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

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FILE: [REDACTED]
EAC 02 288 50637

Office: VERMONT SERVICE CENTER

Date: MAY 13 2005

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

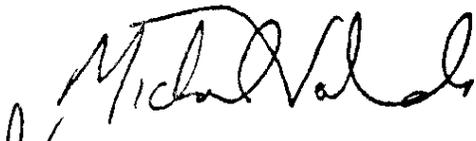
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[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 Director, Vermont 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 cook. 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 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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.20 per hour, which equals \$25,376 per year.

On the petition, the petitioner stated that it was established during 1988 and that it employs 18 workers. The petition states that the petitioner's gross annual income is \$737,623 and that its net annual income is \$2,780. 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 Feeding Hills, Massachusetts.

In support of the petition, counsel submitted a copy of the first page of the 2001 Form 1120S, U.S. Income Tax Return for an S Corporation of Agawam Take Five Restaurant, Incorporated. That page of that return shows that the corporation reports taxes based on the calendar year and that during 2001 it reported ordinary income of \$2,870. Because the corresponding Schedule L was not provided with that single page the Service Center was unable to compute the corporation's net 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 Vermont Service Center, on March 4, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested that, if it had ever employed the beneficiary, the petitioner submit Form W-2 Wage and Tax Statements showing wages it had paid to him.

Although 2001 and 2002 W-2 forms should have been available when that Request for Evidence was issued, counsel submitted no W-2 forms and no explanation for their absence. Counsel submitted a letter from the petitioner, dated May 28, 2002, stating that the petitioner's \$11,199 depreciation expense during 2001, shown on its Schedule L, is not an actual cash expenditure and should be considered in the calculation of funds available to pay the proffered wage. No copy of the petitioner's 2001 Schedule L was submitted with that letter, nor was one provided previously.¹

That letter also states that if the petitioner is able to hire the beneficiary, the compensation of officers shown on its 2001 return would be reduced in the future by some unstated amount, because the beneficiary would replace some of the officers during some hours. Finally, that letter stated that the petitioner's owners also own a partnership that owns the real estate where the petitioning restaurant operates.

With that letter counsel provided a copy of the 2001 Form 1065, U.S. Return of Partnership Income of Take Five Real Estate. Counsel also provided a copy of the unaudited 2002 profit and loss statement of [REDACTED] Incorporated.

Further still, counsel provided a copy of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the second quarter of 2001. That return shows that the petitioner paid \$68,486.93 in wages during that quarter.

In a cover letter dated May 29, 2003, counsel argues that the petitioner's net income need not necessarily exceed the proffered wage in order to demonstrate the petitioner's ability to pay the proffered wage. Counsel further implies that hiring the beneficiary would contribute to the petitioner's net income, and cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered.

Further still, counsel asserted that the petitioner's tax returns are not necessarily a valid index of its ability to pay the proffered wage, as companies routinely minimize income in order to reduce tax liability.

Finally, counsel stated that the petitioner has employed the beneficiary since 2001 and paid him an amount greater than the proffered wage.

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 August 18, 2003, denied the petition.

¹ Nor was that Schedule L, or the balance of that tax return, submitted subsequently.

On appeal, counsel provides a copy of a consolidated compiled balance sheet and income statement of the petitioner and [REDACTED]

Counsel also provides a letter, dated September 16, 2003, from the petitioner's accountant. That letter states that the petitioner in this case is [REDACTED] and Lounge, a business entity comprised of [REDACTED] Real Estate and [REDACTED] Incorporated. The accountant argues that the two companies, together, have the ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(l) states that a petition for an alien worker may be filed pursuant to the instant visa category by "any United States employer." That regulation makes no provision for two companies to file in concert. Further, the 2001 Form 1065, U.S. Return of Partnership Income of [REDACTED] Real Estate shows that it paid no wages and had no labor expense during that year, indicating that it has no employees and is not an employer. It is, therefore, not qualified to file this petition. Finally, that the instant petition is for a cook makes clear that the restaurant, [REDACTED] Incorporated, is the *de facto* petitioner in this case, rather than the real estate holding company. The restaurant must show the ability to pay the proffered wage.

The petitioner, [REDACTED] Incorporated, is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

The consolidated financial statements of the petitioner and the real estate holding company do not separate the income and assets of the petitioner from the income and assets of the real estate holding company. As such, they are of no value in determining the petitioner's ability to pay the proffered wage out of its own funds. Further, those financial statements are compiled, rather than audited.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit and, further, that financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. For this reason the consolidated financial statements of the petitioner and the real estate holding company, and the unaudited 2002 balance sheet of the petitioner are unreliable evidence and will not be considered.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not

represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel asserts that the petitioner has employed the beneficiary since 2001 and paid him an amount in excess of the proffered wage. Counsel offers no evidence in support of that assertion. Further, the Request for Evidence issued on March 4, 2003 requested that, if the petitioner had ever employed the beneficiary, it submit Form W-2 Wage and Tax Statements showing wages it had paid to him. Those W-2 forms were never submitted, nor did counsel tender any explanation of their absence. Simply going on record without supporting documentary evidence is insufficient to sustain the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Counsel has not demonstrated that the petitioner employed and paid the beneficiary.

Counsel urges that some portion of the petitioner's Line 7, Compensation of Officers will not be paid to them in the future if it is able to hire the beneficiary, as hiring the beneficiary would obviate some of the hours worked by the officers of the corporation. Counsel did not demonstrate, however, that any portion of the compensation paid to the corporation's officers was for their performing the duties of a cook. The record, therefore, contains no evidence in support of counsel's assertion that hiring the beneficiary will obviate any of the hours allegedly worked by the corporation's officers. Further, counsel provides no evidence to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. Again, simply going on record without supporting documentary evidence is insufficient to sustain the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further still, the contention that hiring the beneficiary would obviate some of the hours worked by the petitioner's officers conflicts with counsel's assertion that the petitioner already employs the beneficiary, and has employed him since 2001. The compensation that the petitioner paid to its officers has not, therefore, been shown to be available to pay wages

Counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered.

Although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds. The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage. Further, the holding in *Masonry Masters* is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns.

While that decision urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary will generate income and to guess at the amount. If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no evidence that the net income generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption. Yet further, counsel's assertion that hiring the beneficiary would increase the petitioner's profitability conflicts with counsel's assertion that the petitioner had employed the beneficiary since 2001.

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, although counsel asserts that the petitioner has employed the beneficiary since 2001 and paid him an amount greater than the proffered wage, no evidence was submitted to show that the petitioner has ever employed or 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 total 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.

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 \$25,376 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared ordinary income of \$2,870. That amount is insufficient to pay the proffered wage. The petitioner did not submit its 2001 Schedule L or any other evidence from which its year-end net current assets could be determined. The petitioner has not demonstrated the ability to pay the proffered wage during 2001 out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

Counsel asserts that the petitioner's tax returns may not show the true financial condition of the corporation. That assertion, however, neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. 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.