 2001, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On January 22, 2002, the petitioner submitted an I-290B appeal form. Because that document was untimely submitted under 8 C.F.R. § 103.3(a)(2), the Vermont Service Center treated it as a motion to reopen, rather than as an appeal.

In a brief in support of that motion, the purported representative asserted that the petition should be approved because the petitioner has spent thousands of dollars on bakery equipment and wishes to hire the beneficiary. The purported representative further stated that the petitioner placed the beneficiary on the payroll in September 2001. In closing, the purported representative states, "Our argument is simple; the employer had, has and will have the financial ability to pay the wage, because that payment is being made since September 2001 to the present." (Sic) The purported representative provided no evidence of the assertion that the beneficiary was placed on the petitioner's payroll during September 2001.

On October 30, 2002, the Director, Vermont Service Center, ruled on the motion. The director noted that the petitioner had provided no evidence to overcome the denial and denied the petition again.

On appeal, the purported representative alleges that the beneficiary was on the petitioner's payroll during all of 2001, remains on the petitioner's payroll, and is being paid the proffered wage. The purported representative submitted no evidence in support of those assertions.

Assertions of counsel, or of a representative, or of a purported representative, are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988);

Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Further, this office notes that the purported representative's assertions on appeal appear to conflict with the purported representative's previous assertion, also entirely unsupported, that the petitioner placed the beneficiary on his payroll in September 2001.

The purported representative appears to reiterate that the petition should be approved because the petitioner desires to hire the beneficiary and has spent funds on bakery equipment. The purported representative appears to assert, further, that the petitioner's owner's income and assets should be included in the determination of the ability to pay the proffered wage.

The purported representative cites *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1986) and *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985), although the proposition for which he cites them is unclear. The purported representative also submits additional copies of evidence previously submitted.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that the desire of the petitioner to hire the beneficiary and his having paid for bakery equipment is insufficient to demonstrate the ability to pay the proffered wage. The petitioner must demonstrate that ability with copies of annual reports, federal tax returns, or audited financial statements.

The purported representative's reliance on the petitioner's owner's income and assets is misplaced. 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.

The purported representative asserts that the petitioner has placed the beneficiary on its payroll and is paying him the proffered wage. Initially, the purported representative asserted that the petitioner placed the beneficiary on its payroll during September 2001. On appeal, the purported representative asserts that the beneficiary has been on the payroll and receiving the proffered wage during all of 2001 and continuing until the present. The purported representative failed to reconcile those mutually contradictory statements. Even more important, the purported representative failed to provide any evidence to support either of those statements. The file contains no evidence to support even the assertion that the petitioner has been paying any wages to the beneficiary. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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. CIS may rely on federal income tax returns in assessing 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 CIS, then the INS, 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. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The priority date is March 13, 2000. The proffered wage is \$28,600 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2000, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 72 days of that 366-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 294 days. The proffered wage multiplied by $294/366^{\text{th}}$ equals \$22,873.77, which is the amount the petitioner must show the ability to pay during 2000.

During 2000, the petitioner declared ordinary income of \$2,214. That amount is insufficient to pay the salient portion of the proffered wage. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that it had any other funds at its disposal with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during the salient portion of 2000. 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.