

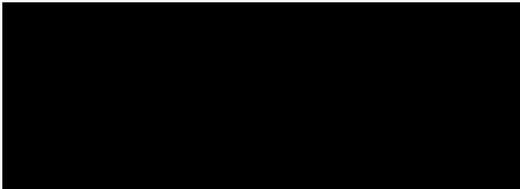
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U.S. Department of Homeland Security  
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U.S. Citizenship  
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Services

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FILE: EAC 02 259 51550 Office: VERMONT SERVICE CENTER

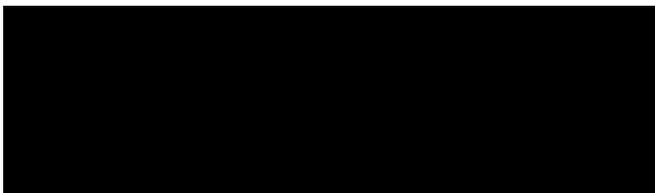
Date: JUN 21 2006

IN RE: Petitioner:  
Beneficiary:



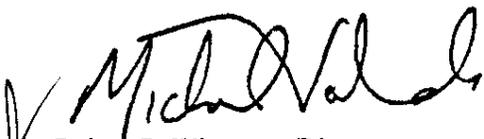
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Mexican/Salvadoran restaurant. It seeks to employ the beneficiary<sup>1</sup> permanently in the United States as a foreign food 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 April 9, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,690.00 per year). The Form ETA 750 states that the position requires three 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, copy of Internal Revenue Service (IRS) Form 1120 for 2001, and, copies of documentation concerning the beneficiary's qualifications.

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<sup>1</sup> The beneficiary is also known as [REDACTED]

The 2001 tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,690.00 per year from the priority date. In 2001, the Form 1120 stated taxable income<sup>2</sup> of \$4,820.00.

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 April 28, 2003, requested evidence pertinent to that issue:

"Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$24,690 as of April 9, 2001, the date of filing and continuing to the present."

"Submit the 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 employed by you in 2001 and 2002, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business."

"Submit your 2001 and 2002 W-3's [Transmittal of Wage and Tax Statements] to include the name and salaries of all employees."

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 complied financial statements<sup>3</sup> for 2001, and 2002, 2001 and 2002 W-3's Transmittal of Wage and Tax Statements, and, copies of beneficiary's Form W-2 Wage and Tax Statements for 2001 and 2002.

The director denied the petition on August 18, 2003 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.

The director stated:

"On April 28, 2003, the service center requested that you submit the 2002 U.S. 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...."

"On July 14, 2003, the service received 2001 and 2002 self generated financial reports that are of little [evidentiary] value and the beneficiary's 2001 and 2002 W-2. "

The director then stated that the beneficiary's W-2 Wage and Tax Statements submitted demonstrated that that the petitioner did not paid the beneficiary the proffered wage in years 2001 and 2002.

On appeal, counsel asserts:

"The ... [U.S. Citizenship and Immigration Services (CIS)] erred in denying the I-140 visa petition for the following reasons:

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<sup>2</sup> IRS Form 1120, Line 28.

<sup>3</sup> As the cover letter to the financial statements states, "A compilation is limited to presenting in the form of financial statements, information that is the representation of management."

1. Petitioner has the ability to pay the proffered wage as evidenced by financial statements and documentation.
2. Denial was based on improper financial analysis.”

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. Based upon the wage information submitted, the petitioner paid wages to the beneficiary of \$8,280 in 2001 and \$12,962.62 in 2002. Therefore for the years for which evidence is provided, the beneficiary did not receive the proffered wage.

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

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 for tax year 2001 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.<sup>4</sup> 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 1120 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.

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<sup>4</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.

Examining the 2001 Form 1120 U.S. Income Tax Return submitted by petitioner, Schedule L found in that return indicates current assets exceeded current liabilities:

- In 2001, petitioner's Form 1120 return stated current assets of \$15,582.00 and \$7,085.00 in current liabilities. Therefore, the petitioner had an \$8,497.00 in current net assets for 2001. Since the proffered wage was \$24,690.00 per year, this sum is less than the proffered wage.

Therefore, for 2001 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor on April 9, 2001, 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 that the Immigration and Citizenship Services (CIS) did not look at the entire record as submitted by petitioner, made a determination that the unaudited financials presented instead of tax returns had little value, implies that that depreciation is an asset and that the compensation of corporation officers taken as a deduction is can be included as funds available to pay the proffered wage since "... Clearly, upon employment of another employee, the principals of the company would simply reduce the overall compensation to officers in order to be able to compensate the employee with the proffered wage."

The response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. The accountant's cover letter to the compiled financials submitted in the matter states, "A compilation is limited to presenting in the form of financial statements, information that is the representation of management." Counsel's statement that we should accept the financial statements because "... they were compiled for the express purpose of filing the company's corporate tax returns..." raises the question why petitioner did not also submit those returns. CIS is restricted to what it can accept as evidence by regulation as is the petitioner. Evidence of the ability to pay the proffered wage ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner in this case has not stated or demonstrated that the tax returns are unavailable. Instead, this is a case in which the petitioner made a decision to withhold its tax returns from submission into evidence. The petitioner's failure to submit the petitioner's tax returns documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

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 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.

Contrary to counsel's assertion above, 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 owners/officers 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.

Also since it has been paid, the officer's compensation is an expense. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. In this case, the record contains no documentation or other competent evidence that demonstrates the three shareholder's willingness to reduce his or her own salaries. Further, since the officers have made no commitment or offer to reduce their compensation by anything in evidence, counsel is merely speculating upon what could have happened in the past (but did not) and what may or may not happen in the future. Based upon what is known, the petitioner has employed the beneficiary, and, it has not chosen to pay her 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.

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.