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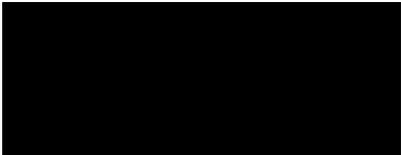
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APR 27 2008

FILE: SRC 02 196 50267 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:



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, 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 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.

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 June 15, 2001. The proffered wage as stated on the Form ETA 750 is \$2,000 per month, which equals \$24,000 per year.

On the petition, the petitioner did not state the date upon which it was established in the space provided for that purpose. The petitioner stated that it employs one worker. The petition stated that the petitioner's gross annual income is \$213,840 but did not state the petitioner's net annual income in the space provided.

On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The Form ETA 750 indicates that the petitioner, [REDACTED], Incorporated, will employ the beneficiary in Plano, Texas. Although the Form I-140 asserts that the petitioner will employ the beneficiary at [REDACTED] Dallas Texas, this office notes that address is counsel's office, and attributes that assertion to faulty completion of the petition.

In support of the petition, counsel submitted a copy of the 2001 Form 1120S, U.S. Income Tax Return for an S Corporation.¹ That return shows that the petitioner reports taxes based on the calendar year, and that it reported ordinary income of \$1,715 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$23,232 and current liabilities of \$1,937, which yields net current assets of \$21,295.

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 December 11, 2002, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center noted that the evidence must establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested a copy of the 2001 Form W-2 Wage and Tax Statement for each worker the petitioner employed during that year and a copy of the petitioner's Form 941 Quarterly Tax Returns for each quarter of 2002.

In response, counsel submitted a letter, dated April 2, 2003, in which he stated that the petitioner has changed its name from [REDACTED] Incorporated to [REDACTED] Incorporated on January 4, 2003. Counsel noted that the address of the petitioner's principal office is unchanged. Counsel submitted no evidence pertinent to the transfer that occasioned that name change and no evidence that the substituted petitioner assumed all of the rights, duties, obligations, and assets of the original petitioner.²

With that letter, counsel submitted the petitioner's 2001 W-2 forms and W-3 transmittal. The transmittal states that the petitioner paid \$37,600 in wages to its employees during that year. The W-2 forms confirm that the petitioner paid that total amount to its five employees during that year.

Counsel also submitted the Form 941 Quarterly Tax Returns of [REDACTED] Incorporated doing business as [REDACTED] Restaurant for each quarter of 2002. Those returns show that the petitioner paid wages of \$7,800, \$7,800, \$7,800, and \$3,900 to its employees during those quarters, respectively, for a total of \$27,300 in wages to all of its employees during that year.

On May 2, 2003 the Texas Service Center issued a Request for Additional Evidence in this matter. The Service Center requested that the petitioner submit evidence to show how the petitioner's name change took place. The Service Center also requested that, if the name change was precipitated by a change in ownership, the petitioner submit evidence to show that the successor-at-interest petitioner assumed all of the rights, duties, obligations, and assets of the original petitioner and that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. The Service Center also specifically requested that the petitioner provide a copy of its 2002 income tax return and its bank statements from June 2001 through April 2003.

In response the petitioner provided a copy of a Bill of Sale and Agreement between [REDACTED] Incorporated and [REDACTED] Incorporated, the substituted petitioner in this case. That agreement was executed

¹ The name of the taxpayer as stated on that tax return is [REDACTED] Incorporated.

² In fact, subsequent evidence, which will be examined at length below, shows that the substitution of [REDACTED] Incorporated, for [REDACTED] Incorporated, did not involve a simple name change as counsel initially represented.

on January 9, 2002 and indicates that the substituted petitioner, [REDACTED] Incorporated, purchased the petitioning restaurant and assumed all of the rights, duties, obligations, and assets of the original petitioner in that business. The original petitioner's president signed that agreement as the president of [REDACTED] Incorporated, rather than as president of [REDACTED] Incorporated. In a cover letter, dated July 17, 2003, counsel stated that the original petitioner in this matter was [REDACTED] Incorporated, dba [REDACTED] Restaurant.

Counsel also submitted the 2002 Form 1120S, U.S. Income Tax Return for an S Corporation of the substituted petitioner. That return indicates that the substituted petitioner also reports taxes based on the calendar year and declared ordinary income of \$2,036 during that year. The corresponding Schedule L shows that at the end of that year the substituted petitioner's current liabilities exceeded its current assets.

Finally counsel submitted the requested bank statements.

On July 30, 2003 the Texas Service Center issued a Notice of Intent to Deny in this matter. The Service Center noted that the agreement transferring the original petitioner's interest in the petitioning restaurant to the substituted petitioner purports to be an agreement between [REDACTED] Incorporated and [REDACTED] Incorporated, but was signed, not by an official of [REDACTED] Incorporated, but by an official of [REDACTED] Incorporated. The Service Center requested that the petitioner clarify the relationship between those two apparently separate corporations. The Service Center also requested evidence that the substituted petitioner in this matter had the ability to pay the proffered wage as of the priority date, June 15, 2001.³

In response, counsel submitted a letter, dated October 6, 2003, from the officer who signed the agreement transferring the original petitioner's interest in the restaurant. That letter states that [REDACTED] Restaurant is the only the dba name [REDACTED] Incorporated, but has never, itself, been incorporated as a separate entity. That letter further states that the officer who signed that agreement is the director of [REDACTED] Incorporated, and was mistakenly represented to be the president of [REDACTED] Incorporated, which does not exist.

With the response counsel also submitted an Agreement for Management Services, dated January 31, 2002, between [REDACTED] Incorporated⁴ as owner of the petitioning restaurant and [REDACTED] Incorporated as a contractor. The substance of that agreement is that [REDACTED] Incorporated, not [REDACTED] Incorporated, agreed to retain [REDACTED] to manage the petitioning restaurant. Nothing in that agreement indicates how [REDACTED] came to cede ownership of that restaurant, having only purchased it on January 9, 2003. That agreement does not state whether, in the transfer of that restaurant from [REDACTED] Incorporated or to [REDACTED] Incorporated, the grantee assumed all of [REDACTED]

³ The request that the substituted petitioner provide evidence of its ability to pay the proffered wage beginning on the priority date demonstrates a misunderstanding of the requirements of 8 C.F.R. § 204.5(g)(2) as interpreted in *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). Pursuant to that decision the substituted petitioner is obliged to demonstrate the ability to pay the proffered wage beginning on the date it acquired its interest in the petitioning business, not on the priority date.

⁴ The corporation which owns the restaurant is again called [REDACTED] Incorporated, rather than [REDACTED] Incorporated, notwithstanding that the letter of October 6, 2003 asserts that no such corporate entity exists.

Incorporated's rights, duties, obligations, and assets. The agreement indicates that [REDACTED] hires and pays restaurant employees, including cooks, pursuant to the management agreement.⁵

In a cover letter, dated October 10, 2003, counsel stated that at the time the Form I-140 petition was filed,⁶ [REDACTED] Incorporated was the management company for the petitioning restaurant,⁷ but that it was not in existence on June 15, 2001, the priority date. Counsel states that, therefore, the petitioner's burden is to demonstrate that the original petitioner had the ability to pay the proffered wage from the priority date until December 2001, and the substituted petitioner, [REDACTED] Incorporated, had that ability from January 2002⁸ to the present.

As to 2001, counsel states that [REDACTED] Incorporated's depreciable assets of \$43,694 demonstrate its ability to pay the proffered wage. Counsel does not explain how [REDACTED] Incorporated would have been able to pay wages out of its depreciable assets.

As to 2002, counsel states that [REDACTED] gross profit of \$103,141 and its depreciable assets of \$34,272 demonstrate its ability to pay the proffered wage. Again, counsel does not identify any specific relationship between those statistics and a petitioner's ability to pay additional wages.

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 10, 2003, denied the petition.

On appeal, counsel cites the Compensation of officers, Depreciation deduction, Gross sales, Net Profits, Retained earnings, and bank balances of the original petitioner and the substituted petitioner as evidence of their ability to pay the proffered wage at all relevant times. Counsel does not suggest any specific calculation pursuant to which those various figures might show the petitioner's ability to pay the proffered wage.

Counsel also cites a non-precedent decision; the facts of which he asserts are similar to the facts of the instant case, for the proposition that the instant petition should be approved. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

A depreciation deduction does not represent 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

⁵ The agreement states that "[REDACTED], Incorporated] shall require its employees to wear uniforms as designated by Owner."

⁶ The petition was filed on June 10, 2002.

⁷ This office notes that the petitioner, at the time it filed the petition, mentioned no such arrangement.

⁸ Although counsel stated that [REDACTED] must show the ability to pay the proffered wage from January 2001 until the present, context dictates that he must necessarily have meant from January 2002, as he also asserted that [REDACTED] acquired management of the restaurant during January 2002 and did not exist prior to January 2002.

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 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.

Retained earnings are the sum over time of the net income of a company. This year's retained earnings are last year's retained earnings plus this year's net income. Stated another way, they are the difference between assets and liabilities over time. However they are viewed, they are not an accumulation of available funds, as the name might imply, and adding them to income and assets is duplicative, at least in part. The petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's ability to pay the proffered wage, because they do not represent funds, in addition to income and assets, available for disposition.

Counsel urges that the petitioner's Line 7, Compensation of Officers need not have been paid to its officers, but could have been retained by the petitioner to pay the proffered wage. Counsel provides no evidence, however, to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, as necessary to pay the proffered wage. The compensation that the petitioner paid to its officers has not, therefore, been shown to be available to pay wages.

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 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 the depreciable 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 \$24,000 per year. The priority date is June 15, 2001.

During 2001 the petitioner⁹ reported ordinary income of \$1,715. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$21,295. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it with which it could have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner¹⁰ reported ordinary income of \$2,036. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it with which it could have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during either of the salient years, 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Additional issues exist in this case that were not cited in the decision of denial. The petitioner named on the Form I-140 petition, Parker Chopstix, Incorporated, did not operate a restaurant on June 10, 2002, the date the petition was filed, and could not have been seeking to hire a cook. The petition should also have been denied for that reason.

Further, assuming that the January 9, 2002 Bill of Sale is evidence of a real transaction, then JM Thai, Incorporated owned the petitioning restaurant beginning on that date. Assuming that the January 31, 2002 Agreement for Management Services is evidence of a real transaction, then ownership of the restaurant had

⁹ In this paragraph, "the petitioner" refers to [REDACTED], Incorporated, the original petitioner.

¹⁰ In this paragraph, "the petitioner" refers to [REDACTED] Incorporated, the substituted petitioner.

been transferred either to [REDACTED], Incorporated or to [REDACTED], Incorporated during the 22-day interim.

The Bill of Sale, if believed, demonstrates that [REDACTED] Incorporated, assumed all of the original petitioner's rights, duties, obligations, and assets. No evidence in the file indicates that [REDACTED] successor did the same. Further, even if [REDACTED] successor did assume all of [REDACTED] rights, duties, obligations, and assets, the subsequent hiring of [REDACTED] does not again qualify it as the successor-at-interest of its own successor-at-interest because [REDACTED] would not, by contracting to operate the restaurant, acquire all of the rights, duties, obligations, and assets of the restaurant's then owner.

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.