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APR 13 2005

FILE: EAC-02-217-50911 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



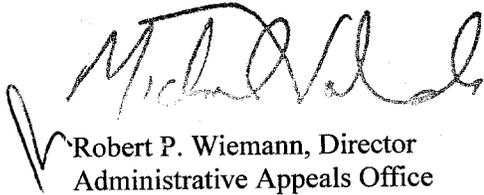
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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

**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 Chinese 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, 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 submits a brief and previously submitted 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 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 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 September 11, 1997. The proffered wage as stated on the Form ETA 750 is \$11.49 per hour, which amounts to \$23,899.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1988, to have a gross annual income of \$1,287,056, and to currently employ 17 workers. In support of the petition, the petitioner submitted its Forms 1120 Corporate tax returns for 1997.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 3, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's corporate tax returns for 1998, 1999, 2000, and 2001; any evidence of wages paid to the beneficiary; and questions about whether or not the proffered position is new.

In response, the petitioner indicated that the proffered position is new and the beneficiary would not be replacing any current employee. The petitioner submitted its Form 1120 Corporate tax returns for the years 1997, 1998, 1999, and 2000.

The tax returns reflect the following information for the following years:

	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>
Net income <sup>1</sup>	-\$142,822	-\$87,807	\$110,945	-\$25,858
Current Assets	\$23,171	-\$39,923	\$64,457	\$40,039
Current Liabilities	\$140,135	\$161,300	\$49,160	\$40,830
Net current assets	-\$116,964	-\$121,377	\$15,297	-\$791

Counsel's accompanying letter asserted that the petitioner's income tax returns establish its continuing ability to pay the proffered wage especially since it has paid total salaries ranging from \$112,645 to \$211,694 over the years. Additionally, counsel explained that the petitioner's 2001 tax return had not been filed yet since the petitioner's fiscal tax year runs from August 31 to September 1 of each year.

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 July 16, 2003, denied the petition, citing the petitioner's negative net incomes and negative net current assets.

On appeal, counsel analyzes the petitioner's tax returns for each relevant year and asserts that the director erred by failing to consider and add back amortization and depreciation and other non-cash expenses to the petitioner's net income. Additionally, counsel noted the petitioner's gross revenues and total amount paid in wages as evidence of the petitioner's continuing ability to pay the proffered wage, and asserts that liability and shareholder's equity subtracted from its liabilities leaves enough capital equity to cover the proffered wage. Counsel references service center liaison teleconference minutes for his assertions. Additionally, counsel states the following:

Please, note than [sic] the restaurant business has a tendency to have employee turn over creating a need for the [petitioner] to constantly be in a position to hire qualified individuals for a replacement position. As in other cases this case the [petitioner] has substantial funds to pay the proffered salary of the beneficiary's replacement position.

The petitioner submits resubmits copies of previously submitted tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1997, 1998, 1999, or 2000.

Contrary to counsel's assertions, 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

<sup>1</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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 the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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. Thus, counsel's appellate assertions are without merit.

Additionally, 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. Thus, contrary to counsel's assertions, the petitioner's shareholder's equity cannot be subtracted from its liabilities to bolster its assertion that it has the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner shows sufficient net income in 1999 to establish its ability to pay the proffered wage in that year since its net income was greater than the proffered wage. In all other years, the petitioner reports a loss, and thus cannot use its net income to establish its continuing ability to pay the proffered wage beginning on the priority date in any other year.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, counsel's argument that the petitioner's total assets, such as shareholder equity, should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

are shown on lines 16 through 18. 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 1997, 1998, and 2000, the petitioner had negative net current assets. Thus, the petitioner cannot use its net current assets in 1997, 1998, or 2000 to establish its continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1997, 1998, 1999, or 2002. In every year but 1999, the petitioner shows negative net incomes and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1997, 1998, or 2000.

On appeal, counsel advised that the beneficiary would replace workers, contrary to assertions made by the petitioner previously in the record of proceeding<sup>3</sup>. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). If the assertions of counsel are accepted as representative of the petitioner's assertions, then this argument still fails since the record does not name these workers, state their wages, verify their full-time employment, or provide evidence of a high turn-over rate. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, no evidence was provided concerning a specific position that involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. 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).

Despite establishing its ability to pay the proffered wage in 1999, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, or 2000. 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.

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<sup>3</sup> *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."