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U.S. Citizenship
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MAY 20 2005

FILE: [Redacted]
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Office: NEBRASKA SERVICE CENTER

Date:

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 Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a night manager. 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, the petitioner submits a statement 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.

8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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 May 6, 2002. The proffered wage as stated on the Form ETA 750 is \$11.04 per hour, which equals \$22,963.20 per year.

On the petition, the petitioner stated that it was established during 1990 and that it employs 50 workers. The petition states that the petitioner's gross annual income is \$7,891,966, but the space reserved for the petitioner's net annual income was left blank. 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 Cincinnati, Ohio.

In support of the petition, the petitioner submitted the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner reports taxes pursuant to the calendar year and that during 2002 it declared a loss of \$353,475 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$253,928 and current liabilities of \$179,651, which yields net current assets of \$74,277.

The petitioner also submitted the unaudited consolidated 2002 balance sheets and income statement of the petitioner and Conn Properties.

On July 28, 2003 the Nebraska Service Center issued a Request for Evidence in this matter. The Service Center noted that the petitioner's 2002 tax return shows a substantial loss and requested that the petitioner provide additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 2002, it provide a 2002 Form W-2 Wage and Tax Statement showing the wages it paid to the beneficiary. That request stated that the evidence submitted in response to the Request for Evidence must all be submitted at the same time.

In response, the petitioner submitted a letter, dated September 10, 2003, from its accountant. That letter states that the petitioner has never failed to pay its employees promptly, that its 2002 payroll was \$2,041,194, and that the petitioner's owner also owns the land and building in which the petitioner operates and recently invested more than \$1 million in that property. The accountant states that, as shown on the unaudited financial statements, the combined net income of petitioner and the petitioner's owner's real estate holding company was \$239,761, rather than the loss shown on the petitioner's tax return.

The accountant further states that the petitioner's owner's equity in the restaurant and the real estate as per their combined balance sheets is \$805,620. Further still, the accountant quotes from the unaudited 2002 balance sheet in estimating that, based on a likely sale at 50% of its annual revenues, minus encumbrances, the value of petitioner's owner's true equity in the petitioning restaurant is approximately \$1,127,190. Finally, the accountant stated that if he were performing an audit of the petitioner, he would have no reservations in stating that it is a going concern and should remain so for the foreseeable future.

With the accountant's statement the petitioner provided 2002 W-2 forms showing the wages the petitioner paid to ten of its employees and a transmittal statement showing that the petitioner paid total wages of \$2,169,407.54 during that year. The W-2 forms provided do not show any wages paid to the beneficiary.

Finally, the petitioner provided copies of its May 2002 and August 2003 bank statements and computer printouts pertinent to its payroll for May 2002.

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 December 12, 2003, denied the petition. The director based the decision on the petitioner's loss during 2002.

On appeal, the petitioner states that the decision of denial was based on incomplete information submitted by the petitioner's accountant in response to the Request for Evidence. The petitioner also states that it employs

approximately 250 people, and that the statement on the Form I-140 petition that it employs only 50 people was the result of a typographical error.¹

With the appeal the petitioner provides (1) the petitioner's financial statements showing its performance during 2002 and 2003, (2) a letter, dated January 30, 2003, from the petitioner's accountant, explaining those financial statements, (3) additional bank statements, (4) additional 2002 W-2 forms showing amounts the petitioner paid to employees other than the beneficiary, (5) 2003 W-2 forms showing wages the petitioner paid to various employees, including one showing that the petitioner paid \$5,625 to the beneficiary during that year, (6) a 2003 transmittal showing that the petitioner paid total wages of \$2,042,371.37 during that year, and (7) a letter, dated January 29, 2004, from the petitioner's payroll company stating that it has always been current in its payroll.

Had the petitioner originally asserted that it employs 100 or more workers and has the ability to pay the proffered wage, that evidence, in itself, might have been found sufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The assertion would have been subject to investigation, but the Service Center might, consistent with 8 C.F.R. § 204.5(g)(2), have found that evidence sufficient. Having failed to make that assertion previously, however, when the Service Center could have scrutinized it, the petitioner is foreclosed from prevailing on that basis now.

The financial statements submitted on appeal show that the data pertinent to 2002 was compiled, whereas the data pertinent to 2003 was audited. The petitioner's reliance on the unaudited financial statements, both those submitted originally and those submitted on appeal, is misplaced. 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The September 10, 2003 letter from the petitioner's accountant cites figures from the unaudited financial statements as evidence of the petitioner's ability to pay the proffered wage. The figures themselves are not reliable evidence, and the accountant's citation of them is similarly insufficient to demonstrate the petitioner's ability to pay the proffered wage.

Further, in that letter, counsel includes income of the real estate holding company in his discussion of the petitioner's ability to pay the proffered wage. The petitioner in this case is the fast food restaurant, not the real estate holding company, and it 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

¹ The petitioner states that it operates eight Burger King restaurants. A fast food operation with a payroll of \$2,169,407.54 annually is clearly more consistent with employment of 250 people with average annual wages of \$8,677.63 than with employment of 50 people with average annual wages of \$43,388.15.

entities who have no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner shall not be further considered.

Further still, the accountant purports to compute the market value of the petitioner and the petitioner's owner's equity and implies that the amount of the owner's equity demonstrates the petitioner's ability to pay the proffered wage. The owner's equity is not a sufficiently liquid fund to be included in the determination of the petitioner's ability to pay the proffered wage. Finally, that the accountant pronounces that the petitioner is a going concern is insufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2003 audited financial statements submitted on appeal show that during that year the petitioner earned net income of \$171,343. Those statements also show that the petitioner's operations provided net cash of \$568,067 during that year. Finally, those statements show that at the end of that year the petitioner had current assets of \$358,743 and current liabilities of \$247,124, which yields net current assets of \$111,619.

The petitioner's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.² Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

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 established that it employed the beneficiary and paid her \$5,625 during 2003. The record does not establish that the petitioner employed the beneficiary during any other salient time.

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).

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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. 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 \$22,963.20 per year. The priority date is May 6, 2002.

The petitioner has not established that it paid any wages to the beneficiary during 2002, and must therefore demonstrate the ability to pay the entire proffered wage to her during that year. During that year, the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of profits during that year. The petitioner ended the year, however, with net current assets of \$74,277. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during 2002.

The petitioner paid the beneficiary \$5,625 during 2003, and must show the ability to pay the \$17,338.20 during that year. At the end of 2003, according to its audited balance sheet, the petitioner had net current assets of \$111,619.³ That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petitioner has demonstrated the ability to pay the proffered wage during both of the salient years and has,

³ Because the petitioner showed its ability to pay the proffered wage during the previous year with its net current assets, it is foreclosed from showing its ability to pay the proffered wage during 2003 with its net cash from operations. Although a complete explanation of accrual and cash convention accounting is beyond the scope of today's decision, to show the ability to pay the proffered wage with net current assets during one year and to show the ability to pay the proffered wage with net cash from operations during the following year would count some of the petitioner's funds twice. The petitioner could, however, have shown its ability to pay the proffered wage with its 2003 net income of \$171,643.

therefore, overcome the sole basis for the decision of denial. 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.