



U.S. Citizenship
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Office: NEBRASKA SERVICE CENTER

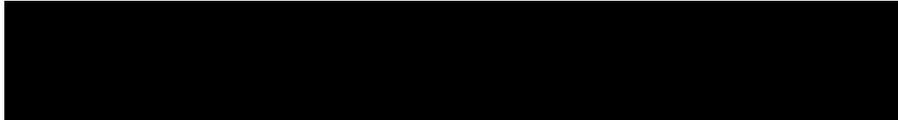
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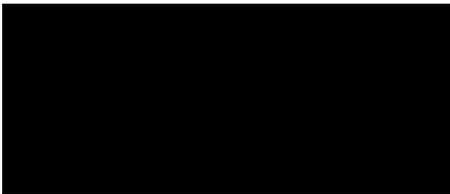
Petitioner:

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation that operates two restaurants. 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$2,050 per month, which equals \$24,600 per year.

On the petition, the petitioner stated that it was established during 1976 and that it employs 12 workers. The space provided for the petitioner to state its gross annual income was left blank, as was the space provided for its net annual income. 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 Seattle, Washington.

In support of the petition, counsel submitted the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports taxes pursuant to the calendar year.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$24,087 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 priority date of the instant

petition is April 30, 2001, however, evidence pertinent to the petitioner's finances during previous years is not direction relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2001 return shows that the petitioner declared a loss of \$2,005 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted a signed declaration, dated October 30, 2002, of the petitioner's owner stating that he has been working as the petitioner's cook for over 80 hours per week during the previous two years, but wishes to replace himself in that capacity by hiring two cooks.

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 28, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested a copy of the petitioner's 2002 tax return and legible copies of any Form W-2 Wage and Tax Statements issued to the beneficiary for work during 2001 or 2002. The Service Center also noted that the petitioner had "multiple petitions pending."

In response, counsel submitted a copy of the petitioner's 2002 tax return, copies of monthly statements pertinent to the petitioner's bank account, and a notarized statement, dated November 18, 2003, from the petitioner's owner. Counsel did not submit any W-2 forms.

In his statement the owner states that the beneficiary of the instant petition and the beneficiary of the other pending petition have replaced other cooks no longer employed in that capacity, including the owner himself and another named former cook. The owner stated that he is no longer able to work as a cook because he has opened another restaurant 35 miles away and it is in the midst of an expansion. The petitioner's owner states that he did not employ either the beneficiary of the instant petition or the beneficiary of the other pending petition during 2001 or 2002.

The petitioner's owner further stated that he owns the building which houses the petitioning restaurant, and although he is currently charging it \$4,000 per month, he could forego part or all of that amount as necessary to permit the petitioner to pay the proffered wage. The petitioner's owner also cites the petitioner's depreciation deductions and its bank statements as indices of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's 2002 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$0 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 March 22, 2004, denied the petition.

On appeal, counsel submits a letter, dated April 19, 2003, from the petitioner's accountant. The accountant notes that the petitioner's owners also own another restaurant and are negotiating to open a third. The accountant notes that the petitioner's depreciation deduction is not an actual cash expense and implies that it should be considered an additional amount available to pay wages. The accountant notes that the petitioner's owner also owns the building in which it is housed and states that the rent could be reduced as necessary to permit the petitioner to pay the proffered wage. Counsel concludes that the petitioner has the ability to pay the proffered wage.

In his own statement, counsel contends that the bank statements should have been accorded more weight, and that the evidence submitted shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's owner stated that the petitioner is replacing previous cooks, himself and another named individual, with the beneficiary of the instant petition and the beneficiary of the other pending petition. The petitioner's owner stated that the petitioner did not employ either of the beneficiaries during 2001 and 2002. Although the petitioner's owner did not explicitly so state, he appears to imply that he employed himself and the other named cook during 2001 and 2002 and their wages are now available to pay the proffered wage in this case and the other pending case.

The petitioner's owner, however, provided no evidence of the amount the petitioner paid to him and the other former cook during 2001 and 2002 or the hours they worked. This office is unable, therefore, to determine what hours the petitioner's owner and the other former cook worked and whether the wages the other former cook and the owner earned, in the capacity of cook, are sufficient to pay the proffered wages in these cases.¹ Merely going on record without proof is insufficient to sustain the burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Because the record contains no evidence of the wages paid to those previous cooks, this office will not include them in the determination of the funds available to the petitioner to pay the additional wages.

The argument by counsel and the accountant that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel and the accountant are 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 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

¹ The proffered wage in the other case, [REDACTED] LIN 03 209 51251 is \$2,050 per week or \$24,600 per year, the same as that in the instant case.

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.

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 Citizenship and Immigration Services (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). That the petitioner's owner also owns other restaurants under a separate corporation is irrelevant to the instant case.

The accountant and the petitioner's owner assert that the petitioner's owner could also forego rent as necessary to permit the petitioner to pay the proffered wage. That is correct. The petitioner's owner would be under no obligation to do so, however. The petitioner is obliged to demonstrate the ability to pay the proffered wage out of its own funds, without the addition of any rebate of rent that the petitioner's owner might or might not grant. Further, any such rebate or diminution of the petitioner's rent would be prospective, and would not show the ability to pay the proffered wage during past years. The income and assets of the petitioner's owner shall not be further considered.

Counsel'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.² 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. Notwithstanding that the Service Center appeared to request them, bank statements are not, in the instant case or in general, convincing indices of a petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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's owner stated that he did not employ the beneficiary of this petition or the beneficiary of the other petition during 2001 or 2002. Although the petitioner's owner appeared to imply that he has employed both beneficiaries during 2003 and 2004 he provided no documentary evidence to establish that fact. The record contains insufficient evidence of any wages paid to either beneficiary.

² 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 a given 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 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 priority date of the instant petition is April 30, 2001. The proffered wage in both the instant case and the other pending case is \$24,600 per year. The petitioner must show the ability to pay the proffered wage in both cases, a total of \$49,200 per year.

During 2001 the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate 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 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 taxable income before net operating loss deduction and special deductions of \$0. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate 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

during 2002 with which it could have paid the proffered wage. 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 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.

An additional issue exists in this case that was not mentioned in the decision of denial.³ Pursuant to 20 C.F.R. §626.20(c) (8) and 656.3, the petitioner has the burden when asked 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). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship.” *See Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000).

In the instant case, the beneficiary shares the family name of the petitioner’s owner, as does the beneficiary of the other pending petition. This creates the suspicion, at least, that the beneficiary and the petitioner’s owner might be related, which would, in turn, cast suspicion on the assertion that the petitioner is hiring the beneficiary because it was unable to locate suitable U.S. workers for the proffered position. Because this issue was not raised by the Service Center, however, and the petitioner has not been accorded an opportunity to respond, this office does not base today’s decision, in whole or in part, on that issue.

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.

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).