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U.S. Citizenship
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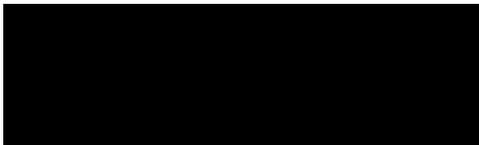
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FILE: LIN 03 210 51320 Office: NEBRASKA SERVICE CENTER Date: NOV 03 2005

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:



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 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 found 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 July 17, 2002. The proffered wage as stated on the Form ETA 750 is \$15 per hour, which equals \$31,200 per year.

On the petition, the petitioner stated that it was established during 2000 and that it employs eight workers. The petition states that the petitioner's gross annual income is \$595,458 but does not state its net annual income in the space provided. 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 Akron, Ohio.

In support of the petition, counsel submitted the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return and a letter from a bank, dated June 18, 2003. That letter states the balances on that date of two accounts held under the petitioner's tax identification number, which the letter mischaracterizes as a social security number.

Counsel also provides tax returns and bank letters pertinent to other corporations with names similar to the petitioner's. The record of proceeding shows that those other corporations are commonly held or otherwise affiliated with the petitioner.

The petitioner's 2002 tax return shows that it was incorporated on May 1, 2000 and that it reports taxes pursuant to the calendar year. During 2002 the petitioner reported taxable income before net operating loss deduction and special deductions of \$36,693. The corresponding Schedule L shows that at the end of that year the petitioner had net current assets of \$29,360 and no current liabilities, which yields net current assets of \$29,360.

On February 6, 2004 the Director, Nebraska Service Center, requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a letter, dated February 19, 2004, in which he noted that, "the Petitioner owns four (4) locations [REDACTED]. Together, these locations for the year 2003 had \$2,248,353.05 in sales." [Emphasis in the original.]

Counsel's statement is incorrect. The petitioner in this case is [REDACTED] incorporated dba [REDACTED]. It is not any other entity. The other restaurants listed are separate corporations.

The petitioner 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 with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). Counsel's assertions pertinent to the income and assets of other corporations are inapposite.¹

Counsel provides unaudited figures for the gross sales of [REDACTED]. [REDACTED] is not the petitioner in this matter. The financial vigor of [REDACTED] is inapposite to the instant proceeding.

Further, 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. Counsel's reliance on unaudited financial records is misplaced.

Finally, figures for gross sales are not generally convincing evidence of a petitioner's continuing ability to pay the proffered wage beginning on the priority date. Showing that the petitioner's gross receipts exceeded,

¹ Further, CIS records show that the other corporations listed by counsel have filed petitions for alien workers. Those other cases will be judged separately from the instant case, based on the merits of those other cases, including those other petitioner's continuing ability to pay the proffered wage beginning on the priority date.

or greatly exceeded, the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income,³ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 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 11, 2004, denied the petition.

On appeal, counsel submits the petitioner's 2003 Form 1120 U.S. Corporation Income Tax Return.

The petitioner's 2003 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$72,801 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$68,628 and no current liabilities, which yields net current assets of \$68,628.

In the brief, counsel contends that the formula for current assets is "CURRENT ASSETS = Stocks + Debtors [sic] + Cash" [Emphasis in the original.] As authority for that position counsel provides a printout of web content from a site in the United Kingdom. Notwithstanding that the phrase "current assets" may be differently defined in Britain than it is in the United States, that formula is incorrect for IRS purposes. An explanation of the calculation of net current assets is included below.

Counsel again cites the income of the affiliated corporations pertinent to which evidence was previously provided. Again, evidence pertinent to those other corporations is not directly relevant to the instant case. The petitioner must show the continuing ability to pay the proffered wage beginning on the priority date out of its own funds, not the funds of its owner or any other 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 a given period, the AAO will, in addition, examine the net income figure reflected on

² The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

³ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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). 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.

End-of-year net current assets are the taxpayer's end-of-year current assets, shown on a Form 1120, U.S. Corporation Income Tax Return, Schedule L, at lines 1(d) through 6(d), less the taxpayer's end-of-year current liabilities, shown on Schedule L at lines 16(d), 17(d), and 18(d). Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. Thus, if the 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$31,200 per year. The priority date is July 17, 2002.

During 2002 the petitioner reported taxable income before net operating loss deduction and special deductions of \$36,693 during that year. That amount is sufficient to pay the proffered wage.⁴ The petitioner has demonstrated the ability to pay the proffered wage during 2002.

⁴ The Service Center relied upon the petitioner's taxable income in stating that it did not have the ability to pay the proffered wage. The petitioner's taxable income is equal to its taxable income before net operating loss deduction and special deductions less its net operating loss deduction and special deductions. This case involves no special deductions. The difference between the petitioner's taxable income before net operating loss deduction and special deductions and its taxable income was the amount of its net operating loss deduction. A net operating loss deduction, however, is not a current expense. It is a carry-forward of losses from previous years. It does not require or represent the current use of cash. The Service Center should correctly have considered the petitioner's taxable income before net operating loss deduction and special deductions in determining its continuing ability to pay the proffered wage beginning on the priority date.

During 2003 the petitioner reported taxable income before net operating loss deduction and special deductions of \$72,801 during that year. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner has demonstrated that it was able to pay the proffered wage during both of the salient years. Therefore, the petitioner has sufficiently 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 met that burden.

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