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U.S. Citizenship
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Services



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FILE: EAC 03 047 50863 Office: VERMONT SERVICE CENTER

Date: JUN 29 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

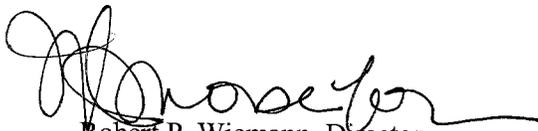
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 25, 2001. The proffered wage as stated on the Form ETA 750 is \$12.60 per hour (\$26,208.00) 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, a copy of petitioner's Form 1040 U.S. Corporation Income Tax Return for 2001, and, copies of documentation concerning the beneficiary's qualifications. The business is a sole proprietorship.

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 October 15, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Submit evidence to establish that the employer had the ability to pay the proffered wage or salary of \$504 per week as of April 25, 2001, the date of filing and continuing to 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 business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.

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

Submit an itemized list of all of the petitioner's monthly expenses, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, medical costs, etc. for 2001 and 2002.

Submit annual reports for 2001 and 2002, which are accompanied by audited or reviewed financial statements.

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 Internal Revenue Service (IRS) Form 1040 tax returns¹ for years 2001 and 2002.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$26,208.00 per year from the priority date.

- In 2001, Form 1040 stated an adjusted gross income of \$25,942.00.
- In 2002, Form 1040 stated an adjusted gross income of \$31,294.00.

The petitioner also submitted W-2 Wage and Tax statements, a letter about the business from an accountant and documents concerning the petitioner's identity. The "W-2" statements do not show wage payments to the beneficiary by the petitioner.

The director denied the petition on February 10, 2004, 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:

As the petitioner is basing his/her ability to pay on his/her individual federal tax return, the petitioner must establish an ability to pay the proffered wage and an ability to support his or her family. The evidence submitted did not establish that the petitioner has the ability to pay the proffered wage

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through

¹In 2001, the Form 1040, Schedule C stated taxable business income of \$27,914.00. In 2002, the Form 1040, Schedule C stated taxable business income of \$8,710.00.

friendship.” See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). We note that the beneficiary and petitioner share a family name.

The petitioner states his reason to appeal the director’s decision as:

“Evidence of ability.”

On appeal, the petitioner re-submitted the sole proprietor’s individual income tax returns for 2001 and 2002; the petitioner also produced a corporate return for MSAS, Inc. company for 2002 and 2003, and, the sole proprietor’s individual income tax return for 2003.

The tax returns stated:

- In 2001, Form 1040 stated an adjusted gross income of \$25,942.00.
- In 2002, Form 1040 stated an adjusted gross income of \$31,294.00.
- In 2002, Form 1120 stated taxable income of \$18,123.00.
- In 2003, Form 1040 stated an adjusted gross income of \$62,400.00.
- In 2003, Form 1120 stated taxable income of \$29,539.00.

There was no information submitted on appeal describing a familial relationship between the petitioner and the beneficiary if any.

Petitioner included a letter about the business from an accountant. The letter describes how, in the accountant’s estimation, the business could pay the proffered wage from the priority date. In the accountant’s opinion, depreciation may be added back to the net income of the business, whether as a sole proprietorship or corporation², along with the wages of the franchise business owners and the compensation as corporate officers to achieve a higher “cash flow” enabling the petitioner to pay the proffered wage from the priority date.

Petitioner’s counsel advocates the addition of depreciation taken as a deduction in those years’ tax returns to eliminate the abovementioned deficiencies. Since depreciation is a deduction in the calculation of taxable income on tax Forms 1040 and 1120, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against petitioner’s and his accountant’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

² The record of proceeding reflects that the petitioner incorporated in 2002.

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.

Petitioner's accountant viewed the wages of the franchise business owners and/or the compensation as corporate officers as assets available to pay the proffered wage. 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 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). The compensation of officers represents monies already expended by the corporation and, is therefore, not an asset.

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. The petitioner has not employed the beneficiary.

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.

During the tax years examined, the petitioner's business changed from a sole proprietorship form of conducting business to a corporate form. During 2001 and partially in 2002, it was a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain

themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of three. In 2001, the sole proprietorship's adjusted gross income of \$25,942.00 does not cover the proffered wage of \$26,208.00 per year. It is improbable that the sole proprietor could support himself and his family without funds for an entire year. Likewise, in 2002, the sole proprietorship's adjusted gross income of \$31,294.00 barely covers the proffered wage of \$26,208.00 per year. It is improbable that the sole proprietor could support himself and his family on \$5,086 for an entire year. Thus, in the subject case, as set forth above, petitioner did not have taxable income³ to pay the proffered wage at any time between the years 2001 through 2002 for which petitioner's tax returns are offered for evidence while it was structured as a sole proprietorship. While it was structured as a sole proprietorship, the record also does not contain any evidence of the sole proprietor's unencumbered and liquefiable personal assets to counter its deficiency in establishing its continuing ability to pay the proffered wage beginning on the priority date.

As now structured as a corporation, the company reports taxable income as already stated in 2002 of \$18,123.00 and in 2003 of \$29,539.00. Since the proffered wage is \$26,208.00 per year, it is only in 2003 that the company could pay the proffered wage if the company is the employer. There is no statement to this effect in the record, nor has the petitioner evidenced in the record of proceedings any intent to transfer its responsibilities as employer to the new company under the petition.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage for petitioning entities structured as corporations. 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 through 6. 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 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.

Examining the 2002 and 2003 Form 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets never exceeded its current liabilities.

- In 2002, petitioner's Form 1120 return stated current assets of \$20,405.00 and \$00.00 in current liabilities. Therefore, the petitioner had \$20,405.00 in current net assets for 2002. Since the proffered wage was \$26,208.00 per year, this sum is less than the proffered wage.

³ As reported on Form 1040.

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.

- In 2003, petitioner's Form 1120 return stated current assets of \$45,513.00 and \$00.00 in current liabilities. Therefore, the petitioner had \$45,513.00 in current net assets for 2003. Since the proffered wage was \$26,208.00 per year, this sum is more than the proffered wage.

The petitioner had not established that it had the ability to pay the beneficiary the proffered wage in 2002 or 2003 through an examination of its net current assets. From April 25, 2001, petitioner did not have sufficient personal income to pay the proffered wage and household expenses in years 2001 through 2002. According to the petition and Alien Labor Certification, the sole proprietorship is the petitioner and employer. There is no substantiation in the record of proceeding that MSAS, Inc is the successor in interest to the sole proprietorship or that MASAS Inc. has assumed the responsibility to employ the beneficiary.

The record contains no evidence that the petitioner qualifies as a successor-in-interest to the sole proprietorship. This status requires documentary evidence that the corporation has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage.

Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, the sole proprietorship, as demonstrated above, did not have the ability to pay the proffered wage from the priority date. .

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The AAO also notes that in any additional proceedings in this matter, explanations and evidence would be required to establish the bona fides of the employment offer based on the similarity of familial names between the sole proprietor and the beneficiary.

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.