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IN RE:

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 denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a cook specializing in Italian cuisine. 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 states that the petitioner has established that it has the ability to pay the proffered wage, and that Citizenship and Immigration Services (CIS) ignored evidence previously submitted. Counsel resubmits a letter from the petitioner's accountant.

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 the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 annually.

With the petition, the petitioner submitted the first page of IRS Form 1120, Federal Corporate Income Tax Return, for the year 2001, and a letter of work experience written by Michael De La Polla, Ottomanelli at Michael's, New York City. On the petition, the petitioner claimed to have been established in 1990, to have ten employees, and to have a gross annual income of \$1.1 million and a net annual income of \$529,322.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 6, 2003, the director requested additional evidence pertinent to that ability. The director stated that the petitioner indicated on its 2001 Form 1120, that the petitioner had a taxable income loss of \$1,556, with \$568 in depreciation. The director specifically requested

that the petitioner provide further evidence as to the petitioner's ability to pay the proffered wage. The director requested further information as to whether the beneficiary would fill a newly created position.

In response, the petitioner stated that the beneficiary would not fill a newly created position, and that the position of specialty cook of Italian cuisine had existed since the opening of the petitioner in 1990. The petitioner stated that the beneficiary is presently working as a cook at the proffered wage. The petitioner also stated that the beneficiary had not been issued a W-2 Form because the beneficiary had not been given a social security number by the Social Security Administration and that the beneficiary had not been given employment authorization for CIS. The petitioner submitted a copy of its 2001 federal income tax return. Statement Two of the tax return indicated that Richard Smith was the sole officer of the corporation. Page one of the tax return indicated that Mr. [REDACTED] received \$62,600 in compensation in 2001.

The petitioner also submitted a letter from [REDACTED] New York. Mr. [REDACTED] stated that the accounting office was fully familiar with the petitioner's income, expenses, financial condition and ability to pay employee wages and other operating expenses, both presently and in 2001. Mr. [REDACTED] states that the petitioner was established over 12 years ago and that in 2001, the petition had over \$1.1 million in gross receipts. In addition, the petitioner paid \$188,260.24 in employee salaries and \$62,000 in compensation to officers. [REDACTED] stated that the officer compensation was paid entirely to the sole corporate officer [REDACTED].

[REDACTED] also stated that the petitioner is located within walking distance of the theater district in New York City, and that following the attacks on the World Trade Center on September 11, 2001, a state of emergency was declared throughout New York City. As a result the petitioner's staff was not able to get to work during the state of emergency. Following the events of September 11, 2001 and severe disruptions, there was a sharp and prolonged drop in theatre attendance which impacted the petitioner's level of business for the remainder of the 2001 calendar year. [REDACTED] also stated that based on the petitioner's gross receipts for 2001, the daily receipts were \$3,108.28, and that the income from the three days the petitioner was closed, based on this daily figure, was \$9,324.85. [REDACTED] further stated that during the months of September and October 2001, the petitioner's business activities sharply declined. [REDACTED] stated that these factors should be examined and considered when examining the 2001 annual income of the petitioner. [REDACTED] stated that, at the very least, the per day income of the petitioner for the several days that it was required to close should be deemed to be included in its annual income, which would erase any net loss.

[REDACTED] also noted that after paying all employee salaries and operating expenses, the petitioner paid its sole officer and director \$62,000. The compensation for the sole corporation officer was money that was actually available in 2001 for the payment of any other required company expenses, including employee salaries, and operating expenses.

[REDACTED] also noted that the owner of the petitioner owns and operates a second ancillary corporation from the same physical premises. [REDACTED] identified the corporation as [REDACTED]. Mr. [REDACTED] states that the petitioner does business as Angels Restaurant, and the other business does business as Angels Take Out. The accountant submits menus for both entities, as well as photographs of [REDACTED] [REDACTED] as well as a copy of the Form 1120 for Angels Take Out. [REDACTED]

stated that Angels Take out in 2001 had \$357,115 in gross receipts for 2001 and paid \$82,620 in employee salaries in 2001. [REDACTED] also stated that Angels Take Out paid \$20,800 to [REDACTED] in 2001.

[REDACTED] noted that the second business, Angels Take Out, shows a net loss of \$2,009 for 2001. Mr. [REDACTED] stated that if the daily gross receipts for Angels Take Out in 2001, namely, \$978.39 a day, and the depreciation amount of \$1,663 were combined, the second company, Angels Take Out, would not be operating at a net loss in 2001.

The petitioner submitted a Form 1120 for tax year 2001 for [REDACTED]. This form indicates that [REDACTED] is the president and sole officer of this entity and was compensated \$20,800 during the tax year. Employees for this business entity received \$82,620 in salaries and wages. The petitioner also submitted its W-3 Transmittal of Wage and Tax Statements for 2001 which indicated the petitioner paid \$188,260.24 in wages. This document accompanied four Form 941 quarterly reports for 2001, and two Forms 941 for the first two quarters of 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 March 19, 2004, denied the petition. The director stated that the petitioner's 2001 Form 1120, which indicated a taxable income of \$1,556, was insufficient to establish that the petitioner had the ability to pay the proffered wage. With regard to the Form 1120 for 2001 submitted for the second business entity operating with the petitioner, the director stated that this form also indicated a net loss for 2001. The director also stated that this document could not be considered as evidence that the petitioner has the ability to pay the proffered wage, as each petitioner/company must be able to demonstrate that it can pay the proffered wage based on their own financial resources, not through the financial resources of ancillary corporations. With regard to the petitioner's accountant's comments on the compensation paid to the petitioner's sole officer, the director stated that the compensation of officers represents monies already expended by the corporation, and thus, this money was not considered to be readily available funds with which to pay the proffered wage. In sum, the director stated that the petitioner had not submitted sufficient documentation to establish that it had the ability to pay the proffered wage in 2001 and onward.

On appeal, counsel states the petitioner has clearly established its ability to pay the proffered wage of \$39,291 in 2001. Counsel states that CIS completely ignored and disregarded the events of September 11, 2001 on businesses located in Manhattan. Counsel further states that it appears the director ignored the detailed explanation and analysis of the impact of September 11, 2001 on the petitioner's business provided by the petitioner's accountant. Counsel requests that the accountant's letter be read and examined. Counsel then examined the petitioner's gross receipts in 2001, and the average gross receipts per day, and the income lost during the three days after September 11, 2001 while the petitioner was closed.

It is noted that counsel's assertion with regard to the three days of gross receipts that were lost following the September 11, 2001 are not persuasive as to the ability of the petitioner to pay the proffered wage. It is a given fact that many businesses located in Manhattan experienced similar losses of gross receipts immediately after the September 11, 2001 attacks and for the remainder of the year. What is not clear from counsel's assertion is the impact any increased gross profits during that period of time would have had on the petitioner's ability to pay the

entire proffered wage of \$39,291. First, the petitioner has submitted no further documentation to establish that its daily gross receipts in September prior to the September 11, 2001 were actually \$3,108.28 per day. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Second, if the average daily figure of gross receipts were more substantially documented, the projected gross for the three days, namely, \$9,324.85, the petitioner's taxable income would have still been insufficient to pay the proffered wage of \$39,291. Furthermore, *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. However, the totality of the circumstances of the petitioner in the instant petition are not analogous to the petitioner in *Sonogawa*, as counsel has not shown that the year 2001 was an uncharacteristically unprofitable or difficult year within a framework of successful years.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. Although the beneficiary indicated on the Form ETA 750 that he worked for the petitioner from January 2000 to the present, and the petitioner indicated in its response to the director's request for further evidence that it presently employed the beneficiary at the prevailing wage, the petitioner provided no documentation of any such employment in the form of W-2 forms or Forms 1099-MISC. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward. Furthermore since the petitioner did not establish any previous employment of the beneficiary, for purposes of these proceedings, the petitioner has to establish that it has the ability to pay the entire proffered wage, rather than the difference between actual wages and the proffered wage.

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, CIS will next 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). 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 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, now CIS, should have considered income before expenses were paid rather than net income. As correctly noted by the director, in 2001, the petitioner had taxable income of -\$1,556. This sum is not sufficient to pay the entire proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its 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 out of those net current assets. Upon review of the petitioner's tax returns submitted either with the initial petition or in response to the director's request for further evidence, the petitioner did not submit Schedule L. Therefore the AAO cannot examine the petitioner's net current assets for 2001 and whether these assets were sufficient to pay the proffered wage.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of -\$1,556, and unknown negative net current assets, and has not, therefore, demonstrated the ability to pay the proffered wage. Although counsel asserted that the owner of the petitioner had another ancillary business operating at the same physical location, and submitted financial and salary information on the second business, as correctly noted by the director, these two businesses appear to be distinct. 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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." Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

With regard to the compensation of the corporation's sole officer being used to pay the proffered wage, contrary to the director's comments, the compensation of sole corporate officers may be viewed as discretionary expense, as opposed to wages, which are not discretionary. As such, officers' compensation can be viewed at times as a source of additional funds with which to pay the proffered wage. However, in the instant petition, the record lacks substantive documentation to gauge the feasibility of the officer's compensation being considered as a means of paying the proffered wage. For example, the record lacks information on the compensation of the petitioner's officer for the years other than 2001, or that it is discretionary. In the instant petition, the record is not clear as to whether the corporate officer's compensation

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.

for the petitioner and for the second company owned by the corporate officer are in fact the only compensation provided to the corporate officer. The record reflects no information as to whether the amount of officer compensation varied over the course of the pertinent years 2001, 2002, and 2003, demonstrating that the amount does not represent some contractually obligated and fixed amount of compensation.

With regard to the instant petition, although counsel and the petitioner's accountant raise the issue of officer's compensation, and the petitioner's income tax form does establish that [REDACTED] is the sole officer, the record contains incomplete documentation of the petitioner's financial resources in 2001, and no further information as to the petitioner's previous or subsequent income tax returns to document the amounts of the sole officer's compensation, or the difference between the beneficiary's proffered wage and the officer's compensation. Without more persuasive evidence, within the context of the totality of the petitioner's circumstances, the proposed use of the officer's compensation does not support the fact that the petitioner has established its ability to pay the proffered wage.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.