

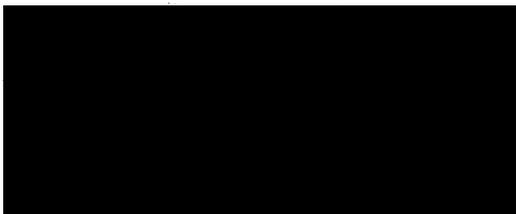
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U.S. Department of Homeland Security  
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U.S. Citizenship  
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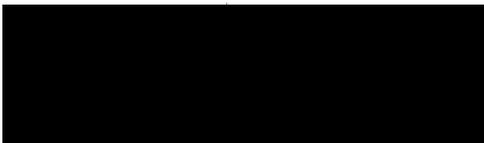
FILE: WAC 02 049 50998 Office: CALIFORNIA SERVICE CENTER Date:

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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a board and care facility. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a cook. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a brief. Counsel states that the evidence previously submitted was sufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date and that the petition, on the strength of that evidence, should have been approved.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

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 or seasonal nature, for which qualified workers are unavailable in the United States.

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 either 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. Here, the Form ETA 750 was accepted on January 5, 1998. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which equals \$24,024 per year.

On the petition, the petitioner stated that it was established during 1995 and that it employs two workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Fountain Valley, California.

With the petition counsel submitted the 2000 joint Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse. That return indicates that the petitioner was a sole proprietorship and that the petitioner's owner and owner's spouse had three dependents during that year. According to the attached Schedule C, Profit or Loss from Business, the petitioner earned a profit of \$4,319 during that year. The petitioner's owner and owner's spouse declared adjusted gross income of \$48,176, including all of the petitioner's profit.

In a cover letter submitted with the petition, counsel stated that he had requested that the petitioner's owner obtain profit and loss statements showing the petitioner's earnings during 2000 and the first half of 2001. Counsel noted that he had asked that the salary the petitioner paid to its owner not be included as an operating expense on those profit and loss statements, as he considered that would yield a more correct representation of the petitioner's profits. Counsel submitted those two profit and loss statements. They are not audited.

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 February 26, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested copies of the petitioner's four most recent California Form DE-6 Quarterly Wage Reports showing wages paid to all of its employees and copies of the petitioner's 2001 W-2 Wage and Tax Statements and W-3 transmittals.

In response, counsel submitted its California Form DE-6 Quarterly Wage Reports for the last quarter of 1999; the first, second, and fourth quarters of 2000; and the second, third, and fourth quarters of 2001.<sup>1</sup> This office notes that the petitioner may not have provided all of its four most recent quarterly wage reports as the Request for Evidence specifically requested. The quarterly reports submitted show that the petitioner's owner was its sole employee during each of those quarters and earned \$2,400, \$2,400, \$2,400, \$2,400, \$2,000, \$2,000, and \$2,000 during those quarters, respectively.

Counsel also submitted 2000 and 2001 W-2 Forms showing that the petitioner paid the petitioner's owner total wages of \$9,600 and \$6,000 during those years, respectively. This office notes that the total wages paid to the petitioner's owner during 2001 equal the total subject wages it paid to him during the second, third, and

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<sup>1</sup> All of those DE-6 quarterly reports, including the report for the last quarter of 2001, show that the petitioner had only one employee, who was the petitioner's owner. This casts some doubt on the assertion, made on the Form I-140 petition, which was submitted on November 21, 2001, that the petitioner then employed two workers.

fourth quarters of 2001. The petitioner did not provide its 2001 W-3 transmittal, although the Request for Evidence explicitly requested it.

Counsel provided a real property assessment dated July 11, 2001 showing the assessed value of a property at the petitioner's mailing address. The record owners as stated on that assessment are [REDACTED] *et alia*. Whether that property is the petitioner's business property, the petitioner's owner's personal residence, or both is unknown to this office.

Counsel provided a letter from a customer service manager at a bank branch stating the current balances and three-month average balances of a checking account and a business checking account belonging to the petitioner's owner.

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 June 12, 2002, denied the petition.

On appeal, counsel asserted that the petitioner's owner and owner's spouse have sufficient personal assets to pay the proffered wage if necessary. In support of that assertion counsel stated that the petitioner has a credit line, but did not state the amount of that credit line or provide any evidence in support of its existence.

Counsel also provided copies of the bank statements of [REDACTED]. Counsel cited those bank statements as additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, although he noted that they do not extend back to the priority date. The account holders are not the petitioner's owner and owner's spouse listed on the tax return in this case. Counsel stated that the account holders are the parents of the petitioner's owner and provided a letter from the account holders stating that "The funds in [that bank account] are used to supplement the [petitioner's expenses.]"

Further, counsel stated that the petitioner's owner and owner's spouse own a property in Tustin, California. Counsel provided a market analysis produced by a real estate agent as evidence of the value of that property. That market analysis estimates the market value of that property to be \$420,000 to \$425,000. Counsel stated that the mortgage on that property was \$197,920.82 on June 13, 2002. As support for that assertion counsel provided a mortgage loan statement from an institutional lender.

Further still, counsel stated that the petitioner's owner has a stock portfolio worth over \$58,000. In support of that assertion counsel provided a statement of the petitioner's owner's investment account showing that the total closing balance of all five funds comprising that account was \$19,775.72 on March 31, 2002. This office notes that the evidence does not support counsel's assertion.

Counsel again asserted that the petitioner's owner's tax return does not accurately reflect the profitability of the petitioning business. Counsel noted that the petitioner's owner paid himself a salary for work done for the

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<sup>2</sup> The petitioner's owner is identified on the tax return submitted as [REDACTED] and the owner's spouse uses the name [REDACTED]. Notwithstanding the minor discrepancy this office believes the owner's spouse to be the part owner named on the assessment notice. How many other part owners exist, identified on the assessment only as *et alia*, is unknown to this office, though the notice indicates that at least one other part owner exists.

petitioner, and implied that the amount of that salary should correctly be counted as part of the petitioner's profit. Counsel further asserted that the amount of the petitioner's depreciation deduction should be included in the determination of the petitioner's ability to pay the proffered wage.

Counsel referred to the unaudited profit and loss statement for the first half of 2001 as additional support for the petitioner's ability to pay the proffered wage. Counsel stated, "Unfortunately, we cannot provide a copy of the Owner's personal tax return for 2001 at this time but conservatively, it can easily be deduced that the net income for the rest of the 2001 [sic] was well above the proffered wage." The appeal was submitted to CIS on August 7, 2002. Counsel did not state why the petitioner's owner's 2001 tax return was not then available nor from what aspect of the evidence one might deduce that the petitioner's 2001 net income exceeded the proffered wage.

Counsel concluded that the petitioner has been continuously able since the priority date to pay the proffered wage out of its profits and the income and assets of its owners. The Director, AAO found that the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and dismissed the appeal on December 10, 2003.

With the motion, counsel submits no additional evidence but argues that the evidence previously submitted was sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In a letter submitted with the petition and in subsequent submissions counsel argued that the salary the petitioner paid to its owner should properly be counted as additional profit generated by the petitioner. Counsel's analysis is flawed. If the salary paid to the petitioner's owner was commensurate with the labor and services he provided, then that salary was a legitimate expense incurred in operating the petitioning business, whether it was paid to the petitioner's owner or to some third party, and is not properly part of its profit. Further, even if that salary could be correctly included with the petitioner's profit, that inclusion would make no difference in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, as the petitioner is a sole proprietorship.

If the petitioner were a corporation, then the income and assets of its owner would not be included in the calculation of the petitioner's ability to pay the proffered wage. This is because a corporation is a legal entity separate and distinct from its owners or stockholders. *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, the stockholders, or anyone else. As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others 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.

Because the petitioner is a sole proprietorship, its owner is obliged to satisfy its debts and obligations out of his own income and assets. Therefore the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses as well as pay the proffered wage. In addition, he must show that she could sustain himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). Because, in this calculation, the petitioner's profits and the income and assets of its owner are all included in the calculation of the funds available

to pay the proffered wage, whether or not the salary the petitioner paid to its owner is attributable to the petitioner as additional profit is, in this instance, of no practical effect.

The petitioner's owner's parents, however, are not obliged to pay the petitioner's debts and obligations out of their income and assets. Notwithstanding that the petitioner's owner's parents have stated that funds in their bank accounts "are used to supplement" the petitioner's expenses, the income and assets of the petitioner's owner's parent's will not be included in the determination of the petitioner's ability to pay the proffered wage.

Evidence of the funds in the petitioner's owner's own accounts, both bank accounts and investment accounts, although relevant, is not convincing evidence of the petitioner's ability to pay the proffered wage. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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.

Counsel stated that the petitioner's owner and owner's spouse have a credit line, but neither provided evidence of its existence nor even stated its amount. Obviously, the amount of that credit line will not be included in the calculations pertinent to the petitioner's ability to pay the proffered wage.

Even if the existence and amount of that credit line had been established, however, it would still not constitute evidence of the petitioner's ability to pay the proffered wage. 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 unaudited financial records submitted is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Whether the petitioner provided its four most recent California Form DE-6 reports is unclear. It provided no report for the first quarter of 2001. The quarterly reports for the last three quarters, however, show wages equal to the amount the petitioner indicated, on the 2001 W-2 form, that it paid to its owner during that entire year. If the petitioner paid no wages during the first quarter, and submitted no quarterly report, then by providing its quarterly reports for the last quarter of 2000 and the last three quarters of 2001 it complied with the request for its last four quarterly reports. In any event, the evidence submitted appears to indicate that, during 2001, the petitioner paid a total of \$6,000 in wages, all of it to its owner, and that it paid no wages to any other employee. Nothing on those W-2 forms and quarterly reports supports the petitioner's ability to absorb the added expense of another employee.

Counsel provided a tax assessment of the property at the petitioner's business address, intending to rely on the value of that property to demonstrate the petitioner's ability to pay the proffered wage. Even if a property tax assessment were a valid index of market value, the evidence would be insufficient to show the petitioner's owner's equity in that property. First, the assessment notice does not identify all of the owners by name. The assessment notice indicates that the property is owned by Sororro Sabino and others. Although that notice appears, therefore, to identify the petitioner's owner's spouse as a part owner of the property, the number and identity of the other part owners, and whether they are willing to sell or encumber their interest in the property as necessary to pay the proffered wage in this case, is unknown. Further, the record contains no evidence of the amount of the encumbrances, if any, on that property. Counsel has not demonstrated that the petitioner's owner and the owner's spouse have any equity in that property.

Similarly, counsel provided evidence pertinent to a property in Tustin, California. That evidence included a mortgage statement and a market analysis performed by a real estate agent. A market analysis is not a real estate appraisal. It is not performed by a disinterested expert in return for a fee. It is a complimentary service offered by sales agents in anticipation of being permitted to list the property under analysis, either immediately or at some future time. That anticipated prospective interest precludes an impartial analysis. The evidence of the value of the Tustin, California property is unconvincing.

Further although counsel submitted a mortgage statement showing the amount by which one mortgage encumbers that property, he submitted no evidence that the property is otherwise unencumbered. Even if counsel had established the value of the Tustin property, he would not have demonstrated the value of the petitioner's owner's equity in that property.

Finally, counsel is incorrect that the petitioner's depreciation deduction should be included in the calculation of the funds available to pay the proffered wage. Counsel is correct 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. The value lost as equipment and buildings deteriorate, however, 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.

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, 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).

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 CIS should have considered income before expenses were paid rather than net income.

The priority date is January 5, 1998. The proffered wage is \$24,024 per year.

Counsel submitted no evidence deemed acceptable by the regulation at 8 C.F.R. § 204.5(g)(2) to show its ability to pay the proffered wage during 1998. The petitioner has not demonstrated its ability to pay the proffered wage during 1998.

Counsel submitted no evidence deemed acceptable by the regulation at 8 C.F.R. § 204.5(g)(2) to show its ability to pay the proffered wage during 1999. The petitioner has not demonstrated its ability to pay the proffered wage during 1999.

During 2000, the petitioner's owner and owner's spouse declared adjusted gross income of \$48,176, including all of the petitioner's profit. If the petitioner's owner had been obliged to pay the proffered wage out of that amount, he would have been left with \$24,152 with which to support his family of five during that year. The Service Center did not request any evidence pertinent to the petitioner's owner's family's budget and none was provided. Although \$24,152 is a small amount upon which to support a family of five for a year, this office is not prepared to say that the petitioner's owner could not have accomplished that feat, especially with the added amount in his investment account.<sup>3</sup> The petitioner has sufficiently demonstrated the ability to pay the proffered wage during 2000.

Although the petitioner's 2001 tax return should have been available when the appeal in this case was submitted counsel did not submit that return, nor any other evidence acceptable under 8 C.F.R. § 204.5(g)(2) as evidence of its ability to pay the proffered wage during that year. Counsels stated that the return was not then available but did not provide any evidence in support of that assertion nor even state why it was unavailable. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

<sup>3</sup> Although the statement of the petitioner's owner's investment account did not support counsel's statement that the petitioner's owner holds over \$58,000 in securities, it did demonstrate that the petitioner's owner, on the date of that statement, held securities in the amount of \$19,775.72. Although insufficient to pay the proffered wage in itself, that amount could have been used to make up any possible shortfall during 2001.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 1998, 1999, and 2001. Therefore, the objection of the AAO has not been overcome on the motion.

An additional issue appears in this case which was not discussed in the decision of denial. The Service Center requested, on February 26, 2002, that the petitioner provide its 2001 W-3 transmittals. That document was never provided. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied for this additional reason.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

**ORDER:** The motion is granted. The AAO's decision of December 10, 2003 is affirmed. The petition is denied.