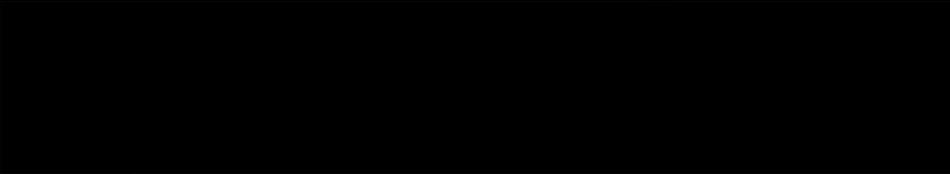




U.S. Citizenship
and Immigration
Services

04



FILE: EAC 02 209 50206 Office: VERMONT SERVICE CENTER Date: OCT 07 2004

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

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 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

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 an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied 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, counsel asserts that the director erred in interpreting the effect of the September 11th tragedy on the petitioning business.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since 1998.

On Part 5 of the petition, the petitioner states that it was established in 1990, has a gross annual income of 1.1 million dollars, a net annual income of \$529,322, and currently employs ten workers. In support of its ability to pay the proffered annual salary of \$49,291.20, the petitioner submitted an incomplete copy of its Form 1120, U.S. Corporation Income Tax Return for 2001.

On November 7, 2002, the director requested additional evidence from the petitioner in support of its ability to pay the beneficiary's proposed wage offer. The director advised the petitioner that it should submit a complete copy of its 2001 federal income tax return, or alternatively, annual reports for 2001 accompanied by audited or reviewed financial statements. The director specifically requested that the petitioner provide a Wage and Tax Statement (W-2) showing how much was paid to the beneficiary if the petitioner employed him in 2001. The director also instructed the petitioner to identify the present holder of the certified position and submit evidence of the salary paid to him or her, as well as copies of its federal quarterly federal tax return for the relevant period.

In response, the petitioner replied directly on the director's notice requesting additional evidence, by stating that the alien had been employed in the certified position since 1998, but had not been issued a W-2 because he didn't have a social security number. The petitioner also submitted a complete copy of its 2001 corporate tax return. It shows that the petitioner reported gross receipts or sales of \$1,134,524, officer's compensation of \$62,600, \$133,850 in salaries and wages, and taxable income of -\$1,556 before the net operating loss (NOL) deduction. Schedule L of the tax return reflects that the petitioner had \$21,739 in current assets and \$15,904 in current liabilities, resulting in \$5,835 in net current assets. As a measure of a petitioner's liquidity, besides net income, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets as an alternative resource out of which a proffered wage may be paid. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets and current liabilities are shown on Schedule L of its corporate tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

In addition, the petitioner submitted copies of its quarterly federal tax returns for 2001 and the first two quarters of 2002. These returns show that the petitioner reported cumulative wages paid of between \$40,000 and \$50,000 each quarter during that period. The petitioner provided a copy of a newspaper article discussing an aid program designed to compensate businesses for losses incurred as a result of the September 11th World Trade Center attacks.² Finally, the petitioner provided copies of photographs of its business, copies of menus, and copies of 2001 income tax and quarterly federal tax returns filed by "365 E. 62 St. Bakery Corp." These tax returns show that the principal shareholder is the same as the petitioner's, but they bear a different address and tax identification number than the petitioner's.

Accompanying these documents is a letter dated, December 18, 2002, from Jeffrey Perlman of the accounting firm of Dlugash & Perlman. Mr. Perlman asserts that the September 11th attacks and subsequent decrease in tourism impacted the petitioner's business for the remainder of 2001. He states that the petitioner was closed for three days from September 11th to September 13, 2001, and that the prorated income from these three days, based on the petitioner's gross receipts of 2001, would represent \$9,324.85. Mr. Perlman claims that these factors should be considered and that, at the very least, the \$9,324.85 should be added to the petitioner's annual income,

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

² The article states that for eligible businesses farthest away from the World Trade Center site, the maximum reimbursement would be limited to three days' losses, while up to 25 days of reimbursement would be available to businesses located within a defined area nearer to ground zero.

erasing any loss. [REDACTED] further suggests that the \$62,600, paid as officer's compensation, would have been available to pay the proffered wage. He finally states that the physical location of the petitioner and [REDACTED] are the same and that the [REDACTED] uses the same staff to operate a take-out business. Reciting the same factors of losses from September 11th that affected the petitioner's business, Mr. [REDACTED] concludes by claiming that the financial status of both firms should be considered in reviewing the petitioner's ability to pay the proffered salary.

On May 21, 2003, the director denied the petition, determining that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date. The director reviewed the petitioner's net income and net current assets as presented on its 2001 tax return and found that they both were less than the offered salary. The director found that although the petitioner had stated that it had employed the beneficiary since 1998, the record contained no evidence demonstrating any wages paid to the beneficiary. The director declined to consider officer's compensation already expended as readily available funds to pay the proffered wage and declined to consider the tax returns of the [REDACTED] Corp., as it represents a separate legal entity. The director acknowledged that the September 11th tragedy affected the petitioner's business, but noted that the Schedule L balance sheet included in the petitioner's 2001 tax return, also showed that the petitioner's 2000 net current assets were only \$12,868.

On appeal, counsel submits no additional evidence, but asserts that the director did not acknowledge Mr. Perlman's analysis of the impact of September 11th on the petitioner's business. Counsel reiterates the claim that the petitioner's losses for three days as well as all the other circumstances related to the closure, should be factored into the review of the petitioner's ability to pay the proffered wage. In view of the petitioner's level of gross receipts, salaries and wages, and officer's compensation paid in 2001, counsel argues that the petitioner's financial ability to pay the proffered salary of \$39,291.20 has been established.

The AAO disagrees. First, although the director did not specifically acknowledge the accountant's letter by name and date, it is obvious that his denial was written in response [REDACTED] statements. The director addressed every issue presented by the letter, as it was the only explicit articulation of the petitioner's position contained in the underlying record.

Second, it is noted that CIS will not consider the financial documentation of 365 E. 62 St Bakery Corp. merely because it operates in the same location and uses the same staff. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the proposed wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). The fact that it may be using the same staff raises an issue as to whether the petitioner itself if the prospective U.S employer making a bona fide job offer for a full-time position.

Third, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If a petitioner may have employed an alien beneficiary at a salary less than the proffered wage,

appropriate credit will be given. In the instant case, as noted by the director, no evidence from the petitioner was submitted corroborating the employment and payment of wages to the alien beneficiary during any of the relevant period.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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). Showing that a petitioner's gross receipts or gross income exceeded the proffered wage or exceeded a certain level is not sufficient. Gross income will not be considered without also reviewing the expenses incurred in order to produce that income. Similarly, showing that the petitioner paid wages to other employees or officer's compensation in excess of the proffered wage is insufficient, as it represents money already expended and not available to pay the proffered wage. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

As discussed above, neither the petitioner's 2001 net income of -\$1,556, nor its net current assets of \$5,835, could cover the proffered wage of \$39,291.20. [REDACTED] calculation of three days of revenue, totaling \$9,324.85, was based on a prorated version of the petitioner's gross receipts in 2001. Thus, it purports to represent three days of gross receipts, an amount less than 1% of the total. To add it directly to the petitioner's net annual income would not include a consideration of three days of "cost of goods,"³ or other reported expenses that might be affected. Even if added directly to the petitioner's net income, it would bring the total to \$7,768.85, an amount still well short of the proffered wage. Although the effect of the September 11th tragedy on the petitioner's business has been hypothesized, no specific evidence has been presented to establish that the petitioner's overall financial profile in 2001 was a radical departure from other years. As noted by the director, the petitioner's modest net current assets of \$12,868 for the year 2000, which was drawn from the figures listed at the beginning of the tax year shown on the petitioner's 2001 Schedule L, was also far less than the proffered wage.

Upon review of the evidence and argument contained in the record and offered on appeal, the AAO concludes that the evidence failed to persuasively demonstrate that the petitioner has had the continued ability to pay the proffered wage during 2001. 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.

³ "Cost of goods," as shown on line 2 of the 2001 tax return, was \$605,311. Prorated to a three-day total, it amounts to \$4,975.14. The difference between this amount and \$9,324.85 given as the three-day loss of revenue is \$4,349.71.