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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
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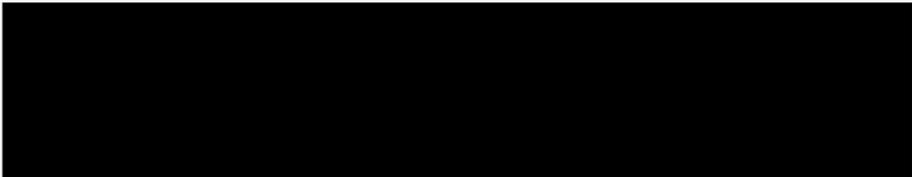
FILE: EAC 02 196 52443 Office: VERMONT SERVICE CENTER Date: APR 25 2006

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

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 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 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 April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$14,75 per hour, which equals \$30,680 per year.

On the petition, the petitioner stated that it was established on August 1, 1990 and that it employs five workers. The petition states that the petitioner's gross annual income is \$330,152 but the petitioner declined to state its net annual income in the space provided. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Margate, New Jersey.

On the Form ETA 750B, signed by the beneficiary, the beneficiary appears to claim to have worked for the petitioner. However, in the space provided for the starting date of that employment, the beneficiary entered "Job now open." In the space provided for the end date of that employment, the ETA 750B reads "Open." Whether the beneficiary is claiming employment for the petitioner on that form is unclear.

In support of the petition, counsel submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that [REDACTED] owns the petitioner and that the petitioner reports

taxes based on the calendar year. That return also shows that the petitioner declared ordinary income of \$9,364 during that year. The corresponding Schedule L shows that the petitioner ended the year with current assets of \$10,529 and current liabilities of \$7,823, which yields net current assets of 2,706. This office notes that, although the petition was submitted on May 20, 2002, the petitioner's 2001 tax return was already available. The tax preparer who signed that form dated it March 5, 2002.

Counsel also provided a 2001 Form W-2 Wage and Tax Statement showing that the petitioner paid \$24,000 to [REDACTED] during that year. In a cover letter, dated May 13, 2002, counsel stated that the beneficiary would replace [REDACTED] the petitioner's owner, as cook when the beneficiary is able to work for the petitioner.

Finally, counsel submitted the petitioner's bank statements for various months.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on March 6, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested the petitioner's 2000 tax returns and Form W-2 Wage and Tax Statements showing all of the wages the petitioner has paid to the beneficiary during any periods when it employed him.

The petitioner's response was submitted on June 2, 2003. Although the petitioner's 2002 tax return should then have been available, that return was not provided and no explanation for its absence was given.

Counsel submitted a letter, dated May 30, 2003, from the petitioner's owner. That letter states that the beneficiary will replace the owner as cook and that the owner would devote more of his time to management of the restaurant. The letter states that the petitioner anticipates, therefore, that better management and a better cook will result in increased profits.

Counsel submitted a 2001 W-2 form showing that the petitioner paid wages of \$10,918 to [REDACTED] during 2001. In his letter of May 30, 2003 the petitioner's owner stated that Mr. [REDACTED] sometimes substituted for him as cook, and that Mr. [REDACTED] wages are also available to pay the proffered wage. Counsel also submitted a 2002 W-2 form showing that the petitioner paid the beneficiary \$3,780 in wages during that year. In his letter, the petitioner's owner states that those wages were for two months of work.

Counsel also provided a copy of the 2001 joint Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse. That return shows that the petitioner's owner and owner's spouse had adjusted gross income of \$54,144 during that year, and that they had two dependents.

In response to a request in the Request for Evidence, counsel provided a copy of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. This office observes that, notwithstanding that direct request, the priority date is April 24, 2001, and evidence of the petitioner's financial condition during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Finally, counsel submitted additional bank statements.

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 August 13, 2003, denied the petition. In that decision the director cited *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958) for the proposition that the income and assets of a corporation's owners may not be counted in determining whether the corporation is able to pay the proffered wage. The director also cited *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1986) for the proposition that CIS may rely on the petitioner's tax returns in determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel argues that (1) the petitioner's tax returns should be considered on a "cash flow basis," (2) the director erroneously concluded that the petitioner's Compensation of Officers<sup>1</sup> is not discretionary, (3) that Compensation of Officers is an elective expense, (4) that *Matter of M, Supra*, is not on point, (5) that the instant petitioner's owner is entitled to invest his income and assets in his company, and (6) that the petitioner's bank statements show its continuing ability to pay the proffered wage beginning on the priority date.

The appeal in this matter was submitted on September 15, 2003. Counsel did not submit a copy of the petitioner's 2002 tax return with that appeal, although the return should have been available. Counsel provided no reason for the failure to submit that return.

In support of the appeal, counsel submits copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the second quarter of 2001 through the first quarter of 2003, inclusive. Those returns show that the petitioner employed from four to six workers during those quarters. The petitioner paid total wages during those quarters ranging from \$14,844 to \$19,860.<sup>2</sup> Those returns also show that the petitioner employed the beneficiary during the second and third quarters of 2002 and paid him \$1,680 and \$2,100 during those quarters, respectively, for a total of \$3,780, thus confirming the amount shown on the 2002 W-2 form previously submitted.

Counsel submits a deed to a property of the petitioner's owner and [REDACTED]. Although the petitioner's owner and [REDACTED] took title as husband and wife, [REDACTED] is not the petitioner's owner's spouse as shown on his 2001 Form 1040 U.S. Individual Income Tax Return.<sup>3</sup> A notation on that deed appears to show that [REDACTED] is the petitioner's owner's mother. Although that deed indicates that the petitioner's owner and his mother paid \$190,750 for that property on April 27, 1988, counsel submits no evidence of its current market value, that the petitioner's owner and his mother still own it, or of the amount of any encumbrances. The record contains insufficient evidence for this office to determine the petitioner's owner's equity in that property, if any. Further, any equity in that property would be the property of the individual owners, not of the petitioning corporation. That consideration is addressed further below.

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<sup>1</sup> Form 1120S, U.S. Income Tax Return for an S Corporation, Line 7.

Those returns show that, during the entire 2002 calendar year, for instance, the petitioner paid total wages of \$68,297.

<sup>3</sup> The spouse named on the petitioner's 2001 tax return is [REDACTED]

Counsel submits a copy of the petitioner's Certificate of Incorporation. That certificate indicates that that [REDACTED] is an alias of the petitioner's owner. [REDACTED]

Finally, counsel submits additional bank statements.

Counsel states that the petitioner's ability to pay the proffered wage should be considered on a cash flow basis, rather than based on year-end accumulations. Counsel states that the petitioner's cash flow during 2001, for instance, was \$7,891 during April, \$12,124 during May, \$9,481 during June, \$20,538 during July, \$22,708 during August, \$20,768 during September, and \$12,121 during October. If counsel submitted evidence that those figures were the petitioner's net cash flow from operations,<sup>4</sup> counsel would have demonstrated the petitioner's ability to pay the proffered wage during those months. Those figures, however, are the petitioner's bank balances at the end of those months.

Counsel's reliance on bank statements 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.<sup>5</sup> 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 returns.

Counsel implies that the petitioner's Compensation of Officers is discretionary, and that for the director to conclude otherwise was error.<sup>6</sup> Counsel further implies that, therefore, the amount the petitioner paid as compensation to its officers during each of the salient years should be included in the determination of the petitioner's ability to pay the proffered wage during those years.

For this office to conclude that the petitioner's Compensation of Officers is discretionary, counsel must demonstrate that the officer or officers are willing and able to forego that compensation and that the petitioner is not obliged to pay it. In fact, what little evidence the record contains on that point suggests that the petitioner's Compensation of Officers is not discretionary, but fixed.

During 2000 the petitioner paid Compensation of Officers of \$24,000. During 2001 the petitioner paid Compensation of Officers of \$24,000. Nothing in the record suggests that the compensation paid was discretionary, rather than fixed, by contract or otherwise.

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<sup>4</sup> Pursuant to 8 C.F.R. § 204.5(g)(2), the only acceptable evidence of the petitioner's net cash flow from operations would be its audited financial statements or annual reports that included such statements.

<sup>5</sup> The decision of denial enunciates a possible exception to this general rule. That decision implies that, if the bank statements showed a monthly incremental increase equal to the monthly amount of the proffered wage, then those bank account statements would show the petitioner's ability to pay the proffered wage. That hypothetical scenario is not present here, however, and this office expresses no opinion on the wisdom of accepting that incremental increase as evidence of ability to pay.

<sup>6</sup> Up to that point, counsel had not asserted that the petitioner's Compensation of Officers is discretionary.

Counsel argues that the wages the petitioner paid to its owner were for working as its cook, and that, if the beneficiary relieves the owner of those duties, that amount would be available to pay the proffered wage. Counsel submits a 2001 Form W-2 showing that the petitioner paid its owner \$24,000 in wages during that year. Counsel also submits a 2001 Form W-2 showing that the petitioner paid an additional \$10,918 to [REDACTED]. The petitioner's owner states that Mr. [REDACTED] sometimes relieved him as cook. The petitioner's owner states that, if the beneficiary were available to work full-time, then those wages, too, would be available to pay the proffered wage.

The petitioner's owner states that "[he] is sometimes relieved by [REDACTED]." The petitioner's owner offered no evidence in support of that assertion. Further, the petitioner's owner did not even allege that **all** of the wages paid to Mr. [REDACTED] were for working as a cook, rather than for working occasionally as cook and at other times in other capacities. **Without** additional evidence this office is unable to determine what portion of the \$10,918 paid to [REDACTED] was for performing in the capacity of cook, and unable, therefore, to determine what portion of that amount would have been available to pay the proffered wage if the beneficiary had then been able to work for the petitioner.

In various submissions, counsel and the petitioner's owner have suggested that hiring the beneficiary will result in increased profits. Neither counsel nor the owner, however, has provided even a reasonably supported estimate of the increased profits that the petitioner will thereby obtain.

If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of additional gross income the beneficiary would generate, if any. 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 income generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

In the decision of denial, the director cited *Matter of M, Supra*, for the proposition that the petitioner's owner's income and assets are not properly considered in determining the petitioner's ability to pay the proffered wage. Counsel counters that *Matter of M* does not stand for that proposition. Counsel is correct that the director's cite was insufficiently specific.

**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 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.

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 director requested W-2 forms showing all of the wages the petitioner has paid to the beneficiary. In response, the petitioner submitted a 2002 W-2 form showing that the petitioner paid the beneficiary \$3,780 during that year. The petitioner submitted Form 941 Employer's Quarterly Federal Tax Returns showing that it paid all of those wages to the beneficiary during the second and third quarters of 2002. The petitioner has not demonstrated that it employed or paid the beneficiary during any other 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).

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 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 \$30,680 per year. The priority date is April 24, 2001.

During 2001 the petitioner declared ordinary income of \$9,364. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$2,706. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other available funds with which it might have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner has demonstrated that it paid the beneficiary \$3,780 during 2002, and must demonstrate its ability to pay the \$26,900 balance of the proffered wage during that year. The petitioner, however, submitted no copies of annual reports, federal tax returns, or audited financial statements covering 2002, although its tax returns, at least, should have been available. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not 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 not met that burden.

**ORDER:** The appeal is dismissed.