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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

JUN 15 2005

FILE:

[REDACTED]
EAC-03-184-54613

Office: VERMONT SERVICE CENTER

Date:

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

PETITION: 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:

[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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant manager. 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.

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 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:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$21.00 per hour, which amounts to \$43,680.00 annually. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on May 22, 2003. On the petition, the petitioner claimed to have been established in 1998, to currently have seven employees, to have a gross annual income of \$886,008.00, and to have a net annual income of \$53,593.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 8, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submission in response to the RFE were received by the director on July 1, 2004.

In a decision dated September 1, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence consisting of a copy of a pay statement of the beneficiary dated September 8, 2004. Counsel states on appeal that the director made an error in calculating the figure for net current assets based on the information on the Schedule L attached to the petitioner's federal tax return for 2001. Counsel states that a correct calculation shows net current assets to be an amount higher than the proffered wage. Counsel states that the evidence establishes the petitioner's ability to pay the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, the pay statement submitted on appeal is dated after the date of the director's decision. Therefore no grounds would exist to preclude that document from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage 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 instant case, on the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary did not claim to have worked for the petitioner. The record contains copies of pay statements of the beneficiary showing that the beneficiary was employed by the petitioner in 2003 and 2004. The statements are for pay periods ending September 4, 2003; September 11, 2003; December 31, 2003; June 23, 2004; June 30, 2004; and September 8, 2004.

The pay statements show gross income of \$900.00 per week paid to the beneficiary, a rate which is equivalent to a rate of \$46,800.00 per year. However, the first statement is for the pay period beginning on September 4, 2003 and ending on September 10, 2003. That statement shows the year to date compensation to be \$900.00, which indicates that the beneficiary began work for the petitioner at the beginning of that pay period.

The last statement in the record for the year 2003 is for the final pay period of 2003, and it shows the beneficiary's earnings for the year to date in the amount of \$15,300.00. The record also contains a copy of the beneficiary's Form W-2 Wage and Tax Statement showing compensation in the amount of \$15,300.00 paid by

the petitioner to the beneficiary that year. Since the beneficiary's total compensation for 2003 of \$15,300.00 is less than the proffered wage of \$43,680.00, the pay statements and the Form W-2 fail to establish the petitioner's ability to pay the proffered wage for the entire year of 2003.

The latest statement in the record for the year 2004 is for the pay period ending September 8, 2004. The proffered wage amount for the 36-week period from January 1, 2004 through September 8, 2004 would be \$30,240.00. That statement for the pay period ending September 8, 2004 shows the beneficiary's earnings for the year to date in the amount of \$32,400.00, a figure which is greater than the proffered wage through the date of that statement. That pay period ended a week after the September 1, 2004 date of the director's decision. Therefore the pay statement for that pay period is sufficient to establish the petitioner's ability to pay the proffered wage for the portion of 2004 which is relevant to the instant appeal. Nonetheless, the evidence of the beneficiary's employment by the petitioner fails to establish the petitioner's ability to pay the proffered wage in 2001, 2002 or 2003.

As another 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 for a given year, 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. 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 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

In the instant petition, the petitioner's tax returns indicate income from activities other than from a trade or business, namely small amounts of interest income. Those additional amounts of income are more than offset by deductions shown on the Schedule K's for charitable contributions. Since charitable contributions may be considered as discretionary expenses, for the purposes of the analysis relevant to the instant petition, the

petitioner's net income will be considered to be the figures for ordinary income, rather than the figures for income on line 23 of the Schedule K's, which are lower than the figures for ordinary income.

The petitioner's tax returns show the following amounts for ordinary income on line 21: \$29,744.00 for 2001; \$14,218.00 for 2002; and \$3,910.00 for 2003. Since each of those figures is less than the proffered wage of \$43,680.00, those figures fail to establish the ability of the petitioner to pay the proffered wage. The record before the director closed with the July 1, 2004 submission of the petitioner's response to the RFE. As of that date, the petitioner's tax return for 2003 was its most recent return available.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -\$15,640.00 for the beginning of 2001; \$11,481.00 for the end of 2001; \$7,293.00 for the end of 2002; and \$29,579.00 for the end of 2003. Since the figure for the beginning of 2001 is negative, and since the figures for the end of 2001 and the end of 2002 are less than the proffered wage of \$43,680.00, those figures fail to establish the ability of the petitioner to pay the proffered wage in 2001 or 2002.

Concerning 2003, the evidence discussed above establishes that the petitioner paid the beneficiary \$15,300.00 in compensation that year. The difference between that amount and the proffered wage is \$28,380.00. The petitioner's net current assets at the end of 2003 of \$29,579.00 were sufficient to have covered this difference, and therefore are sufficient to establish the petitioner's ability to pay the proffered wage in 2003.

The record also contains copies of Form 941 Employer's Quarterly Federal Tax Returns of the petitioner for the years 2001, 2002 and 2003. Those returns show payments of wages in amounts which are consistent with the information on the petitioner's Form 1120S tax returns.

The record also contains copies of bank statements. Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

Although the petitioner's bank statements alone are not sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period, they are relevant to the petitioner's overall business circumstances, as discussed below.

Even when the petitioner shows insufficient net income or net current assets to pay the proffered wage, CIS may consider the totality of the circumstances concerning a petitioner's financial situation. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, the CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the present matter, the petitioner has identified itself on IRS Form 1120S as an S corporation. Pursuant to *Matter of Sonogawa*, the petitioner's status as an S corporation is a relevant factor to be considered in determining its ability to pay. An S corporation pays no taxes itself, but all of its income is passed through to its owners in proportion to their ownership shares, who pay taxes on that income as part of their individual income. In the instant case, the Schedule K-1's attached to the petitioner's tax returns show that one individual is the owner of 100% of the shares of the petitioner.

The record contains a letter dated June 25, 2004 from a certified public accountant. The accountant states that he has served as the petitioner's accountant since 1993. That statement indicates that the petitioner has been in business since at least that date. On the petitioner's Form 1120S federal tax returns, the date of election as an S corporation is stated to be March 4, 1998. In his letter, the accountant states that certain of the expenses shown on the petitioner's tax returns are subject to the discretion of the owner, including officer's compensation and pension contributions. The accountant states that the owner is mainly interested in building the business with his own retirement in mind and in planning for his family's future. The accountant states that the pension contribution amount for each year is determined after the year-end, and that it is an amount calculated to reduce the overall taxable income of the corporation. Since the amounts of the petitioner's yearly pension contribution are discretionary, pension contributions are apparently not a contract obligation of the petitioner to its employees. A reasonable inference from the accountant's statements is that the pension contributions are for a pension fund of the owner himself. The petitioner's tax returns show the following amounts in pension contributions: \$21,853.00 in 2001; \$39,375.00 in 2002; and \$29,185.00 in 2003.

The accountant also states that the officer's compensation has varied depending on the amount of time the owner has had to dedicate to managing the business. The petitioner's tax returns show the following amounts in officer's contributions: \$60,500.00 in 2001; \$68,900.00 in 2002; and \$68,900.00 in 2003.

Finally, the accountant states that the petitioner's business grew from 2001 to 2003, an assertion which is consistent with information on the petitioner's tax returns. Those returns show the following amounts for gross receipts or sales: \$841,887.00 in 2001; \$886,008.00 in 2002; and \$921,950.00 in 2003.

If the figures for officer's compensation and for pension contributions are considered as additional financial resources of the petitioner, in addition to its net income each year, the total financial resources of the petitioner would be \$112,197.00 for 2001; \$122,493.00 for 2002; and \$101,995.00. If the proffered wage had been paid to the beneficiary in 2001, 2002 and if the beneficiary had been paid the full annual proffered wage in 2003 (crediting the petitioner with the \$15,300.00 actually paid to the beneficiary in 2003), the amounts remaining for officer compensation and pension contributions would have been \$68,517.00 in 2001; \$78,813.00 in 2002; and \$73,615.00 in 2003.

The bank statements in the record provide additional evidence of the petitioner's financial stability. The statements show consistent positive ending monthly balances averaging \$26,263.44 per month in 2001, \$34,269.66 per month in 2002, and \$25,313.44 per month in 2003. The statements show no charges for overdrafts.

CIS has long held that it 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.

In the instant case, the statements in the accountant's letter do not rely on the personal financial resources of the petitioner's owner, but rather on the resources of the petitioner. The owner has the authority to allocate resources of the petitioner to officers' compensation, to pension fund contributions, or to any other expenses of the petitioner, or to declare unexpended resources as ordinary income. But those resources remain legally those of the petitioner until they are distributed to the owner or to other persons. Therefore, the foregoing analysis of the totality of the petitioner's financial circumstances does not rely on the assets or other financial resources of any person or legal entity other than the petitioner.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). The foregoing analysis of the petitioner's federal tax returns and all other relevant evidence is sufficient to establish the petitioner's ability to pay the salary offered as of the priority date of the petition and continuing to present.

In his decision, the director correctly analyzed the petitioner's net income for 2001. In his analysis of the petitioner's net current assets for the end of that year the director erroneously transposed the figures for current assets and current liabilities. But that error did not affect the director's reasoning on that point, since the director correctly concluded that the petitioner's current assets did not exceed its current liabilities by an amount sufficient to pay the proffered wage. The director also correctly determined that the petitioner's bank statements did not

provide independent evidence sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

The director did not conduct any further analysis based on the principles in *Matter of Sonogawa*, 12 I&N Dec. 612. As shown above, under those principles, the petitioner's evidence is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period. At the time of the director's decision, decisions previously issued by the AAO may not have considered discretionary pension contributions and officer compensation to a shareholder who holds a controlling interest in the petitioner as factors relevant to an analysis under *Matter of Sonogawa*, 12 I&N Dec. 612. But in certain circumstances, as shown above, it is appropriate to do so.

For the reasons discussed above, the assertions of counsel on appeal are sufficient to overcome the decision of the director.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.