



U.S. Citizenship
and Immigration
Services

Security and Order Through
a System of Checks and Balances

B6



FILE: EAC 02 131 53359 Office: VERMONT SERVICE CENTER Date: JUN 17 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:



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.


for 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 (AAO) 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, 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.

On appeal, counsel 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 10, 2001. The proffered salary as stated on the labor certification is \$12.60 per hour or \$26,208 per year.

With the petition, counsel submitted a copy of the 2000 Form 1120, U.S. Corporation Income Tax Return for Thira, Inc., doing business as the petitioner. The return lists the employment address identified on the ETA 750, is designated in box "E" as the corporation's final return and further reflects that Thira, Inc. was incorporated in 1997. The 2000 income tax return reflected a taxable income before net operating loss deduction and special deductions of \$4,568 and net current assets (current assets minus current liabilities) of \$0. This evidence was considered insufficient by the director, and, on May 28, 2002, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of April 10, 2001 to be in the form of copies of annual reports, signed and certified federal tax returns, or audited financial statements. The director informed the petitioner that additional evidence such as accredited profit/loss statements, bank account records, or personnel records may be considered but only as supplementary support to establish the petitioner's ability to pay. The director also requested that the

petitioner submit copies of the beneficiary's 2000 and 2001 Forms W-2, Wage and Tax Statements, showing the wages earned by the beneficiary in those years.

In response, counsel submitted a letter stating that, at that time, the petitioner had not filed its 2001 federal tax return and that the return would not be available until mid-September. Counsel also stated that the beneficiary did not file taxes, nor did he receive a form W-2 for the years 2000 and 2001.

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 December 12, 2002, denied the petition.

On appeal, counsel submitted a copy of a 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, for Lemagia, Inc. and a letter from the owner which states:

I am Antonio Petrakis. I am one of [the] owners/managers of Pacini's Italian Eatery. For the fiscal year ending December 31, 2001 the taxes for Pacini's Italian Eatery were filed under the S Corporation, Lemagia, inc. (d/b/a Pacini's Italian Eatery). I have provided Attorney Brown with a copy of the Lemagia tax return for 2001.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

CIS may also review the petitioner's net current assets as another means of determining the petitioner's ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and

current liabilities.¹ Net current assets identify the amount of “liquidity” that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner’s current assets are sufficiently “liquid” or convertible to cash or cash equivalents, then the petitioner’s net current assets may be considered in assessing the prospective employer’s ability to pay the proffered wage.

The 2000 tax return reflects a taxable income of \$4,568 and net current assets of \$0. Because the priority date of the petition is April 10, 2001, the petitioner’s 2000 tax return has no direct relevance to the petitioner’s ability to pay the proffered wage and will not be considered as evidence of the petitioner’s ability to pay the wage beginning on the priority date and continuing.

The 2001 tax return for Lemagia, Inc. reflects an ordinary income of \$150,960 and net current assets of \$28,972. However, there is no evidence in the record that establishes that Lemagia is one and the same restaurant as the petitioner or a successor in interest. Each of the entities has a different address and a different employer identification number. The 2001 return is not designated as the corporation’s initial return and Lemagia was incorporated in 1996. The record does not contain any evidence, such as a merger or other agreement establishing that Lemagia assumed all the rights duties and obligations of the petitioner. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, CIS may not “pierce the corporate veil” and look to the assets of the corporation’s owner to satisfy the corporation’s ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation’s ability to pay the proffered wage. In the instant case, since both Pacini’s and Lemagia, Inc. are corporations and since there is no evidence that they are the same restaurant, it must be assumed that they are different and, therefore, financial documentation for Lemagia, Inc. may not be used as evidence of Pacini’s Italian Eatery’s 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.

¹ A petitioner’s “current assets” consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner’s balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner’s “current liabilities” are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner’s accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.