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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: WAC 01 126 51073 Office: CALIFORNIA SERVICE CENTER Date: **MAR 31 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California 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.

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.

The petitioner must demonstrate eligibility 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. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on July 31, 2000. The proffered wage as stated on the Form ETA 750 is \$13.87 per hour, which equals \$28,849.60 per year.

With the petition, counsel submitted the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return and unaudited financial statements for the year ended December 31, 2000. This office

notes that the petitioner's 1999 tax return covers the 1999 calendar year. Because the priority date is July 31, 2000, figures on that return are not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date. This office further notes that 8 C.F.R. § 204.5(g)(2) states that copies of annual reports, federal tax returns, and audited financial statements are preferred of a petitioner's ability to pay the proffered wage. Thus, the unaudited financial statement has little evidentiary value.

Counsel submitted a letter, dated December 1, 2000 from a bank branch indicating that the petitioner maintains a business checking account with an average balance of \$15,968.77. That letter also indicates that the petitioner has a line of credit for \$20,000, but does not indicate the balance of that credit line. Counsel also submitted the monthly statements of that checking account for April 2000 through October 2000.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on July 26, 2002, requested additional evidence pertinent to that ability. The Service Center stipulated that the evidence should be copies of annual reports, federal tax returns, or audited financial statements. In addition, the Service Center requested that the petitioner provide its California Form DE-6 Quarterly Wage Reports for the past eight quarters and a brief description of the job duties of each of its employees.

In response, counsel submitted a letter, dated August 12, 2002, in which he asserted that the petitioner's tax returns, checking account balances, and credit line show the ability to pay the proffered wage.

With his letter, counsel submitted copies of the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. The 2000 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$17,511 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$12,128 and current liabilities of \$5,309, which yields net current assets of \$6,819.

The 2001 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$15,528 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$24,070 and current liabilities of \$4,996, which yields net current assets of \$19,074.

Counsel submitted the petitioner's California Form DE-6 Quarterly Wage Reports for the third and fourth quarters of 2000, all four

quarters of 2001, and the first and second quarters of 2002. Those reports show that the petitioner did not employ the beneficiary during those quarters.

Counsel submitted the petitioner's checking account statements for November 2000 through August 2002. Counsel submitted an additional letter from the petitioner's bank, dated October 4, 2002, confirming the existence of the petitioner's checking account.

Finally, counsel submitted a photocopy of a letter, also dated October 4, 2002. That letter appears to be a photocopy of the previously described bank letter, except that some lines have been added to the body of the letter. The added lines state that the petitioner has a credit line with a limit of \$35,000 and "no oweing [sic] balance."

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 18, 2002, denied the petition. The director noted that during 2000 and 2001, the petitioner's taxable income before net operating loss deduction and special deductions and net current assets were both less than the proffered wage.

On appeal, counsel asserts that the director erred in disregarding the petitioner's line of credit and the amount of its bank balances during various months.

In a brief filed to supplement that appeal, counsel asserts that, because the petitioner is a subchapter C corporation, the income and assets of the petitioner's owner should be considered in determining the petitioner's ability to pay the proffered wage.

A corporation is a legal entity separate and distinct from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980). 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.

A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered

wage.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. 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). Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the preferred evidence of a petitioner's ability to pay a proffered wage.

The financial statements submitted in this case clearly indicate that they were produced pursuant to a compilation, rather than an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are insufficient to demonstrate the ability to pay the proffered wage.

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 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, 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*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date is July 31, 2000. The proffered wage is \$28,849.60 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, 212 days of that 366-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 154 days. The proffered wage multiplied by $154/366^{\text{th}}$ equals \$12,138.90, which is the amount the petitioner must show the ability to pay during 2000.

During 2000, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$17,511. The petitioner was able to pay the salient portion of the proffered wage out of its profits during that year. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner must demonstrate the ability to pay the entire proffered wage. During that year, the petitioner declared taxable income before net operating loss deduction and special deductions of \$15,528. That amount is insufficient to pay the proffered wage. The petitioner ended the year with net current assets of \$19,074. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated the ability to pay the proffered wage during 2001. Therefore, the petitioner has not demonstrated 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.