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**U.S. Citizenship  
and Immigration  
Services**

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File: WAC 02 111-51032 Office: CALIFORNIA SERVICE CENTER

Date: **MAY 12 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, 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 case will be remanded for further consideration.

The petitioner is a board and care facility for mentally disabled adults. 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 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 12, 1998. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which equals \$24,024 per year.

The petition states that the petitioner is [REDACTED] and has three employees. With the petition counsel submitted copies of the 1998, 1999, and 2000 Form 1040 joint income tax returns of the petitioner's co-owners, a husband and wife. The 1998 and 1999 returns show that they had three dependents during each of those years. The number of dependents the co-owners had during 2000 was not reported because the first page of the 2000 return was not initially provided.

A 1998 Schedule C shows that the petitioner declared a net profit of \$478 during that year. On that Schedule C, Profit or Loss from Business (Sole Proprietorship) the petitioner is referred to as [REDACTED]. Its address is given as [REDACTED] Covina, California. The Form 1040 shows that the co-owners declared an adjusted gross income of \$42,940 during that year, including all of the petitioner's net income.

Three other Schedules C were attached to that return showing income and expenses from three other guest homes owned by the same co-owners. One gives income and expense information for [REDACTED]

The 1999 Schedule C shows that the petitioner declared a net profit of \$3,455 during that year. The Form 1040 shows that the petitioner's co-owners declared an adjusted gross income of \$52,942 during that year, including all of the petitioner's net income. That return also includes three other Schedules C for the other guest homes.

The 2000 Schedule C shows that the petitioner declared a net profit of \$2,982 during that year. As was stated above, the first page of that return was not provided. As such, the adjusted gross income of the co-owners was not then reported to CIS. Again, that return includes three other Schedules C pertinent to the other guest homes.

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 April 8, 2002, requested additional evidence pertinent to that ability.

The Service Center requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center stipulated that the evidence should be either copies of annual reports, federal tax returns, or audited financial statements. The Service Center also specifically requested complete copies of the petitioner's 2000 and 2001 tax returns.

In response, the petitioner provided copies of the 2000 and 2001 Form 1040 joint tax returns of the petitioner's co-owners. The first page of the 2000 return, not previously provided, shows that the petitioner's co-owners had three dependents during that year and declared an adjusted gross income of \$77,237.

The 2001 Form 1040 does not include any Schedules C and shows no business income or loss at Line 12, indicating that the petitioner's co-owners owned no sole proprietorship companies during that year.

The petitioner also provided copies of the 2000 Form 1120S U.S. Income Tax Return for an S Corporation of CKY Transport and the 2001 Form 1120S U.S. Income Tax Return for an S Corporation of FNJC Corporation. A letter from one of the petitioner's co-owners, dated June 27, 2002, states that FNJC operates four board and care facilities including the petitioner. Counsel's cover letter, dated June 27, 2002, states that FNJC Corporation was previously known as CKY Transport.

The 2001 Form 1120S U.S. Income Tax Return for an S Corporation of FNJC Corporation shows that during that year the corporation declared ordinary income of \$37,195.

As evidence of the relationship between the petitioner and FNJC Corporation, counsel submitted a copy of a California Fictitious Business Name statement. That form establishes that FNJC Corporation, of [REDACTED] California, operates under the name Forestdale Guest Home II. It does not demonstrate any relationship between FNJC and the petitioner, Forestdale I of [REDACTED] Covina, California.

Counsel also provided a letter from a bank indicating that, on May 6, 2002, the co-owners opened a bank

account, which, on May 20, 2002, contained \$31,404.22.

A letter from another bank shows that FNJC opened an account during July of 2001 that, on May 26, 2002, contained \$10,284.04.

Because of the new issues raised by the evidence presented in response to the first request for evidence, the California Service Center, on July 19, 2002, issued a new request for evidence. The Service Center requested an explanation of the relationship between the petitioner, CKY Transport, and FNJC Corporation. The Service Center also requested evidence that one corporation or the other operates and maintains the petitioner. The Service Center requested a copy of the petitioner's articles of incorporation, copies of W-2 and W-3 forms showing wages paid to employees during 2001, and certified copies of the petitioner's 2000 and 2001 income tax returns.

The Service Center also noted that the petitioner's co-owners' income tax returns for any period during which the petitioner was incorporated are not directly relevant to the petitioner's ability to pay the proffered wage.

In response, counsel submitted a letter, dated October 7, 2002. In that letter, counsel stated that the petitioner had not submitted California Form DE-6 Quarterly Wage Reports during the previous four quarters, but did not explain why.

In an accompanying letter, dated September 24, 2002, one of the petitioner's co-owners states that she and her husband own four board and care facilities, including Forestdale I and Forestdale II. That letter further states that during 1998, 1999, and 2000, they were held as sole proprietorships and their income and expenses reported on Schedules C attached to the co-owner's joint tax returns. The co-owner stated that she and her husband established a subchapter S corporation a few years ago that remained inactive through 2000. The co-owner states that the facilities still belong to the original co-owners, who rent them to FNJC.

Counsel provided another letter, dated September 30, 2002, from one of the petitioner's co-owners stating that CKY Transport was incorporated on July 28, 2000 and changed its name to FNJC Corporation on May 15, 2001. The petitioner's co-owner further stated that FNJC owns four guest homes, including Forestdale I and Forestdale II. Counsel provided a copy of a Certificate of Status issued by the California Secretary of State confirming that CKY had incorporated on July 28, 2000. Counsel also provided a Certificate of Amendment to the articles of incorporation of CKY Transport changing the name of that corporation to FNJC Corporation. That amendment indicates that the name change was approved on April 16, 2001 and recorded on April 19, 2001.

In that letter, the petitioner's co-owner implied that the depreciation deductions of each of the guest homes should be viewed as a fund available to pay the proffered wage.

Finally, counsel provided a statement of property, including real property and stocks, held by the co-owners. One of the co-owners stated the value of each of the six real properties and the equity the co-owners ostensibly have in that property. The co-owner did not state how she arrived at the value of those properties or provide any corroboration of the accuracy of those statements of value.

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 5, 2002, denied the petition. The director stated that, although the adjusted gross income of the petitioner's co-owners during 1998 and 1999 exceeded the proffered wage, the amount of that adjusted gross income which would have remained after paying the proffered wage would have been insufficient to support the co-owners' family of five.

The director further stated that, although the petition states that the petitioner has three employees, the petitioner has not claimed any wages, salaries, or compensation of officers during 1998 – 2001. In addition, the director noted that the letter of October 7, 2002 states that the petitioner did not file a California Form DE-6 Quarterly Tax Return during the preceding four quarters. The director noted that this appeared to be inconsistent with the assertion on the petition that the petitioner has three employees.

On appeal, counsel asserted that the decision of denial was in error, without any concrete assignment of error.

In a brief filed to supplement that appeal, counsel makes the following assertions. Counsel asserts that total income should have been considered, rather than adjusted gross income. Counsel asserts that the petitioner's depreciation deductions should have been included in the calculation of the petitioner's ability to pay the proffered wage. Counsel asserts that the director erroneously speculated that the petitioner's owners could not support their family on the amount of their adjusted gross income that would have remained after paying the proffered wage. Counsel asserts that the income and assets of the petitioner's co-owners should have been considered in determining the ability of the petitioner to pay the proffered wage, and implies that this is so even during those years when it was a corporation. Counsel again lists the properties, including real properties, allegedly owned by the petitioner's co-owners, along with their ostensible values. Again, counsel provides no evidence in support of those value estimates. Counsel asserts that, consistent with the decision in *Masonry Masters, Inc. v. Thornburgh*, 875 F2d 898 (C.A.D.C. 1989), the director should have considered the ability of the beneficiary to generate income for the petitioner. This office will address counsel's arguments *seriatim*.

The difference between total income and adjusted gross income is the total of lines 23 through 31a, which total is shown at line 32. The amounts shown on those lines are not considered amounts available to the taxpayer for disposition. The adjusted gross income is considered to be the taxpayer's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080, 1084 (S.D.N.Y. 1985), the court held that CIS, then the Immigration and Naturalization Service had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns. Further, considering a petitioner's adjusted gross income as an index of its ability to pay the proffered wage rather than considering its total income is a longstanding policy of this office.

Counsel's argument pertinent to depreciation is unconvincing. 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, 537 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986).

The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel asserts that the director's finding that the petitioner's co-owners would have been unable to support themselves on the income remaining after paying the proffered wage was speculative. This office agrees. The record contains no evidence of the expenses of the petitioner's owners.

Counsel argues that the income and assets of the petitioner's co-owners should have been considered in the determination of the petitioner's ability to pay the proffered wage. As to years during which the petitioner was a sole proprietorship, counsel is correct. Counsel is incorrect, however, as to years during which the petitioner was a corporation.

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). 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.

Counsel submits a list of assets allegedly owned by the petitioner's owners. Counsel alleges a value for each of those properties but, as was noted above, provides no evidence in support of those ostensible values. 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). Absent credible evidence in support of those asserted values, they cannot be considered.

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 and the petitioner's owners' bank statements somehow reflect additional available funds that were not reflected on their tax returns. Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are preferred evidence of a petitioner's ability to pay a proffered wage.

Counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F2d 898 (C.A.D.C. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered. Initially, this office notes that the AAO is not bound to follow the published decision of a United States district court, even in cases arising within that court's district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

A portion of that decision urges that the ability of the beneficiary in that case to generate income for the petitioner should be considered. That portion is clearly dictum, however, as the decision was based on other grounds. Further, it appears in the context of a criticism of the failure of CIS, then the Immigration and Naturalization Service, to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage.

Finally, while that decision urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary would generate income and to guess at the amount. The petitioner has submitted no evidence that the petitioner would generate additional income, and absent such evidence CIS will make no such assumption. *See Matter of Treasure Craft of California, supra.*

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 to assess a petitioner's ability to pay a proffered wage. *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 at 532; *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).

The priority date is January 12, 1998. The proffered wage is \$24,024 per year. During 1998, the petitioner was a sole proprietorship. The petitioner's co-owners' tax return shows that they declared an adjusted gross income of \$42,940 during that year, including all of the petitioner's net income. If the petitioner's owners had paid the proffered wage out of their adjusted gross income, they would have been left with \$18,916. Because the record contains no evidence of the petitioner's owners' expenses, this office cannot determine whether or not the petitioner's owners would have been able to support their family of five on that amount.

During 1999, the petitioner was a sole proprietorship. The petitioner's owners declared an adjusted gross income of \$52,942 during that year, including all of the petitioner's net income. If the petitioner's owners had paid the proffered wage out of their adjusted gross income, they would have been left with \$28,918. Again, absent evidence pertinent to the petitioner's owners' expenses, this office is unable to determine whether they could have supported their family on that amount.

During 2000, the petitioner was a sole proprietorship. The petitioner's owners declared an adjusted gross income of \$77,237 during that year, including all of the petitioner's net income. The director appeared to concede that the petitioner's owners were able to pay the proffered wage during that year, and this office will leave that finding undisturbed.

The petitioner's owners state that, beginning in 2001; FNJC corporation operated the petitioner. The 2001 Form 1120S U.S. Income Tax Return for an S Corporation of FNJC Corporation shows that during that year the corporation declared ordinary income of \$37,195. That corporation was able to pay the proffered wage during 2001.

As presently constituted, the record does not support the decision of the director that the petitioner was unable to pay the proffered wage during 1998 and 1999. In order to support that finding the director must solicit evidence pertinent to the petitioner's owners' budget during those years.

This office notes that another issue may exist in this case. FNJC now operates Forestdale Guest Home, the petitioner in this case. The petitioner's owners, themselves, do not employ anyone, and do not propose, personally, to employ the beneficiary. FNJC Corporation proposes to employ the beneficiary at Forestdale Guest Home. In order to rely on this petition, FNJC Corporation must show that it is the petitioner's successor-in-interest. To qualify as a successor-in-interest, the substituted petitioner must show that it assumed all of the rights, duties, obligations, and assets of the original employer. *Matter of*

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*Dial Repair Shop 19 I&N Dec. 481 (Comm. 1981).* Evidence in the record appears to indicate that FNJC does not own Forestdale Guest Home.

**ORDER:** The petition is remanded for further consideration and action in accordance with the foregoing.