

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



B6

FILE: EAC 03 101 51830 Office: VERMONT SERVICE CENTER

Date: **AUG 29 200**

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the 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 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 20, 2001. The proffered wage as stated on the Form ETA 750 is \$9.75 per hour (\$20,280.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, as well as other documents.

Because the Director determined 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 January 7, 2004, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$390 per week as of June 20, 2001, the date of filing and continuing to the present.

Submit the 2001 United States federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax returns. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.

* * *

If the beneficiary was employed by you in 2001, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business."

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1120 tax return for year 2001.

The tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$20,280.00 per year from the priority date.

- In 2001, the Form 1120 stated taxable income¹ of \$15,100.00.

The director denied the petition on April 20, 2004 finding that the evidence submitted did not establish that the petitioner had the 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, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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*, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the

¹ IRS Form 1120S, Line 21.

petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that the INS, now 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 v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to sufficient pay the proffered wage at any time in 2003 for which petitioner's tax return was offered for evidence.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

Examining the Form 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in that return indicates the following.

- In 2001, petitioner's Form 1120 return stated current assets of \$3,019.00 and <\$142,668.00> in current liabilities. Therefore, the petitioner had a <\$139,649.00> in net current assets for 2001. Since the proffered wage was \$20,280.00 per year, this sum is less than the proffered wage.

Therefore, for the year 2001 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there are another ways to determine the petitioner's ability to pay the proffered wage from the priority date through the inclusion of "Depreciation," "Cash," "Total Assets,"³ and, "Inventory." Counsel cites no legal precedent for the additive calculation, and, according to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. In his calculations, counsel is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result.

Petitioner's counsel advocates the addition of depreciation taken as a deduction in the tax return to eliminate the abovementioned deficiencies. Petitioner's counsel cited no legal precedent for his position. Since

² 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

³ Petitioner submitted a deed for the realty parcel where the restaurant is located showing ownership by the company.

⁴ 8 C.F.R. § 204.5(g)(2).

depreciation is a deduction in the calculation of taxable income on tax Form 1120, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that the court should revise these figures by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel also includes in the above additive calculation "Cash." Correlating the amounts stated in counsel's additive calculation with the petitioner's tax return for year 2001, it is clear that counsel is combining petitioner's taxable income with the cash also received by the business for that year as stated on Schedule "L" as current assets. CIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. The cash stated on Schedule L is included in the taxable income and that cash cannot be counted twice.

Additionally, petitioner's counsel submitted bank statements. The petitioner's bank statements demonstrate a closing balance of \$3,922.95 as of December 31, 2001. While this balance is admittedly small relative to the proffered wage, counsel's reliance on the balance in the petitioner's bank account is still misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statements show the amount in an account on a given date, and cannot show a sustainable ability to pay the proffered wage. No evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return.

"Total Assets," of the owner and business and, "Inventory" of the business are also offered to show the ability to pay the proffered wage. We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Similarly, inventory used by the business is purchased for consumption in the business to produce revenues reflected in taxable income, and, offset by the petitioner's liabilities. Inventory is included in the calculation of net current assets and cannot be counted twice.

Counsel offers the owner's (of petitioner) personal income as evidence of the ability to pay. Contrary to counsel's assertion, Citizenship and Immigration Services (CIS), formerly the Service or CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

Counsel asserts that since the priority date of the certified Alien Employment Application (ETA 750) is June 20, 2001, petitioner obligation to pay the proffered wage is reduced in that year based upon a proration of the remaining days in year 2001. Therefore, under this hypothesis, the proffered wage should also be prorated to reduce the petitioner's obligation for year 2001. However, if for the sake of argument, that is the case, it would also be necessary to prorate the taxable income for year 2001 further reducing petitioner's ability to pay the proffered wage. Ultimately, taxable income although important is just one of the indicators that CIS uses to determine the ability to pay. In the present instance, as is discussed below, all the various methods used by CIS demonstrated that petitioner was not on the priority date a viable business entity with the ability to pay the proffered wage on the priority date.

Counsel contends, without substantiation, that the events of "September 11, 2001 terrorist attacks" impacted the petitioner's restaurant business, and impacted its profitability. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel makes the assertion that the petitioner "...has been and continues to be in a comfortable/stable financial position" Counsel cites *Matter of Sonogawa* to assert that the petitioner is a viable business. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. 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. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

There are no parallels in the subject case to the precedent case *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioner has submitted one tax return that by any measure does not demonstrate the ability to pay the proffered wage. Petitioner taxable income is less than the proffered wage, its net current assets are negative, and, its cash on hand at year's end amounted to only \$3,019.00 in 2001. There is no evidence presented that profits have increased in years after 2001. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years, as is the case here. Counsel, has not established a case for application of *Matter of Sonogawa*.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

Petitioner indicates that a spouse of the owner who works in the business is in ill health and it would be advantageous to employ the beneficiary to assume some or all of her duties. In this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a cook will improve her situation, or what her contribution or wages are in the business. Based upon petitioner's documentation in the record, it is unclear whether or not the owner's spouse is presently employed or why beneficiary's employment is necessary to alleviate the situation.

Counsel's analysis cannot be concluded to outweigh the evidence presented in the corporate tax return as submitted by petitioner that by any test demonstrates that petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted by the petitioner shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.