



U.S. Citizenship
and Immigration
Services

IDENTIFICATION OF THE
INVESTIGATOR OF THE
INVESTIGATION OF THE



B6

APR 29 2005

FILE: WAC 03 030 52424 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: 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 preference visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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, the petitioner submits additional evidence and asserts that additional monies can be made available to pay the proffered wage.

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 November 21, 2001. The proffered wage as stated on the Form ETA 750 is \$2,400 per month, which amounts to \$28,800 per annum. On the Form ETA 750B, signed by the beneficiary on July 18, 2000, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, the petitioner claims to have been established in July 1997, have a gross annual income of \$162,000, a net annual income of \$11,000, and to currently employ six workers.

In support of its ability to pay the proffered wage of \$28,800 per year, the petitioner initially submitted a copy of its Form 1120, U. S. Corporation Income Tax Return for 2001. It shows that the petitioner declared a net taxable income of \$442 before the net operating loss (NOL) deduction. Schedule L of the tax return reflects that the petitioner had \$26,638 in current assets and \$4,933 in current liabilities, resulting in \$21,705 in net current assets. Besides net income, CIS will consider *net current assets* as an alternative method of examining a petitioner's continuing ability to pay the certified wage. Net current assets are the difference between the petitioner's current

assets and current liabilities.¹ A petitioner's year-end current assets and current liabilities may be found on line(s) 1(d) through 6(d) and line(s)16(d) through 18(d), respectively, of Schedule L of a corporate tax return. They represent a measure of a petitioner's liquidity during a given period and an alternate resource out of which to pay a proffered wage. If a petitioner's year-end 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.

On April 2, 2003, the director requested additional evidence pertinent to the petitioner's financial ability to pay the proposed wage offer beginning on the priority date and continuing until the present. The director advised the petitioner to provide either copies of annual reports, completed and signed federal tax returns, or audited financial statements. The director also instructed the petitioner to provide copies of the last four state quarterly wage reports that were accepted by the state of California, as well as proof that the petitioner is doing business as "Chinatown Chinese Restaurant."

In response, the petitioner resubmitted a copy of its 2001 corporate tax return and a copy of its 2002 corporate tax return, stamped "on extension" on page 1. An accompanying Internal Revenue Service (IRS) application for extension of time indicates that the petitioner had requested an extension until September 15, 2003 to file its 2002 tax return. The sample 2002 tax return reflects that the petitioner had -\$175 in net taxable income before the NOL deduction. Schedule L indicates that the petitioner had \$4,000 in current assets and \$14,372 in current liabilities, yielding -\$10,372 in net current assets.

The petitioner also supplied copies of its last four state quarterly wage reports showing that including the sole shareholder, it maintained a payroll of three workers during 2002. The reports do not reflect that the petitioner employed the beneficiary.

Besides providing various copies of documents indicating that it is doing business as the Chinatown Chinese Restaurant, the petitioner submitted a copy of its sole shareholder's individual income tax returns for 2001 and 2002, as well as copies of property tax bills, two grant deeds, a HUD closing statement, and a partial copy of a deed of trust, which has no legal description attached. Although only an itemization of some of these documents was offered with the petitioner's response, the financial information relating to the sole shareholder's three individual holdings of real property, as well as her personal tax returns was apparently submitted for consideration in support of the corporate petitioner's ability to pay the proffered wage.

Examining the petitioner's net income and net current assets as presented on the two corporate tax returns supplied to the record, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage date and denied the petition on March 31, 2004.

On appeal, the petitioner submits a letter from its account, [REDACTED] CPA" and copies of the sole shareholder's individual Wage and Tax Statements (W-2s) for 2001, 2002, and 2003, as well as copies of

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

previously submitted documentation relating to the sole shareholder's individual real estate holdings. [REDACTED] states that the sole shareholder's salary of \$36,000 in 2001 and \$47,000 in 2002, as reflected on the W-2s, was paid out of the petitioner's income in order to help accomplish the minimization of the corporate tax liability. A letter from the petitioner's sole shareholder is also submitted on appeal. She states that she has other investments and assets to sustain herself and that her salary was paid in order to accomplish the tax strategy as asserted by Mr. [REDACTED]. She characterizes the combined figures, reflected on Schedule L as common stock (line 22) and additional paid-in capital (line 23), as representing the petitioner's \$50,000 in net equity and supporting the petitioner's ability to pay the proffered salary. Finally, she maintains confidence that an additional cook will increase sales and her willingness to put more capital into the restaurant.

The petitioner's assertion that the sole shareholder's individual assets, either real or personal are an available source to be considered is not persuasive in this case. 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). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court stated, "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." This court also found that "[CIS] fully considered the assets section of Schedule L" and had no need to credit other amounts such as unappropriated retained earnings or common stock. Moreover, it is noted that the individual tax returns of the sole shareholder reflect that between 75% and 80% of her total adjusted gross income in 2001 and 2002 was derived from her salary paid by the petitioner.

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 may have 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 record does not indicate that the petitioner employed the beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will also examine the net income figure 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). 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.

In this case, as noted by the director, the corporate petitioner's tax return fails to demonstrate that either its reported net income of \$442 or its net current assets of \$21,705 was sufficient to pay the certified wage of \$28,800 in 2001. Similarly, the 2002 tax return reflects that neither the net income of -\$175, nor the net current assets of -\$10,372 was enough to cover the proffered salary.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning at the priority date. In this matter, the petitioner has failed to demonstrate that it has had the continuing financial ability to pay the certified wage beginning November 21, 2001. The sole shareholder's hypothesis that an additional cook will increase the petitioner's revenue does not overcome the petitioner's financial evidence contained in the record. 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). Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Based upon a review of the evidence contained in the underlying record and on appeal, the AAO concludes that the petitioner has failed to persuasively establish that it has had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, it is noted that the ETA 750B, signed by the beneficiary, only lists one job that he held from 1988 to the present. He classified himself as the "owner / operator" of a restaurant in China named the [REDACTED]. It is noted that while some of the documentation submitted in support of the required two years of experience appear to be issued by a Chinese state agency, neither of the English translations of two letters of verification from the [REDACTED] Fast Food Restaurant indicate the identity of the person signing the letter. In view of the beneficiary's self description of his relationship to this restaurant, further explanation or investigation might be warranted.

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.