

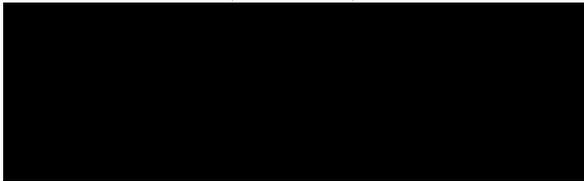
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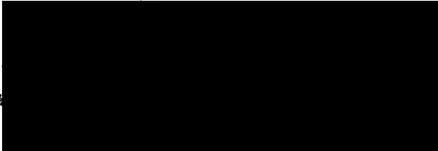


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **AUG 24 2005**
EAC 03 149 51924

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

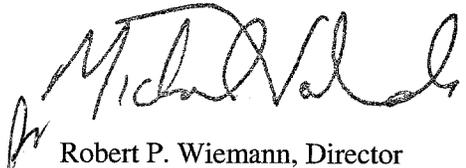
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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 17, 2001. The proffered wage as stated on the Form ETA 750 is \$27.21 per hour, which equals \$56,596.80 per year.

On the petition, the petitioner stated that it was established on February 24, 2000.¹ The petitioner did not state the number of workers it employs in the space on the petition provided for that purpose. The petition states that the petitioner's gross annual income is \$412,045 and that its net annual income is \$4,398. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in New York, New York.

¹ This petitioner states that it was established on February 24, 2000. The Form ETA 750 in this case was accepted for processing on April 17, 2000, less than two months later. That the petitioner filed for the alien worker so soon after it opened may suggest that, rather than hiring the beneficiary because of the asserted lack of qualified U.S. workers, the petitioner is hiring the beneficiary out of preference over available U.S. workers. As this issue was not raised in the decision of denial, however, this office will not base today's decision on that ground, even in part.

In support of the petition, the petitioner submitted copies of its 2000 and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation tax return. Those returns show that the petitioner reports taxes pursuant to the calendar year. Because the priority date is April 17, 2001, evidence pertinent to the petitioner's financial condition is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The relevance of the petitioner's 2000 tax return, however, is explained below.

The 2000 return shows that during that year the petitioner declared ordinary income of \$14,981. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$22,443 and current liabilities of \$5,383, which yields net current assets of \$17,060.

The 2001 return shows that during that year the petitioner declared ordinary income of \$4,398. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$20,038 and current liabilities of \$5,822, which yields net current assets of \$14,216.

The petitioner also submitted a payroll data summary prepared by its payroll service and covering the period from January 2002 through November 2002 and its NYS-45 New York Unemployment Insurance and Withholding forms for the third and fourth quarters of 2001 and all four quarters of 2002.

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 July 11, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center specifically requested the Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during 2001 and 2002 and a copy of the petitioner's 2002 tax return.

In response, the petitioner submitted a letter, dated September 29, 2003, in which an attorney who then represented the petitioner stated that the petitioner had employed the beneficiary but, rather than paying him and issuing W-2 or 1099 forms, the petitioner's owner had paid his room, board, and transportation expenses. In support of that assertion counsel provided letters from the petitioner's owner and the beneficiary, both dated September 29, 2003. Both letters assert that the beneficiary has worked for the petitioner without formal payment. The beneficiary's letter states that the arrangement commenced during October of 2000, whereas the petitioner's owner's letter appears to imply that the arrangement began upon establishment of the petitioning restaurant, which the petition states was on February 24, 2000. In any event, the petitioner provided no W-2 or 1099 forms showing wages paid to the beneficiary.

As evidence that the petitioner is able to pay the proffered wage, the attorney states that the petitioner's owner owns two other restaurants and two cooperative apartments and submits evidence of the ownership of those other restaurants and the cooperatives. Counsel submits a letter, dated September 23, 2003, from the petitioner's accountant stating the gross income and taxable income of the other two restaurants and the petitioner during 2000, 2001, and 2002.

Counsel also submits, as requested, a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation. That return shows that the petitioner declared a loss of \$879 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 \$23,418 and current liabilities of \$20,347, which yields net current assets of \$3,134.

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 January 6, 2004, denied the petition.

On appeal, the petitioner's current counsel notes that the petitioner was established during 2000, and that many businesses fail to produce a profit during their first years in operation. Counsel notes that the events of September 11, 2001 adversely affected the profitability of businesses in lower Manhattan, where the petitioning business is located, and that bias against Middle-Eastern businesses such as the petitioner was common for some time after those events. Counsel notes that he is submitting a copy of the petitioner's 2003 tax return.

The petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation shows that the petitioner declared ordinary income of \$64,792 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$51,116 and current liabilities of \$13,211, which yields net current assets of \$37,905.

Counsel submits a letter, dated February 4, 2004, from the petitioner's accountant. The accountant lists various indices of the improvement in the petitioner's business from 2002 to 2003 and during various quarters within those two years. The accountant also states that the petitioner's gross revenues have continued to rise during 2004. The account states that, based on those figures, he predicts that the petitioner's business will continue to improve and he believes that the petitioner is able to pay the proffered wage.

Counsel adds that the petitioner has recently been reviewed or otherwise written about in four widely read publications, that the petitioner's business has greatly improved, and asserts that the petitioner will now have no difficulty paying the proffered wage. Counsel provides copies of four reviews of the petitioning restaurant. Of those four reviews, two refer to the beneficiary by name. The reviews that refer to the beneficiary by name are 2003 and 2004 guides to New York restaurants.

The beneficiary stated, on the Form ETA 750, Part B, that he has worked for the petitioner since October of 2000. The reviews confirm that he worked for them during 2003 and 2004. That the beneficiary has worked for the petitioner for so long undermines the petitioner's argument that hiring the beneficiary will increase its business.

Counsel's citation of various assets of the petitioner's owner, including other restaurants he owns, 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 with 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.

Counsel asserts that various factors combined to cause the petitioner to have losses and low profits. Counsel states that the petitioner's profits were low during some of the salient years because (1) the petitioner was established during 2000, (2) the events of September 11, 2001 depressed the profits of various businesses in Lower Manhattan, and (3) that, in addition, the events of September 11, 2001 precipitated bias Middle Eastern businesses such as the petitioner.

This office concurs that office concurs that new businesses, especially new restaurants, often fail to post a profit. This fact does not favor the petitioner, or support the proposition that this office should ignore or discount the petitioner's losses and low profits during salient years.

The events of September 11, 2001 clearly had an adverse effect on businesses in Manhattan. The petitioner, however, must demonstrate that its losses and low profits were due to those events, and that otherwise it would have been substantially more profitable.

The facts of the instant case have some similarity, on the surface at least, to the facts of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business. Counsel claims that exigent circumstances in the instant case have damaged the petitioner's business. The petitioner in *Sonegawa* had been favorably featured in Time and Look magazines. The petitioner in the instant case has been favorably reviewed in popular magazines.

Sonegawa, however, relates to petitions filed during **uncharacteristically** unprofitable or difficult years but only within a framework of significantly more profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and had enjoyed great success. The petitioner was a fashion designer whose clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière, and the determination that the petitioner's prospects for a resumption of successful business operations were well established.

Counsel is correct that, if the petitioner's losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the petitioner is a relatively new business, and has only once posted a sizeable profit. The evidence is insufficient to demonstrate that absent the events of September 11, 2001 the petitioner would have been markedly more profitable during 2001 and 2002,² and assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

² If the petitioner had shown a large profit during 2000, that would have been evidence in favor of the proposition that the petitioner's low profit during 2001 and slight loss during 2002 were caused by the events of September 11, 2001. The petitioner's profit during 2000, however, was also less than the annual amount of the proffered wage, and does little to demonstrate that the petitioner would have prospered absent the events of September 11, 2001.

The petitioner may not rely on its owner's income and assets, including other restaurants,³ as indices of its ability 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 [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 income and assets of the petitioner's owner shall not be further considered.

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 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. 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.

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

³ If the petitioner had presented evidence that its owner has a history of starting restaurants, and that all of his previous restaurants have succeeded and been at least moderately profitable, that evidence could have been considered as a favorable factor in the analysis, pursuant to *Sonegawa, supra*, of whether a reasonable expectation exists that the petitioner will succeed. No evidence was submitted to show that the petitioner's owner founded his other two restaurants, though, and the petitioner submitted insufficient evidence to show that they are profitable.

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 \$56,596.80 per year. The priority date is April 17, 2001.

During 2001 the petitioner declared ordinary income of \$4,398. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$14,216. That amount is insufficient to pay the proffered wage. 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 a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had net current assets of \$3,134. That amount is insufficient to pay the proffered wage. 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.

During 2003 the petitioner declared ordinary income of \$64,792. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

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.

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.