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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

APR 13 2005

FILE: SRC 03 067 51104 Office: TEXAS 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: SELF-REPRESENTED

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 Director, Texas 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 market/restaurant. It seeks to employ the beneficiary permanently in the United States as a chef/manager. 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, the petitioner submits a statement 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$19.18 per hour, which equals \$39,894.40 per year.

On the petition, the petitioner stated that it was established on November 12, 1996 and that it employs eight 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 Miami, Florida.

In support of the petition, the petitioner submitted its 1999 and 2000 Form 1120 U.S. Corporation Income Tax Returns and its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. Those returns show that the petitioner reports taxes based on the calendar year.

The 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,196 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$8,186 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 return shows that the petitioner declared ordinary income of \$8,658 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

As was noted above, however, the priority date is April 27, 2001. Because the priority date is during 2001 the petitioner's finances during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on July 2, 2003, requested additional evidence of that ability.

In response, the petitioner submitted a letter, dated September 2, 2003. That letter states,

When we filed the ETA-750 in April 27, 2001 (Alien Labor Certification) we knew that the process was going to take approximately two years to be completed and that by the years 2002/2003 we were going to have the financial capability to hire the services of a Peruvian Chef for our food store converting into Peruvian Specialty foods RESTAURANT. We are estimating that by 2004 our business will continue to grow and that when [the beneficiary] is ready so start working for us he would (sic) be a very important factor to make more money. We need a Peruvian Chef.

At this time, we have the financial ability to pay [the beneficiary] the wages of \$39,984.00 and we are respectfully submitting the U.S. Income Tax Return for an S Corporation for the year 2002.

With that letter the petitioner submitted its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared ordinary income of \$41,664 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

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 November 28, 2003, denied the petition.

On appeal, the petitioner submits a statement dated December 26, 2003. The petitioner states that if the petitioner's 2001 income had been insufficient to pay the proffered wage the petitioner could have drawn on the personal resources of its owner. The petitioner further stated that it was not concerned with the ability to pay the proffered wage during 2001, as it knew that it would not be obliged to pay it during that year, as the

process of petitioning for the beneficiary would take some years. The petitioner adds that it expects that employing the beneficiary will increase its sales and generate more income. The petitioner observes that its 2002 income was sufficient to pay the proffered wage. The petitioner states that its sales and income have increased during 2003, as has the income of its owner, who is working for another company.

With the appeal the petitioner provided pay stubs showing amounts paid to the petitioner's owner by the other company for which she works. The petitioner provided letters from two Florida banks stating that the petitioner's owner maintains accounts with them. The petitioner also provided monthly statements pertinent to one of those accounts. The petitioner provided a copy of a commercial space lease and other documentation that apparently pertains to another restaurant owned by the petitioner's owner. The petitioner provides no evidence in support of its assertion that its sales and income have increased during 2003.

The petitioner may not rely on its owner's income and assets in demonstrating its ability to pay the proffered wage. The petitioner is a corporation. 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.<sup>1</sup> 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. The petitioner must show the ability to pay the proffered wage out of its own funds.

The petitioner's reliance on the bank statements in this case is misplaced. 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, the bank accounts submitted appear to be the personal funds of the petitioner's owner, and, as was observed above, are not, therefore, relevant to the petitioner's ability to pay the proffered wage. Finally, even if those accounts were shown to reflect funds of the petitioning corporation, no evidence was submitted to demonstrate that the funds reported on those bank statements somehow reflect additional available funds that were not reflected on its tax returns.

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

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<sup>1</sup> 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.

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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income 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 petitioner urges that, in addition, the ability of the beneficiary to generate additional income should be considered in calculating the petitioner's ability to pay the proffered wage. The petitioner alleges that hiring the beneficiary would result in increased sales and income. However, the petitioner submits no evidence in support of that assertion, and absent such evidence the Service will make no such assumption.

The proffered wage is \$39,894.40 per year. The priority date is April 27, 2001.

The 2001 return shows that the petitioner declared ordinary income of \$8,658 during that year. That amount is insufficient to pay the proffered wage. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner was unable to pay any portion of the proffered wage from its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$41,664. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner's assertion that it knew it would not be obliged to pay the proffered wage until after the petition was approved, and that approval would likely require at least a few years, is inapposite. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate the continuing ability to pay the proffered wage

beginning on the priority date. Because the priority date is April 27, 2001 the petitioner is obliged to show the ability to pay the proffered wage during 2001 and during each ensuing year.

The petitioner failed to submit evidence sufficient to demonstrate that it had the 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.