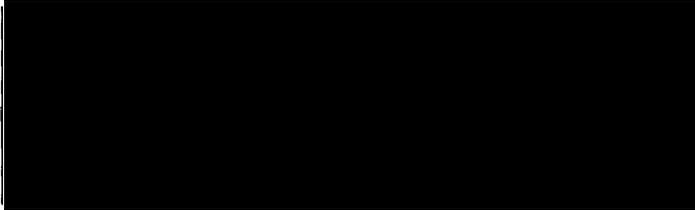


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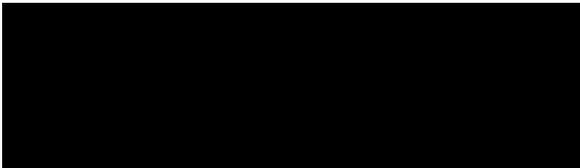
Petitioner:

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, 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 catering service. 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 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 25, 2001. The proffered wage as stated on the Form ETA 750 is \$56,284.80 per year.

On the petition, the petitioner stated that it was established on January 8, 1998 and that it employs 60 workers. The petition states that the petitioner's gross annual income is \$1,608,647 and that its net annual income is \$62,786. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June 1997. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Cinnaminson, New Jersey.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared a loss of \$72,168 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

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 September 6, 2002, issued a

Request For Evidence in this matter. The Service Center requested that the petitioner submit additional evidence of its continuing ability to pay the proffered wage beginning on the priority date. Noting that the Form ETA 750 stated that the petitioner had employed the beneficiary during 2001, the Service Center also requested copies of W-2 forms showing the wages the petitioner paid to the beneficiary.

In response, counsel submitted an additional copy of the petitioner's 2001 Form 1120S Federal Income Tax Return for an S Corporation. Counsel did not submit the requested W-2 forms and did not submit any additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In a cover letter dated March 20, 2002, counsel stated that the petitioner was established during 1998 and that its tax return and company profile<sup>1</sup> show its ability to pay the proffered wage.

On November 13, 2002 the Service Center issued another Request for Evidence in this matter, again requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also, again, specifically requested the 2001 Form W-2 Wage and Tax Statements showing the amount of the wages the petitioner paid to the beneficiary.

In response, counsel submitted a 2001 W-2 form showing wages paid by another company, MPG Incorporated, to the beneficiary. Counsel also submitted a letter, dated December 16, 2002, from the petitioner's owner, stating that he and his immediate family own six restaurants, diners, and caterers, which he manages, including the petitioning caterer and [REDACTED] Incorporated, [REDACTED]. The petitioner's owner states that although the beneficiary worked for both the petitioner and [REDACTED] Incorporated dba New [REDACTED], and that his W-2 form was issued solely by [REDACTED] Incorporated.

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 May 2, 2003, denied the petition.

On appeal, counsel argues that the petitioner's depreciation deduction should be included in the determination of the petitioner's ability to pay the proffered wage. Counsel states that the amount of the petitioner's existing wage expense is also indicative of its ability to pay additional wages. Counsel states that the petitioner's owner is willing and able to contribute more capital to the petitioner as necessary to support its expenses. Finally, counsel states that the petitioner will replace a named existing employee.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. 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. But 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

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<sup>1</sup> What counsel meant by the "company profile" is unclear.

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's assertion that the petitioner's owner could contribute capital to the petitioner as necessary to pay the proffered wage is inapposite. 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, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner shall not be further considered. Likewise, the ability of the other restaurants ostensibly owned by the petitioner's owner and members of his family to pay the proffered wage and the wages they actually paid to the beneficiary are not relevant to the petitioner's own ability to pay the proffered wage.

On appeal, the petitioner's owner states that the beneficiary will replace another worker, apparently an authorized U.S. worker, and that the other worker's wages should, therefore, be considered funds available to pay the proffered wage.<sup>2</sup> The fundamental purpose of the visa category pursuant to which the petition in this case was filed is to provide foreign workers for positions that U.S. employers are unable to fill with U.S. workers. The position is currently filled. If the petitioner is seeking to replace the incumbent with the beneficiary out of preference, rather than necessity, that is inconsistent with the purpose of the instant visa category.

That the petitioner intends to discharge a current employee in favor of the beneficiary calls into question the legitimacy of the petitioner's claim that it is unable to find U.S. workers to fill the proffered position. Because this consideration formed no part of the basis for the decision of denial, however, and the petitioner has not been accorded an opportunity to reconcile its claim of inability to fill with proffered position with a U.S. worker with its willingness to discharge a current worker and pay his wages to the beneficiary, that issue plays no part in today's decision. This office notes, however, that even if the petitioner had satisfied CIS on the issue of its ability to pay the proffered wage, the petition could not be approved until the petitioner had addressed this issue.

However, because the petitioner did not demonstrate that it must, of necessity rather than preference, discharge that other employee, that other employee's wages will not be included in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.<sup>3</sup>

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<sup>2</sup> Counsel asserts, but provides no evidence to demonstrate, that the worker whom the beneficiary would replace earns \$40,000 annually working for the petitioner.

<sup>3</sup> Even had the petitioner demonstrated that it is replacing a current worker with the beneficiary out of necessity, rather than out of preference, and demonstrated, rather than alleged, that the other worker earns \$40,000 annually, the \$40,000

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, although the petitioner claims to have employed the beneficiary since June 1997, the petitioner did not establish that it employed and paid the beneficiary at any time after the priority date.

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 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 \$56,284.80 per year. The priority date is April 25, 2001.

During 2001 the petitioner declared a loss of \$72,168. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its profits during that year. The petitioner ended the year with 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 evidence of any other

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annual salary of that other employee would be insufficient to show the ability to pay the \$56,284.80 wage proffered in this case.

funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

Counsel argues, however, that the amount of the petitioner's wage expense demonstrates its ability to pay the additional amount of the proffered wage. The petitioner's wage expense during 2001 was \$361,704.

Counsel's reasoning is unconvincing. The regulation at 8 C.F.R. § 204.5(g)(2) makes an exception to the necessity of a petitioner demonstrating, with copies of annual reports, federal tax returns, or audited financial statements, its ability to pay the proffered wage, if the petitioner is able to demonstrate that it employs 100 or more workers. No such exception is included in that regulation for companies with an annual payroll expense in excess of any particular amount and none will be construed. That the petitioner was able to pay its expenses during the salient years does not demonstrate the ability to pay any additional wages.

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.