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U.S. Citizenship
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Services

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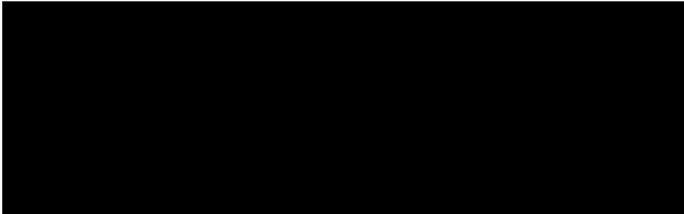


FILE: WAC 02 126 52578 Office: CALIFORNIA SERVICE CENTER Date: **MAR 02 2005**

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office 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 curry chef. 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.

On appeal, counsel submits a brief.

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 granting 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 5, 1997. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, which equals \$26,000 per year.

On the petition, the petitioner stated that it was established on February 19, 1997. The petitioner declined to state the number of workers it employs and its net annual income. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Marina Del Rey, California.

In support of the petition, counsel submitted a copy of the petitioner's 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns.¹ Those returns show that the petitioner reports taxes based on the calendar year. The petitioner did not provide a copy of its 1997 return and gave no reason for that omission.

¹ The corporation named on those returns is [REDACTED] Incorporated, rather than [REDACTED] Cuisine of India). The petitioner subsequently provided documentation, however, demonstrating that they are identical.

The 1998 return shows that the petitioner declared a loss of \$961 as its taxable income before net operating loss deduction and special deductions that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1999 return shows that the petitioner taxable income before net operating loss deduction and special deductions of \$10,065 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 return shows that the petitioner taxable income before net operating loss deduction and special deductions of \$36,172 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 23, 2002, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested the petitioner's 2001 tax return and copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous two quarters. Finally, the Service Center requested that the petitioner complete the Form I-140 petition.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return, its California Forms DE-6 for the last quarter of 2001, and a completed Form I-140 petition.

The petitioner stated on the completed petition that it employs 11 workers and that its net annual income is \$648,046. The Form DE-6 shows that the petitioner employed 11 workers during all of the fourth quarter of 2001.

The 2001 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$4,019 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$40,541 and current liabilities of \$12,787, which yields net current assets of \$27,754.

In addition, the petitioner provided tax returns and Forms DE-6 for two other corporations, [REDACTED] and [REDACTED]. The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders and from other corporations. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else.² As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds. The tax returns and Forms DE-6 of other corporations are not relevant to any matter at issue in this proceeding and shall not be further addressed.

² Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

On January 21, 2003 the California Service Center issued another Request for Evidence in this matter. The subject matter of that Request for Evidence, however, is irrelevant to the basis for the subsequent decision of denial.

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, and, on May 28, 2003, denied the petition.

On appeal, counsel observes that during each salient year at least one of the four restaurants owned by the petitioner's owner declared taxable income before net operating loss deduction and special deductions sufficient to pay the proffered wage.

As was noted above, the petitioner is a corporation, and a corporation is a legal entity separate and distinct from its owners or stockholders, and from other corporations. *Matter of M, Supra*. The petitioner must show the ability to pay the proffered wage out of its own funds, not out of the funds of any other person or entity.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of

business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$26,000 per year. The priority date is August 5, 1997. The petitioner was obliged, therefore, to demonstrate its ability to pay the proffered wage during 1997. The petitioner provided no documentation pertinent to 1997 and has failed, therefore, to demonstrate its ability to pay the proffered wage during that year.

During 1998 the petitioner declared a loss. The petitioner cannot demonstrate the ability to pay the proffered wage out of its income. At the end of the year the petitioner had negative net current assets. The petitioner cannot demonstrate the ability to pay the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to it with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner declared taxable income before net operating loss deduction and special deductions of \$10,065. That amount is insufficient to pay the proffered wage. The petitioner cannot, therefore, demonstrate the ability to pay the proffered wage out of its income. At the end of the year the petitioner had negative net current assets. The petitioner cannot demonstrate the ability to pay the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to it with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared taxable income before net operating loss deduction and special deductions of \$35,172. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$4,019. That amount is insufficient to pay the proffered wage. The petitioner had net current assets, however, of \$27,754. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, or 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.