



U.S. Citizenship
and Immigration
Services

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FILE: LIN 03 190 51892 Office: NEBRASKA SERVICE CENTER Date: **OCT 18 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant specializing in Russian cuisine. It seeks to employ the beneficiary permanently in the United States as a chef. 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is December 9, 2002. The proffered wage as stated on the Form ETA 750 is \$28,000 annually. On the Form ETA 750B, signed by the beneficiary on November 20, 2002, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on May 30, 2003. On the petition, the petitioner claimed to have been established in 2001, to currently have six employees, to have a gross annual income of \$943,862, but left blank the box in the petition asking for its net annual income.

In support of the petition, the petitioner submitted:

- Counsel's G-28;
- An original certified Form ETA 750;
- A CPA's support letter dated May 15, 2003, with an unaudited profit and loss statement for 2003;

In a request for evidence (RFE) dated January 22, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, along with more evidence the beneficiary met the job qualifications, specifically for four-years experience as a chef. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual

reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, counsel submitted on April 14, 2004:

- The personal financial statement [REDACTED] the petitioner's president and co-owner with his wife of both the petitioner and [REDACTED] a Sub-S corporation;
- A notarized listing [REDACTED] total assets estimated worth more than \$500,000;
- The 2003 Form 1120S, Form 940 returns and the 2003 employer's quarterly reports of both the petitioner and [REDACTED];
- Line of credit evidence of [REDACTED] and of his two Sub-S corporations;
- An April 13, 2004 letter from [REDACTED] to counsel.

In a decision dated May 27, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence status, and denied the petition.

The director based his denial upon the petitioner's income tax losses or if gains, in an amount less than the proffered wage. The director also took into account the financial standing of [REDACTED]. He rejected evidence of [REDACTED] personal financial worth as "not considered business funds at risk, and ... therefore not acceptable evidence in calculating an ability to pay the proffered wages."

On appeal, counsel submits a brief and additional evidence.

Counsel urges this office to consider the combined income and assets of two separate entities owned by the president of the petitioning corporation, in analyzing the petitioner's ability to pay the proffered wage. The arguments of counsel are not convincing, because despite the inclusion of numerous forms of financial documentation from a combination of entities, the primary issue to be determined is whether the petitioner alone had the ability to the proffered wage during the relevant time period.

Although it is undisputed that the petitioner is a corporation, counsel asserts on appeal is that the office should consider the combined proceeds and assets of two entities: the petitioner, and a second corporation. Counsel's position is that since the petitioner's president is its sole shareholder, and is also the owner, with his wife, of the other entity, the two distinct businesses should be considered as one for purposes of financial analysis. Counsel, however, cannot rely on the revenue of an additional and distinct business entity as a means of establishing the petitioner's ability to pay, for this position clearly contradicts the established legal practices and treatment of business organizations. Contrary to counsel's primary assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

Counsel asserts that the petitioner's president is, with his wife, its sole shareholder, as well as the sole shareholder or owner of another other food establishment. However, he personally is not the petitioner named in the petition. The actual named petitioner is a corporation, and therefore, for purposes of this decision, the law pertaining to corporations is controlling. The petitioner is a corporate entity, and therefore it is irrelevant whether its president owns majority shares in the other establishment or has substantial personal assets.

Moreover, counsel alleges in his appeal brief that the two establishments are affiliated companies as a result of the involvement of the petitioner's president in each business. *See* The Investment Company Act, 15 U.S.C.A. § 80a-2.

This office notes that this section of the United States Code is intended to regulate the actions of investment companies in commerce and trade. Consequently, counsel's reliance on the definitions cited is inapposite with the present analysis of the petitioner's ability to pay the proffered wage. The fact that the two establishments may be affiliated under the definitions of the above-referenced subchapter does not supersede the fundamental rules of corporate law. The office, therefore, may not pierce the corporate veil and look to the assets of the petitioner's president as evidence of the petitioner's financial state.

Counsel asserts that consideration should be given to the [REDACTED] investment holdings and similarly to his lines of credit as additional means of establishing the petitioner's ability to pay the proffered wage. It is generally stated that a corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel states on appeal that the director erred by not accepting the petitioner's contention that the beneficiary's work will generate income,¹ that outside pledges of support will sustain the petitioner,² or that its quarterly wage reports show the petitioner's ability to pay the proffered wage.

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.

The decision in *Full Gospel*, cited by counsel, is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S*, 20 I&N Dec. 715 (BIA 1993). Further, the

¹ *Masonry Masters, Inc., v. Thornburgh*, 8975 F. 2d 898 (D.C. Cir. 1989) [all cites in counsel's brief];

² *Gospel Baptist Portland Church v. Thornburgh*, 730 F. Supp. 441, 449 (D.D.C. 1988)

decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a music teacher. Here, counsel is assertion that CIS should treat its principal shareholder's assets and lines of credit as evidence of its ability to pay, even though a line of credit creates an expense and a debt, whereas a parishioner's pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the line of credit.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner, RSVP's, tax returns show the following amounts for ordinary income:

Tax Year	Net income	Income Increase Needed To Pay Proffered Wage	Surplus or Deficit
2002	-\$161,465	\$189,462	Deficit
2003	-\$220,736	\$248,733	Deficit

Since each of those figures is negative or less than the proffered wage, those figures fail to establish the ability of the petitioner to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current

liabilities are shown on lines 16 through 18. If a corporation's 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 those an employer might expect to convert to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -\$226,882 for 2002; -\$21,050 for 2003.

Since each of those figures is negative, they also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of unaudited financial statements, including that attached to the May 15, 2003 letter of [REDACTED] CPA. Intended as an internal planning document, the projected profit and loss statement is not persuasive evidence of the petitioner's financial condition as of the priority date. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel does not provide any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers. While having a chef trained in Russia may help to build a base of loyal patrons, it is unclear whether hiring such a chef would increase the petitioner's revenues enough to overcome the deficits reflected in the petitioner's tax returns for 2002 and 2003.

Counsel asserts that [REDACTED] lines of credit are additional support for finding the petitioner had demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence status.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's line of credit will not be considered for two reasons beyond those involving the stated reasons against piercing the corporate veil for the benefit of the petitioner as opposed to its creditors. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to

demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

After a review of the federal tax returns and of the other alternative sources of funds to pay the proffered wage, it is concluded that the petitioner has not established its ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, the record of proceeding indicates that the petitioner intended to hire a second chef from the Ukraine, whose petition, to permanently hire and classify under 8 C.F.R. §203(b)(3) as a skilled worker, it has also filed on the same date as it did the instant petition. CIS records say the director also denied and which the petitioner has also appealed to AAO. Accordingly, the petitioner would need to establish that its ability to pay twice the amount of the proffered wage in case the AAO were to sustain that appeal. However, the decision will be decided on the other grounds specified.

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.