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U.S. Citizenship
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Services



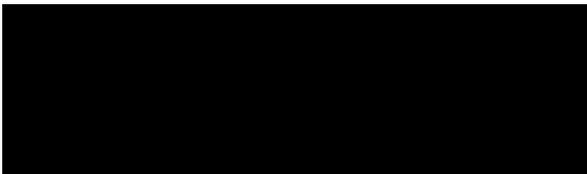
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FILE: WAC-02-202-51469 Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

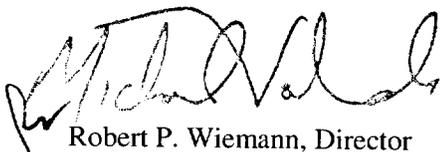
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a Thai-Chinese 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 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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$2,500 per month, which amounts to \$30,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in February 1993, to have a gross annual income of \$300,000, and to currently employ four workers. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001. With his accompanying letter, counsel states that the petitioner is substituting the original intended beneficiary of the certified labor certification with the above-referenced beneficiary.

The tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>
Net income ¹	\$864	\$8,097
Current Assets	\$5,076	\$7,528
Current Liabilities	\$2,267	\$0

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

Net current assets	\$2,809	\$7,528
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Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 13, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically sought the petitioner's 1998 and 1999 tax returns and signed 2000 and 2001 tax returns.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the years 1998 and 1999, in addition to the signed 2000 and 2001 returns which will not be summarized again here since they were above in this decision. The tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>
Net income ²	\$20,100	\$11,434
Current Assets	\$20,100	\$31,534
Current Liabilities	\$0	\$0
Net current assets	\$20,100	\$31,534

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 June 13, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's owner's husband has sufficient funds to cover any shortfall between the petitioner's funds and the proffered wage. Counsel also states that the petitioner has always paid its wages and expenses and has never failed to profit in any year. Additionally, counsel states that the petitioner currently employs temporary cooks who would be terminated and replaced with the beneficiary. Counsel does not provide names or evidence of employment of and actual wages paid to other cooks. The petitioner's owner submits a letter largely restating much of counsel's letter. The petitioner's owner also states that the restaurant is her "toy" and not her family's only source of income. The petitioner submits its owner's individual income tax returns and wage and tax statements, a letter from the petitioner's owner's husband's employer verifying his current salary, the petitioner's bank records and the petitioner's owner's bank records, and state quarterly wage reports.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. 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 reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

² See footnote 1, *supra*.

Counsel's reliance on the assets of the petitioner's owners is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

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 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 petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998, 1999, 2000, or 2001.

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, CIS will next 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 the Service should have considered income before expenses were paid rather than net income.

The petitioner's net income in 1998, 1999, 2000, and 2001 was \$20,100, \$11,434, \$864, and \$8,097, respectively. None of these income figures are amounts greater than the proffered wage of \$30,000. Thus, the petitioner cannot demonstrate a continuing ability to pay the proffered wage out of its net income in 1998, 1999, 2000, or 2001.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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 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. Rather, 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

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 out of those net current assets. The petitioner's net current assets during the years in question, 1998, 1999, 2000, and 2001, were \$20,100, \$31,534, \$2,809, and \$7,528, respectively. Only the petitioner's net current assets in 1999 demonstrate an ability to pay the proffered wage of \$30,000. The net current assets in 1998, 2000, and 2001 are less than the proffered wage of \$30,000, and, as such, the petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its net current assets in 1998, 2000, or 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998. In 1998, the petitioner shows a net income of only \$20,100 and net current assets of only \$20,100 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in 1998.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999. In 1999, the petitioner shows a net income of only \$11,434 but net current assets of \$31,534, and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets in 1999.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, the petitioner shows a net income of only \$864 and net current assets of only \$2,809 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in 2000.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of only \$8,097 and net current assets of only \$7,528 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in 2001.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage in 1998, 2000, or 2001. Counsel advised that the beneficiary will replace some workers. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the temporary cooks involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

The petitioner's owner's letter on appeal also makes a reference to how her restaurant would grow once the beneficiary is employed by the petitioner. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. 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. at 190.

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.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 1998 or subsequently during 2000 or 2001. 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 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.