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U.S. Citizenship  
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Services



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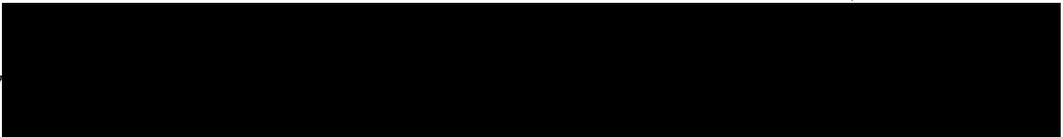


Office: NEBRASKA SERVICE CENTER

Date: AUG 12 2009

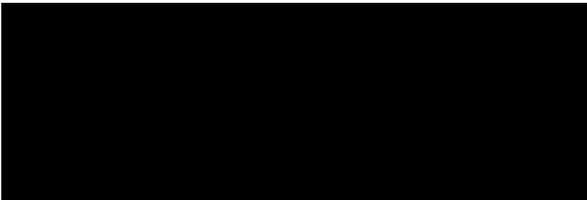
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IN RE: Petitioner:  
Beneficiary



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, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska 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 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 September 10, 1999. The proffered wage as stated on the Form ETA 750 is \$53,498 per year.

On the petition, the petitioner stated that it was established on June 22, 1998 and that it employs five workers. The petition states that the petitioner's gross annual income is \$190,000 and that its net annual income is "Profitable." 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 Indianapolis, Indiana.

In support of the petition, counsel submitted the petitioner's 2000 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation. Those returns show that the petitioner reports taxes pursuant to the calendar year and that the beneficiary owns 100% of the corporation.

The 2000 return shows that the petitioner declared a loss of \$4,462 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$20,000 and current liabilities of \$0, which yields net current assets of \$20,000.

The 2002 return shows that the petitioner reported ordinary income of \$4,958 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$26,687 and current liabilities of \$0, which yields net current assets of \$26,687.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on August 27, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center 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 specifically requested copies of the petitioner's most recent Form 941 Employer's Quarterly Federal Tax Return and bank statements for 12 months to include the priority date.

In response, counsel submitted (1) the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) 1999, 2000, 2001, 2002, and 2003 bank statements, (3) the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the third quarter of 2003, (4) the petitioner's state unemployment report for the third quarter of 2003, (5) the petitioner's payroll earnings report for the third quarter of 2003, and (6) the beneficiary's 1998, 1999, 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns.

The beneficiary's 1998 and 1999 tax returns and corresponding Schedules C show that the beneficiary owned the petitioner during those years, and operated it as a sole proprietorship.

During 1998 the petitioner suffered a loss of \$19,130. The beneficiary declared adjusted gross income of \$15,801 during that year, including the petitioner's loss.

During 1999 the petitioner returned a profit of \$16,566 to the beneficiary. The beneficiary declared adjusted gross income of \$18,566 during that year, including the petitioner's profit.

The petitioner's 2001 tax return shows that the petitioner declared ordinary income of \$3,614 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$21,378 and current liabilities of \$0, which yields net current assets of \$21,378.

The beneficiary's 2000, 2001, and 2002 returns include Form W-2 Wage and Tax Statements showing that the petitioner paid the beneficiary \$13,200, \$16,000 and \$18,000 during those years, respectively.

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 March 5, 2004, denied the petition.

On appeal, counsel asserts that the petitioner's tax return showed net current assets to sufficient to pay the proffered wage. Counsel incorrectly characterizes the amount shown at Line 40 of the petitioner's 1998 and 1998 Forms 4562, the amortizable amount of the petitioner's Goodwill, as the petitioner's net current assets. Counsel further provides a letter from the petitioner's accountant, dated April 6, 2004, stating that the petitioner continues to carry its Goodwill as an asset.

Counsel cites a non-precedent decision of this office and the minutes of a discussion between an official of the Vermont Service Center and an official of an immigration lawyer's organization. Both are cited as authority for the proposition that the petitioner's losses or low net profits during a given year are an insufficient basis for denial if the petitioner's year-end net current assets exceed the annual amount of the proffered wage.

Counsel cites other non-precedent decisions of this office, which he mischaracterizes as precedent, and the minutes of a discussion between an official of the Vermont Service Center and an official of the same lawyer's organization as authority for the proposition that a petitioner may demonstrate the ability to pay the proffered wage during a given year, in whole or in part, by showing that it actually paid wages to the beneficiary during that year.

Counsel's citation of non-precedent decisions is inapposite. 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.

Counsel citation of the Service Center liaison minutes as authority is also inapposite. This office is not bound by the Service Center liaison minutes. The discussion will, however, consider both the petitioner's net current assets and the wages it paid to the beneficiary during various years.

As was noted above, counsel characterized the petitioner's Goodwill as a net current asset. The discussion of net current assets, below, makes clear that it is not.

Notwithstanding that the Service Center requested them, bank account statements cannot ordinarily demonstrate the 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.<sup>1</sup> 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 reported 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 established that it employed and paid the beneficiary \$13,200 during 2000, \$16,000 during 2001, and \$18,000 during 2002.

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<sup>1</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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 total 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 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.

This adjudication is complicated by the fact that during 1998 and 1999 the petitioner was a sole proprietorship. Because the owner of a sole proprietorship is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, 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 and still paid proffered wage. In addition, he must show that he could still have sustained 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).

The instant case is further complicated by the fact that the beneficiary owns the petitioner, and has owned it at all pertinent times. The regulations, as applied to this case, would require the beneficiary to demonstrate that he was able to pay the proffered wage to himself and still retain sufficient funds to support his household. Clearly, a situation in which the beneficiary owns the petitioner was not contemplated in composing the regulations. The reasons this was not contemplated are discussed further below.

The proffered wage is \$53,498 per year. The priority date is September 10, 1999.

During 1998 the petitioner suffered a loss. The petitioner's owner declared adjusted gross income of \$15,801, including that loss. The petitioner cannot demonstrate that it was able to pay the proffered wage out of the petitioner's profit or the petitioner's owner's adjusted gross income. The petitioner has submitted no other evidence of any funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner returned a profit of \$16,566. The petitioner's owner declared adjusted gross income of \$18,566 during that year, including the petitioner's profit. Neither of those amounts is sufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during 1999 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

Since 2000 the petitioner has been held as 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). The owners or shareholders of a corporation are not obliged to pay the debts and obligations of the company out of their own income and assets. Therefore, the assets of its owners or 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 with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

The petitioner may show the ability to pay the proffered wage with its net income. On a Form 1120S, U.S. Income Tax Return for an S Corporation the figure that corresponds most closely to net income is ordinary 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.<sup>2</sup> 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.

Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly **an alternative** to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). The difference between the two, though not shown as such anywhere on the petitioner's tax return, equals

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<sup>2</sup> The petitioner's Goodwill, for instance, is an intangible asset that is not expected to be converted into cash within a year, is not, therefore, included in the petitioner's current assets, and does not, therefore, enter into the computation of the petitioner's net current assets.

the petitioner's net current assets.

During 2000 the petitioner paid the beneficiary wages of \$13,200. Having shown that it paid the beneficiary that amount, the petitioner is obliged to show that it was able to pay the \$40,298 balance of the proffered wage. During that year the petitioner declared a loss of \$4,462 as its ordinary income. The petitioner is unable to demonstrate the ability to pay the proffered wage any portion of the proffered wage out of its ordinary income. At the end of that year the petitioner had net current assets of \$20,000. That amount is insufficient to pay the balance of the proffered wage. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage during 2000. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner paid the beneficiary wages of \$16,000. Having paid the beneficiary that amount, the petitioner is obliged to demonstrate the ability to pay the \$37,498 balance of the proffered wage. The petitioner's 2001 tax return shows that the petitioner declared ordinary income of \$3,614 during that year. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had net current assets of \$21,378. That amount is insufficient to pay the balance of the proffered wage. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage during 2001. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary wages of \$18,000. Having paid the beneficiary that amount, the petitioner is obliged to demonstrate the ability to pay the \$35,498 balance of the proffered wage. The petitioner's 2002 tax return shows that the petitioner declared ordinary income of \$4,958 during that year. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had net current assets of \$26,687. That amount is insufficient to pay the balance of the proffered wage. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage during 2002. 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 1998, 1999, 2000, 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.

Issues are raised by the instant case that were not mentioned in the decision of denial. As was noted, the beneficiary owned the petitioner during 1998 and 1999 as a sole proprietorship, and during 2000, 2001, and 2002 as a corporation.

Pursuant to 20 C.F.R. §626.20(c) (8) and 656.3, the petitioner has the burden to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Where the beneficiary owns the petitioner, the job offer is not *bona fide*. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder, and chief cheese maker even where no other person qualified for the position applied).

In this case, the record clearly indicates that the beneficiary is hiring himself for the position. Even if the beneficiary signed the petition not as an individual but in his capacity as an officer of the petitioning corporation, the record indicates that no bona fide job offer exists that was available to U.S. workers. The director should have invalidated the labor certification and denied the petition should for this additional reason. This additional issue would have precluded approval of the petition even if the petitioner had demonstrated its continuing ability to pay the proffered wage.

Further, that the petitioning company was held as a sole-proprietorship and is now a corporation raises the issue of whether the corporation is the successor-at-interest of the sole proprietorship, within the meaning contemplated in *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981), notwithstanding that the same person who was the sole proprietor now owns the corporation. Pursuant to *Matter of Dial Auto Repair Shop* the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer.

Although the change in type of ownership in the instant case may have been accomplished by simple incorporation, the record contains no evidence to show that no debts or obligations were extinguished pursuant to the change in ownership. Because this additional basis was not cited in the decision of denial, however, and the petitioner has not been accorded the opportunity to address it, today's decision is not based, even in part, on that additional basis.

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.