



U.S. Citizenship
and Immigration
Services

B/c

[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: OCT 21 2004

IN RE:

Petitioner:

[Redacted]

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:

[Redacted]

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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

identifying data deleted to
prevent unwarranted
invasion of personal privacy

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DISCUSSION: The Acting Director, Vermont Service Center, denied the preference visa petition that 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 chef/cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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 submits a brief and additional evidence.

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 granting 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, 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 December 9, 2002. The proffered wage as stated on the Form ETA 750 is \$13.01 per hour, which equals \$27,060.80 per year.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to be working for the petitioner but did not state the date upon which he commenced employment for the petitioner. On the petition, the petitioner stated that it was established on 1987 and that it employs 60 workers. In support of the petition, counsel submitted unaudited financial statements for 2001 and 2002.

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 December 11, 2003, requested evidence pertinent to that ability. The Service Center noted that unaudited financial statements are the unsupported representations of management and not credible evidence of the petitioner's ability to pay the proffered wage. Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner requested that the evidence submitted include annual reports, federal tax returns, or audited financial statements for each salient year. The Service Center also specifically requested that, if the petitioner had ever employed the beneficiary, it provide copies

of Form W-2 Wage and Tax Statements showing the amounts it paid to the beneficiary. The Service Center also requested that tax returns submitted be complete with all schedules and attachments.

In response, counsel submitted a letter, dated March 4, 2004. In that letter, counsel stated that the petitioner has the ability to pay the proffered wage, stressing its gross receipts, number of employees, total wage expense, and wages paid to the beneficiary. Counsel stated that Team Management Group, LLC, owns the petitioning restaurant.

Counsel provided a 2002 W-2 form showing that Team Management Group paid the beneficiary \$19,524.35 during that year. Counsel also provided five pay stubs showing wages the petitioner, Bainbridge's Restaurant, paid to the beneficiary during 2002. The earliest stub is for the pay period that ended January 20, 2002. That stub shows that the petitioner was then paying the beneficiary \$12.50 per hour. The remaining four stubs, the earliest of which is for the period that ended August 18, 2002, show that the petitioner then paid the beneficiary \$13 per hour. The most recent stub is for the pay period that ended November 10, 2002. That stub a year-to-date total of wages paid during that calendar year was \$16,419.92.

Finally, counsel provided the Form 1065 U.S. Return of Partnership Income of Team Management Group, LLC (TMG). That return shows that TMG declared a loss of \$164,300 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year TMG's current liabilities exceeded its current assets.

The Acting 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 April 9, 2004, denied the petition.

On appeal, counsel again stresses the petitioner's gross revenues as an index of its ability to pay the proffered wage. Counsel also argues that the petitioner's cash-on-hand at the beginning and end of the year were also indices of the petitioner's ability to pay the proffered wage. Counsel urges, yet further, that the petitioner's depreciation deduction should be considered in the determination of the petitioner's ability to pay the proffered wage. In addition, counsel notes that the petitioner's owners took a cash distribution during 2002, and states that they might have used that amount to pay wages, if necessary. Finally, counsel notes that a loss declared on tax returns is not necessarily an index of a company's financial strength.

Counsel submits copies of financial statements for the 2001 calendar year. Counsel also submits a letter, dated May 7, 2004, from the managing member of Team Management Group, LLC. The managing member states that Team Management Group, LLC owns Bainbridge's, LLC. That letter further states that the petitioner is able to pay the proffered wage, stressing the petitioner's gross receipts and number of employees and that the petitioner has met its payroll and tax obligations.

Counsel is apparently implying that Bainbridge's, LLC, owns and operates, or is the actual legal name of, Bainbridge's Restaurant, the petitioner in this matter. Otherwise, counsel's statement would have no apparent relevance to this case. The record is not clear on the relationship between Bainbridge's Restaurant and Team Management Group, LLC. The above referenced letter does contain the statement that "Team Management LLC owns Bainbridge's Restaurant, LLC," suggesting that there are two distinct entities, one owned by the other. The record also contains a letter from Counsel dated March 3, 2004, wherein the counsel states that

Bainbridge's Restaurant is owned by Team Management Group, LLC. However, the initial petition contains no reference to Team Management Group, and lists the petitioner as "Bainbridge's Restaurant." Finally, the employer identification numbers for Team Management Group and Bainbridge's Restaurant are the same.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

In this case, the petitioner has not clearly indicated by statement and competent objective evidence the relationship between Team Management LLC and Bainbridge's Restaurant.

Nevertheless, even if it is assumed that Team Management Group, LLC owns Bainbridge's, LLC, it does not follow that Team Management Group LLC is responsible for the debts and obligations of that limited liability company, notwithstanding that it has clearly paid some of Bainbridge's costs in the past.¹ A limited liability company 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 limited liability company are not the debts and obligations of the owners, whether those owners are individuals, corporations, or other limited liability corporations.² As the owners are not obliged to pay those debts, the income and assets of the owners, and their ability, if they wished, to pay the limited liability company'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 tax returns of TMG, and the W-2 forms showing amounts paid by TMG, are not indices of the ability of the petitioner, Bainbridge's Restaurant, to pay the proffered wage

The proffered wage is \$27,060.80 per year. The priority date is December 9, 2002.

The petitioner, Bainbridge's Restaurant, did not submit its own annual reports, federal tax returns, or audited financial statements for 2002. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 2002 and has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Nevertheless, even if it is assumed that Team Management Group, LLC and Bainbridge's Restaurant are the same entity, and therefore Team Management, LLC qualifies as the petitioner, the petitioner still has not demonstrated the ability to pay the proffered wage for 2002 has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reliance on the petitioner's gross revenues, wage expense, and even cash-on-hand is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that

¹ The petitioner's W-2 form, for instance, was issued by TMG.

² Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net, or ordinary, income.

The petitioner's cash-on-hand will be considered with its other current assets, which are addressed below.

Counsel correctly notes that 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. However, 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 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). 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 argues that losses on a tax return are not an index of a company's inability to pay a proffered wage, that is, that the petitioner's tax returns do not show the true financial condition of the corporation. That assertion, however, neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by 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. In the instant case, as the only W-2 form submitted in this case was paid by an entity other than the petitioner, the petitioner did not establish that it employed and paid the beneficiary.

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, the AAO will, in addition, 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*, 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 Immigration and Naturalization Service, 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$27,060.80 per year. The priority date is December 9, 2002.

On the year 2002 Form 1065, U.S. Return of Partnership Income, submitted for Team Management LLC, Team Management's ordinary income is listed as minus \$164,300. On schedule L of Form 1065, Team Management Group's current liabilities exceed the current assets by \$303,507.

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.