

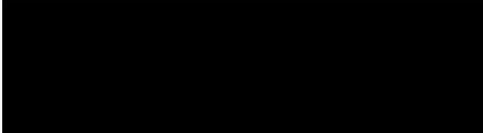
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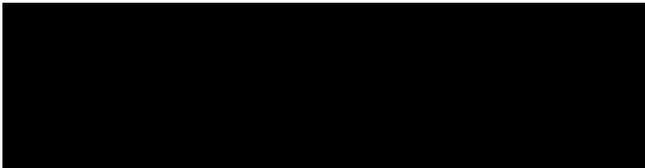
Office: VERMONT SERVICE CENTER

Date: JUN 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty 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 regulation 8 C.F.R. § 204.5(l)(3)(ii) states in pertinent part:

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 April 25, 2001. The prevailing wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689.60 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, a copy of petitioner's Form 1120S U.S. Corporation Income Tax Return for 2000, letter of employment offer from petitioner, copies of documentation concerning the beneficiary's personal data, and, the beneficiary's Form I-94 Departure Record.

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 August 21, 2003, 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 the 2001 and 2002 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 return...."

"If the beneficiary was ever employed by you, 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, April 25, 2001. Counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1120S tax returns for years 2000¹, 2001, and 2002.

The tax returns demonstrated the following financial information concerning the petitioner's inability to pay the proffered wage of \$24,689.60 from the priority date.

- In 2002, the Form 1120S stated an income loss² of <\$22,324.00>³.
- In 2001, the Form 1120S stated an income loss of <\$17,607.00>.

The director denied the petition on, 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.

On appeal, counsel asserts:

"(1) [The petitioner] ... is a "Subchapter S" Corp. which permits a 'pass-through' of personal income to the Corp. and vice-versa. Therefore, the owner should be allowed access to income strictly outside the Corp. to show ability to pay the prevailing wage."

¹ Although not relevant to prove ability to pay from the priority date of April 25, 2001, in 2000, the Form 1120S stated an income loss of <\$12,721.00>.

² IRS Form 1120S, Line 21.

³ The symbol <a number> indicates a loss or negative number.

“(2) The prospective worker’s [i.e. the beneficiary’s] ... productivity as a cook was not considered and should be allowed to off-set his proffered salary.”

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. There is no evidence submitted showing wages that the petitioner has paid the beneficiary although on ETA 750 Part B, Section 15 (b), beneficiary states petitioner employed him since April 2000.

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 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. 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 pay the proffered wage at any time between the years 2000 through 2002 for which petitioner’s tax returns are 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.⁴ A corporation’s year-end current assets are shown on Schedule L, lines 1(d) through 6(d). That schedule is included with, as in this instance, the petitioner’s filing of Form 1120S federal tax return. The petitioner’s year-end current liabilities are shown on lines 16(d) through 18(d). 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.

⁴ 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.

Examining the two Form 1120S U.S. Income Tax Returns submitted by petitioner⁵, Schedule L found in each of those returns indicates the following.

- In 2002, petitioner's Form 1120S return stated current assets of <\$7,776.00> and \$10,632.00 in current liabilities. Since the proffered wage was \$24,689.60 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120S return stated current assets of \$12,992.00 and \$9,678.00 in current liabilities. Since the proffered wage was \$24,689.60 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2002 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 is another way to determine the petitioner's ability to pay the proffered wage from the priority date through an additive calculation. The common elements of this additive calculation are, according to counsel's brief in the matter, "Depreciation," "Cash," "Retained Earnings," and, "Income/Loss." Counsel cites no legal precedent for the additive calculation, and, according to regulation,⁶ 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 those years' tax returns to eliminate the abovementioned deficiencies. Petitioner's counsel cited no legal precedent for his position. Counsel asserts that depreciation is a component to be added to the petitioner's taxable income. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120S, 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.

⁵ Although not relevant to prove ability to pay from the priority date of April 25, 2001, in 2000, petitioner's Form 1120S return stated current assets of \$9877.00 and \$8654.00 in current liabilities.

⁶ 8 C.F.R. § 204.5(g)(2), *Supra*.

Counsel also includes in the above additive calculation "Income/Loss" and "Cash." Correlating the amounts stated in counsel's additive calculation with the petitioner's tax return for each year, it is clear that counsel is combining petitioner's taxable income each year with the cash also received by the business for that year as stated on Schedule "L" as current assets⁷. 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, April 25, 2001.

Lastly, as part of the additive calculation, counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total amount of a company's net earnings since its inception, minus any payments made to stockholders. Retained earnings are actually part of stockholders' equity and represent the portion of a company's assets that are financed from profitable operations rather than from selling stock to investors or borrowing from external sources. Assets of a company's 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 Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Counsel particularly desired to point out that,

" ... [C]ooks are the heart and soul of a Restaurant. A cook's art is the reason people patronize a given Restaurant. A good cook will generate income-not subtract from it. The cook's productivity should be a factor in ... any calculus of the employer's ability to pay."

The record of proceedings is bereft of any substantiation of counsel's assertion. Proof of ability to pay begins on the priority date, that is, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. In this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a specialty cook will significantly increase petitioner's profits. Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. 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

Counsel's hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. According to Form ETA 750 B, the beneficiary was already providing services for the petitioner since April 2000. The record does not contain evidence of the beneficiary's contribution to petitioner's taxable income for tax years 2000 through 2002. The restaurant has operated at a loss in those three years according to the tax returns in evidence.

Counsel's additive calculation cannot be concluded to outweigh the evidence presented in the two corporate tax returns commencing upon the priority date 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.

Lastly, counsel indicates that the petitioner's owner a partner in another similar business and that economies of scale may allow additional productivity gains because "... [the owner] is free to shift employees from one

⁷ Also, retained earnings are not current assets available to meet payroll.

Restaurant to the other as business necessity dictates.” 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 in another business. 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). 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.