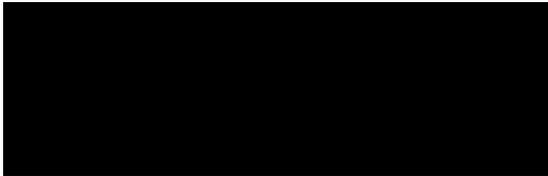


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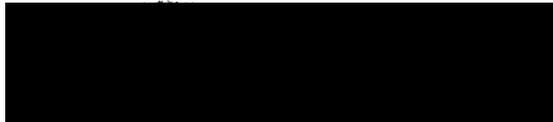
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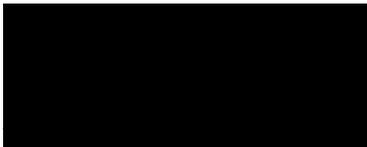
IN RE: Petitioner:



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

DISCUSSION: The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the 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 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 10, 2001. The proffered wage as stated on the Form ETA 750 is \$11.00 per hour (\$22,880.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120S U.S. Corporation Income Tax Return for 2002, copies of financial statements, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The Service Center specifically requested "at least one" of petitioner's annual reports, tax return for 2001, or audited financial statements. The Service Center also requested "additional secondary" evidence such as profit and loss statements for the period January 1, 2001 through December 31, 2001, and bank account records that "encompass" the priority date of April 10, 2001.

The director denied the petition on May 12, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the "Enclosed financial records from petitioning employer show continued ability to pay the proffered wage – especially Net Current Assets (alone and when added to Net Income)." Counsel submits additional evidence.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$22,880.00 per year from the priority date:

- In 2003, the Form 1120S stated taxable income¹ of \$11,429.00.
- In 2002, the Form 1120S stated taxable income of \$14,413.00.
- In 2001, the Form 1120S stated taxable income of \$6,978.00.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now 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 v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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. As opposed to the petitioner's total assets, the AAO will consider only the net current assets in the determination of the ability to pay the proffered wage. In the subject case, as set forth

¹ IRS Form 1120S, Line 21.

above, petitioner did not have taxable income to sufficient pay the proffered wage at any time between the years 2001 through 2003 for which petitioner's tax returns are offered for evidence.

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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's 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.

Examining the Forms 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates the following:

- In 2003, petitioner's Form 1120S return stated current assets of \$5,631.00 and \$2,384.00 in current liabilities. Therefore, the petitioner had \$3,247.00 in current net assets for 2003. Since the proffered wage was \$22,880.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$5864.00 and \$2415.00 in current liabilities. Therefore, the petitioner had \$3,449.00 in current net assets for 2002. Since the proffered wage was \$22,880.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120S return stated current assets of \$4,914.00 and \$2,950.00 in current liabilities. Therefore, the petitioner had a \$1,964.00 in current net assets for 2001. Since the proffered wage was \$22,880.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. The common elements of this contention are, according to counsel's brief in the matter, an accountant's analysis of its financial condition, depreciation as an asset, bank account records, and shareholder distributions. Petitioner offers to establish an account to be funded to pay the proffered wage.

Counsel cites no legal precedent for these contentions, and, according to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Petitioner's counsel cited no legal precedent for his position. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

² 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.

³ 8 C.F.R. § 204.5(g)(2).

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted.

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, 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 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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The petitioner offers an analysis prepared by its accountant derived from its tax returns, some of which it submitted to CIS, and company records for years 2002 through 2005. The analysis is essentially a series of conclusions made by the accountant derived in part from the tax returns analyzed above. Contrary to the accountant's statements, based upon the above financial tests demonstrated above, the income generated from the business was insufficient to pay the proffered wage in any year examined. Since the accountant's analysis is not an audited financial statement, it cannot under regulation be given the same probative weight as audited statements. Further, we note that although the accountant stated that he derived financial data from tax returns for years since 2003, the petitioner chose not to send its 2004 tax return for review. The 2004 tax returns may have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage.

Petitioner offers to establish an account to be funded to pay the proffered wage, and, it also offers owner shareholder distributions to pay the proffered wage. The shareholders declare their distributions to be "surplus," but, the AAO finds it unlikely that the petitioner's shareholders would give up nearly all of his compensation to fund an employee. Moreover, the total of officer compensation and income is less than the proffered wage in 2001, and in 2003, the petitioner did not report any officer compensation. No evidence was submitted that the shareholder distributions were discretionary, and, the evidence presented is contrary to this contention. 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 including shareholder distributions or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Further, petitioner does not specify where the funds would be derived to fund the account to pay the proffered wage or why this "round-about" method of paying an employee's wages is necessary. Presumably, since the company does not have taxable income sufficient to pay the proffered wage, outside sources would be called upon to make up shortfalls that would increase its liabilities and worsen its financial position.

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. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unique or unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 through 2003 for which tax returns were submitted was an uncharacteristically unprofitable period for the petitioner.

The above tax returns present evidence that in no year examined could petitioner could pay the proffered wage from taxable income or net current assets since year 2001. Thereafter, the petitioner had not the ability the ability to pay the proffered wage from either taxable income or net current assets for each year. .

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the three corporate tax returns as submitted by petitioner that by any test shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.