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U.S. Citizenship
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Services



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FILE:



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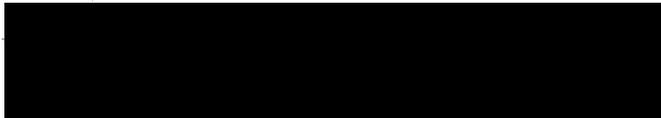
Office: VERMONT SERVICE CENTER

MAY
Date: 18 2005

IN RE:

Petitioner:

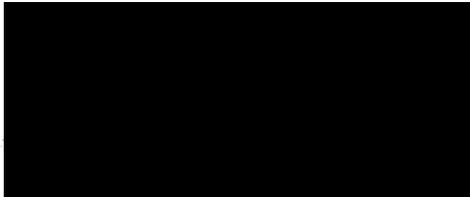
Beneficiary:



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 preference visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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 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 DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$13.20 per hour, which amounts to \$27,456 annually. The ETA 750B, signed by the alien beneficiary on April 17, 2001, indicates that the alien has not worked for the petitioner for the past three years.

On Part 5 of the visa petition, it is claimed that the petitioner was established in 2000, employs five workers, has a gross annual income of \$259,586, and a net annual income of \$196,107. As evidence of its continuing financial ability to pay the certified wage of \$27,456 per year, the petitioner initially submitted copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001. They indicate that the petitioner files its returns using a fiscal year running from June 1st until May 31st of the following year. Thus its 2000 tax return covers the period from June 1, 2000 until May 31, 2001, which includes the visa priority date. These tax returns contain the following information:

	2000	2001
Taxable income before net operating loss (NOL) deduction	\$ 8,728	\$ 9,245

Current Assets (Sched. L)	\$12,763	\$21,790
Current Liabilities	-0-	-0-
Net Current Assets	\$12,763	\$21,790

As shown above, besides net taxable income, CIS will also examine a petitioner's net current assets as an alternative method of reviewing a petitioner's ability to pay a proposed wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ Current assets are found on line(s) 1(d) to 6(d) of Schedule L on a corporate petitioner's tax return and current liabilities are listed on line(s) 16(d) to 18(d). Net current assets represent a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence on September 22, 2003. The director instructed the petitioner to supply evidence of its ability to pay the proffered salary by providing audited financial statements, annual reports, or federal tax returns. The director also specifically instructed the petitioner to provide a copy of its 2002 tax return with all schedules and attachments, as well as copies of the beneficiary's Wage and Tax Statements (W-2s) if it had employed the beneficiary.

In response, the petitioner, through counsel, submitted a partial copy of its 2002 corporate tax return consisting of the first page only. It shows taxable income of -\$24,937 before taking the net operating loss (NOL) deduction. The petitioner also provided copies of its business checking account statements covering 2001, 2002 and from January through September 2003, omitting the July 2003 statement. The petitioner additionally supplied bank statements and the 2001 and 2002 corporate tax returns of an entity with a different name, different federal identification number, and different address than that of the petitioner's, as well as a color advertisement of this entity's menu. A letter, dated December 8, 2003, from "[REDACTED]" accompanies these documents and explains that Mr. [REDACTED] is the president and manager of both businesses. He states that the petitioner has the ability to pay the beneficiary's proposed wage offer.

The director denied the petition on February 9, 2004, concluding that the petitioner's evidence did not demonstrate a continuing financial ability to pay the proffered wage of \$27,456 per year.

On appeal, counsel resubmits copies of various documentation previously supplied to the record, along with a copy of an advertisement of the petitioner's Chinese food menu. Citing agenda items of a Vermont Service Center AILA liaison meeting on March 4, 2003, counsel contends that the ability to pay the beneficiary's proposed wage offer should include the petitioner's combined net income and net current assets, as well as taking into account the year-end balance in the petitioner's checking accounts. Counsel's reliance on an AILA liaison meeting is misplaced. The minutes of such a meeting does not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although such discussions may be useful as an aid in interpreting the law, they are not binding on any CIS officer. Moreover, the regulation at 8 C.F.R. §

¹ 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.

103.3(c) provides that while Citizenship and Immigration Services (CIS), formerly INS, decisions that are classified as precedent decisions, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel's reliance on the bank statements and tax returns of another entity is also not persuasive. 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). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) addressed whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court stated, "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."

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. Here, there is no indication that the petitioner has employed and paid wages to the beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable 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). 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 the Service should have considered income before expenses were paid rather than net income.

In this case, as set forth above, the petitioner's net income as shown on its 2000 tax return is reported as \$8,728, or \$18,728 less than the proffered wage. In 2001, the reported net income of \$9,245 was \$18,728 less than the proposed wage offer, and the 2002 tax return reflects that the petitioner's reported net income of -\$24,937 is \$52,393 short of the amount needed to cover the proffered wage during this period. Thus, the petitioner's net income as shown on its tax returns was insufficient to cover the proffered wage.

Similarly, its net current assets as indicated on Schedule L of its 2000 and 2001 tax returns, also fell short in covering the proposed wage offer of \$27,456. In 2000, the petitioner's net current assets of \$21,790 was \$5,666 short of the proffered salary and in 2001, its net current assets of \$12,763 was \$14,693 short of the amount needed to meet the proffered wage. Counsel's contention that the petitioner's \$20,000 security deposit for rent as an "other asset" listed on line 14 of Schedule L of the 2001 tax return, should be included in a consideration of the petitioner's ability to pay the proffered wage, is not convincing in any event as it is represented as a longer-term asset and not a current asset. Further, any review of total assets must necessarily be balanced by the petitioner's total liabilities. Otherwise, they would not properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, as

set forth above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Counsel's assertion that the balances presented within the petitioner's bank statements should outweigh the petitioner's financial data profiled in its tax returns is also not persuasive. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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 provides an inaccurate financial portrait of the petitioner. It remains that the regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports, audited financial statements and federal tax returns in order to demonstrate its ability to pay a certified wage. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

It is further noted that the petitioner failed to submit its complete 2002 tax return despite the director's specific request set forth in the request for additional evidence. This precluded a review of the petitioner's net current assets for that period of time. 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).

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the evidence and argument presented on appeal, the AAO concurs with the director's determination that the petitioner failed to persuasively demonstrate its continuing ability to pay the proffered wage beginning at the visa priority date, based either on its net taxable income or its net current assets, during any of the relevant period.

Beyond the decision of the director, it is noted that the evidence indicates that Dean Zheng, the petitioner's president bears the same name and same address as "Dean Zheng" listed as the beneficiary's brother in another application.² 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 friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

² Form I-601, Application for Waiver of Ground of Excludability.

Although this case has been decided on other grounds, the observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner's president and the beneficiary represents an impediment to the adjudication of any future employment-based petitions filed by this petitioner on behalf of this 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.