

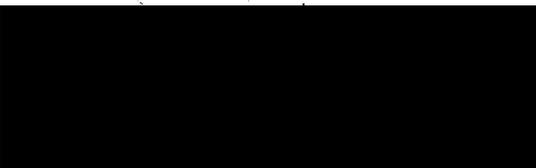
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

136



FILE: WAC 02 207 53766 Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2005

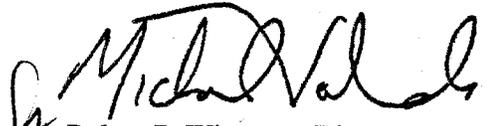
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:  
[Redacted]

**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 Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, foreign food. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on March 15, 2001. The proffered salary as stated on the labor certification is \$2,100 per month or \$25,200 per year.

With the petition, counsel submitted a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return. The tax return reflected a taxable income before net operating loss deduction and special deductions of \$9,336 and net current assets of -\$1,833. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on November 14, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. The director specifically requested a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement.

In response, counsel provided another copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return.

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. On May 28, 2003, the director denied the petition.

On appeal, counsel submits previously submitted documentation and two letters from [REDACTED] a licensed tax consultant. Mr. [REDACTED] first letter states:

Mr. [REDACTED] and his two sons, [REDACTED] and [REDACTED] own an enterprise group of three restaurants in Oregon. Mr. [REDACTED] has the dominant controlling power over his entire business. Although each of the three restaurants is separately incorporated and bearing a different name for administrative reasons, the managements of the three entities are intertwined as if they were one consolidated business. Inside this closely held family enterprise group, the cash flow and the exchange of service personnel are very flexible. For instance, if one restaurant has any financial insufficiency, it can be quickly supplemented by the surpluses of [the] other two restaurants. If one restaurant is temporarily lacking in manpower, a relief can be sought by an immediate transfer of personnel from the other two restaurants. However, since Mr. [REDACTED] various businesses are not registered as a consolidated group, on many occasions he has to choose the name of one business whenever he has any dealing with or application to an outside institution. This may only lead the outsiders to have an underestimation of his financial strength since they will [be] prone to narrow their view on examining the financial conditions of just one of his businesses. The following is a brief summary of the total net income that Mr. [REDACTED] has earned from his enterprise group in the year 2001:

Wong King Restaurant Group No. 1, Inc	\$ 4,988.34
Wong King Restaurant Group No. 2, Inc.	\$ 9,335.56
Wong King Restaurant Group No. 3, Inc.	\$ 245.00
Total	<u>\$14,568.90</u>

This net income of \$14,568.90 is arrived at after deducting a lot of depreciation expenses amounting to \$31,101.00. Considering that the depreciation expenses are abstract expenses, Mr. [REDACTED] commands a corporate cash flow of at least \$46,000.00 in a year. Roughly estimated, the actual cash flow can be as large as \$60,000.00 since the cost of goods sold contains many accrued expenses. At present Mr. [REDACTED] is making active preparations to open his fourth restaurant – a high-class restaurant with unique characteristics – probably at the end of the current year. With regards to the promising market situations and the weak competitors, it can be optimistically estimated that the new restaurant can reap him a net yearly income of at least \$100,000.00.

As his personal finance is concerned, Mr. [REDACTED] paid himself a total gross salary of \$10,800.00 in 2001. Apparently the salary looks meager but this is possible because Mr. [REDACTED] works from morning to evening in his restaurant for 15 hours a day and six days a week and therefore has much of his living expenses saved in his business. His wife also

spends a lot of her time in her husband's business. Besides, his two sons are independent. That is why he can afford to plow back a huge portion of the corporate net income into the retained earnings for future development and can still make his own living. Mr. [REDACTED] owns two residential homes and three cars, the current value of which amounts to approximately \$500,000.00. . . .

Mr. [REDACTED] second letter states:

With reference to all the records that have been sent to the Internal Revenue Service, I summarize the total net income that Mr. Wong has earned from his enterprise group in the year 2002:

Wong King Restaurant Group No. 1, Inc.	\$11,759.45
Wong King Restaurant Group No. 2, Inc.	\$18,446.68
Wong King Restaurant Group No. 3, Inc.	<u>\$ 8,082.16</u>
Total	<u>\$38,288.29</u>

This net income of \$38,322.29 is arrived at after deducting a lot of depreciation expenses amounting to \$46,724.00. Considering that the depreciation expenses are abstract expenses, Mr. [REDACTED] commands a corporate cash flow of at least \$85,000.00 in a year. Roughly estimated, the actual cash flow can be as large as \$100,000.00 since the cost of goods sold contains many accrued expenses. In comparison with the performance in 2001, Mr. [REDACTED] business shows remarkable improvements in 2002. In my observation, the 911 Incident in 2001 was a great impact to the restaurant business in general and Mr. [REDACTED] restaurant group was no exception. The fact that his revenue was able to rebound significantly in just one year manifests the dynamic of his business that can sustain in adverse situations.

Counsel reiterates Mr. [REDACTED] assertions that depreciation should be added back to the taxable income in determining the ability to pay the proffered wage. Counsel also claims that CIS should consider the income from all three of Mr. [REDACTED] businesses when determining the ability to pay the proffered wage. Counsel states:

The CSC decision ignores the fact that the priority date was established on March 15, 2001, or almost a third of the way through 2001. The relevant regulations only require that the petitioner demonstrate the ability to pay from that date forward, not from the beginning of the year. The wage to be paid in 2001 only amounted to \$19,900. In addition, the CSC decision ignores the fact that some of the deductions from income reported by the petitioner on the 2001 corporate tax return are not cash deductions. The depreciation and amortization deductions are routinely added back in when making the determination of ability to pay. These amounts are \$5,976. These figures indicate that the petitioner had at least \$15,312 available to pay the wage of \$19,900. The CSC decision also ignores the fact that the appellant had over \$10,000 in cash on hand at the

end of the year. (As stated on the Schedule L submitted with the 2001 tax return). This amount provided ample funds to pay the remaining amount of the proffered wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.<sup>1</sup> 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). If a corporation's end-of-year net current assets

---

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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 2001 were -\$1,833. The petitioner could not have paid the proffered wage in 2001 from its net current assets.

Counsel points out that the petitioner had over \$10,000 in cash on hand at the end of the year. However, cash on hand at the end of the year is part of net current assets. Net current assets are the difference between a corporation's current assets and current liabilities. 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.

Counsel also asserts that since the petitioner is only one restaurant in a three restaurant/corporation integrated business that the incomes of all three restaurants should be considered in determining the ability to pay the proffered wage. However, 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.

Mr. [REDACTED], a licensed tax consultant, contends that the petitioner is making preparations to open his fourth restaurant, probably at the end of the current year. Mr. [REDACTED] claims that the new restaurant can provide the petitioner a net yearly income of at least \$100,000. However, as stated above, the petitioner is a corporation, and, therefore, assets of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In addition, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Mr. [REDACTED] also states that the "911 Incident in 2001 was a great impact to the restaurant business in general and Mr. [REDACTED] restaurant group was no exception." Mr. [REDACTED] has not, however, explained how the petitioner's business was impacted. Since the business was not incorporated until January of 2001 and previous years' tax returns are not in the record, it does not appear that Mr. [REDACTED] has any basis for his comparison.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$9,336 and net current assets of -\$1,833. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 2001.

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.