

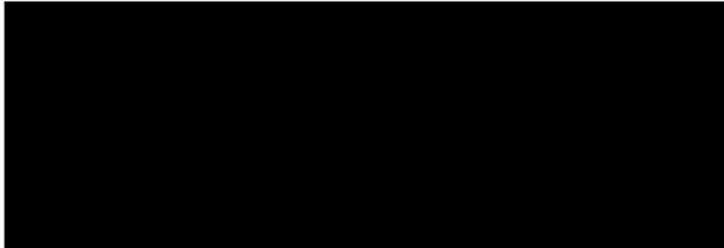
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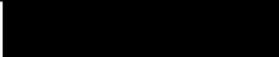


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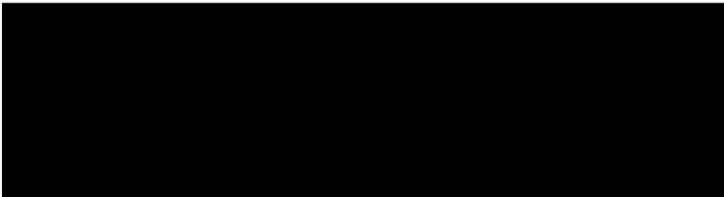
IN RE:

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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.

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 regulation at 8 CFR § 204.5(1)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 30, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$12.09 per hour (\$25,147.20 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits an explanatory letter and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a support letter; a Schedule C statement from [REDACTED]; U.S. Internal Revenue Service Form tax return for 2002; and, copies of newspaper articles concerning the [REDACTED], and a certificate.

Because the director determined the evidence submitted with the petition 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 director requested on June 23, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of a complete copy of the petitioner's U.S. federal tax return for 2002, and, an itemized list of the petitioner's monthly expenses. Supplementary evidence was also requested to the above. The director indicated profit/loss statements; bank account records or personnel records would be additional evidence of the ability to pay the proffered wage. The director requested the petitioner's U.S. federal tax return for 2002, and, a Form W-2 Wage and Tax Statement for the beneficiary if the petitioner ever employed him.

In response to the request for evidence, counsel submitted copies of the following documents: the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for years 2002 and 2003; documentation from the assessor's Office in Thailand stating that Ms. [REDACTED] owns unencumbered realty there; a letter from [REDACTED] Bank in Thailand stating that [REDACTED] has an account there in the amount of \$72,203.00 USD; an affidavit concerning [REDACTED] mother's living expenses; a bank statement and a letter from Fleet bank; an affidavit; canceled checks as well as other documents.

The director denied the petition on November 16, 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 beneficiary is a key employee of the business and she "... is critical to the future success of the Restaurant."

Counsel has explained the present living circumstances of the sole member, [REDACTED] who divides her time living with a daughter in Thailand, and her son [REDACTED] in the United States. Those children support their mother who also has resources independent from the business revenues of the restaurant and her

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² Ms. [REDACTED] is the sole member of [REDACTED]. Her son is the manager and operator of the business who in his own right, according to the record of proceeding, has invested his own funds in the restaurant business.

children's contributions for her living expenses. By logical implication, counsel is contending that the living expenses of [REDACTED] are not relevant to the issues here. We concur.

Further, counsel elaborates that [REDACTED] does not depend on the restaurant for her living; she has never taken any income from the restaurant; "...nor was it ever intended for [REDACTED] to take any income from the Restaurant." Counsel admits that [REDACTED] spends the majority of her time in Thailand. The limited liability company organization is apparently a legal device or fiction established "for planning purposes" and it was an investor's, [REDACTED] resources used to fund the business.

Counsel indicates that the director has failed to adequately consider the business income of \$8,091.00 reported on Exhibit K, Line 12 of the 2002 personal tax return.

Counsel asserts that a <\$14,031.00>³ net loss carry forward from the preceding tax year is also not relevant to the petitioner's 2002 tax return.

Counsel contends that the depreciation expense stated on the tax return as a deduction should be "... added back when calculating the Restaurant's ability to pay since it is not a true expenditure."

Counsel points out that in tax years 2001, 2002, and 2003 the petitioner paid the beneficiary \$15,600.00 per year according to the W-2 statements submitted. (Counsel states there was a fourth year in which the same wage was paid but there is no evidence to that assertion.) Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)).

Counsel has submitted the following documents to accompany the appeal statement, and additional documents transmitted later: the personal U.S. tax returns of Ms. [REDACTED] 36 months of bank statements from January 2001 to December 2003; an affidavit of Mr. [REDACTED] an affidavit of [REDACTED] three W-2s; data concerning [REDACTED] living expenses and pension; newspaper and trade articles; the 1999 and 2000 personal tax returns of the beneficiary; a bank statement; a loan agreement; a purchase and sale agreement; and, a financial statement.

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. Evidence⁴ was submitted to show that the petitioner employed the beneficiary. In tax years 2001, 2002, and 2003 the petitioner paid the beneficiary \$15,600.00 per year according to the W-2 statements submitted.

The petitioner is a limited liability company (LLC). Under U.S. IRS regulations if the organization is a single member LLC, that member must file a Schedule C for the LLC, which is attached to the Form 1040. If the LLC is a multiple member LLC, the LLC will file a separate tax return for the LLC, and each member will

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁴ W-2 statements submitted for years prior to the priority date and for prior employees have no probative in this matter.

file a Schedule K-1, which will be reported on Schedule E of the members' personal 1040 tax returns. Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation.

A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.⁵ An investor's liability is limited to his or her initial investment. As the owners and others only are obliged to pay a certain portion of those debts should they come due, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner, that is to say the LLC, must show the ability to pay the proffered wage out of its own funds.

For purposes of this discussion, since counsel is arguing that the member's income and assets are available to pay the proffered wage (there is no contract or no other evidence in the record to substantiate this), therefore, both the adjusted gross income/loss of Ms. [REDACTED] and the LLC's net profits will be examined.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$25,147.20 per year from the priority date of April 30, 2001:

- In 2002, the Form 1040 stated an adjusted gross income loss⁶ of <\$6,512.00>. In 2002, the restaurant enjoyed a net profit⁷ of \$8,091.00.
- In 2003, the Form 1040 stated an adjusted gross income of \$5,329.00. In 2003, the restaurant enjoyed a net profit of \$12,741.00.

Neither the adjusted gross income profit or loss for tax years 2002 and 2003, nor the net profits stated for those years for the business (i.e. the LLC) are sufficient to pay the proffered wage of \$25,147.20 per year.

If the net profit the petitioner, the LLC, demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period equal the amount of the proffered wage or more, CIS will conclude that the petitioner can pay the proffered wage.⁸

- In 2001, the Form 1040, Schedule C, stated a net profit of \$8,091.00. The petitioner paid the beneficiary \$15,600.00 per year in 2001. The proffered wage is \$25,147.20 per year. The sum of the taxable income and the wages paid is \$23,691.00 that is less than the proffered wage.
- In 2002, the Form 1040, Schedule C, stated a net profit of \$12,741.00.00. The petitioner paid the beneficiary \$15,600.00 per year in 2002. The proffered wage is \$25,147.20 per year. The sum of the taxable income and the wages paid is \$28,341.00 that is more than the proffered wage.

⁵ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

⁶ IRS Form 1040, Line 34.

⁷ IRS Form 1040, Schedule C, Line 31.

⁸ The petitioner's adjusted gross income/loss added to the wages paid are less than the proffered wage.

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. According to regulation,⁹ 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. Since depreciation is a deduction in the calculation of taxable income on tax Form 1040, this method would eliminate depreciation as a factor in the calculation of taxable income.

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.

On appeal, counsel asserts that the beneficiary is a key employee of the business, and, that she "... is critical to the future success of the Restaurant." He contends that the loss of the beneficiary as a specialty cook would cause a hardship to his business. The assertions of the counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a specialty cook will significantly increase petitioner's profits since the beneficiary has been in the petitioner's employ since 2001 for which W-2 statements have been submitted. The petitioner assertion is erroneous. Proof of ability to pay begins on the priority date, that is April 30, 2001, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel indicates that the director has failed to adequately consider the business income of \$8,091.00 reported on Exhibit K, Line 12 of the 2002 personal tax return. No Schedule K was found in the record of proceeding. That figure was stated above as found in Schedule C, and, it is a component to reach the adjusted gross income of the sole member of the petitioner.

⁹ 8 C.F.R. § 204.5(g)(2).

Counsel asserts that a <\$14,031.00> net loss carry forward from the preceding tax year is not relevant to the petitioner's 2002 tax return, and by implication, the sole member's of petitioner adjusted gross income. 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 CIS should have considered income before expenses were paid rather than net income.

Counsel advocates the use of the cash balances of the business accounts to show the ability to pay the proffered wage. 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 returns. Further, the sole member of the petitioner's assets, cash deposits and realty are located off-shore in her country, and, not readily available for process should legal actions be brought for back wages in the United States.¹⁰

As an additional, or alternative method to demonstrate its ability to pay, petitioner submits that it had an established line of credit from a bank. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income 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 suggestion that its income could be augmented with a line of credit will not be considered for two reasons. First, since a line of credit is a "commitment to loan" and not an existent loan, the petitioner 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.

¹⁰ Counsel has not disclosed the reason why Ms. [REDACTED] was chosen to be the sole member of the limited liability company when all of her assets that have been disclosed are out of reach in a foreign country and her son has made substantial investments in the same company, but, he himself, has no disclosed ownership interest in the limited liability company that owns the business.

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).

Counsel has submitted a purchase and sale agreement as evidence of the petitioner's ability to pay the proffered wage. We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.

The unaudited financial statements that petitioner submitted are not persuasive evidence. 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 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. Thus, the unaudited financial statements are of little evidentiary value in this matter.

There is an affidavit submitted by Ms. [REDACTED] dated December 2, 2004, in which she states that she spends nine months of each year in Thailand, and, that "Although I am the sole member of the Far East [REDACTED], the restaurant belongs to my son, [REDACTED] and I do not receive any income from the Restaurant, nor do I need any income from the Restaurant for support." This statement raises doubts about the veracity of the personal income tax returns submitted for Ms. [REDACTED] that state income or losses generated from the restaurant business as received by her.

To qualify as an employer, an organization must be a United States employer in existence. The [REDACTED] is in existence, albeit, its sole member is a Thailand national, whose participation in the control and ownership of the LLC is according to her own admission a legal fiction. The legality of this ownership is a question beyond our jurisdiction, but the existence of the restaurant business is not in question. We commend counsel for forthrightly presenting the above ownership structure. However, we must disregard the personal assets of Ms. [REDACTED] for the reasons above stated in the determination of the petitioner, LLC's, ability to pay the proffered wage. As already stated, an investor's liability is limited to his or her initial investment. As the owners and others only are obliged to pay a certain portion of those debts should they come due, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

Nevertheless, as demonstrated above, the LLC had sufficient profits when the salary of the beneficiary was considered to pay the proffered wage in 2002, and, the petitioner's profits in 2001 were only \$1,456.20 short of reaching the proffered wage amount when the beneficiary 2001 wage payment was considered. Based

upon all the factors above stated and the continuing existence of the petitioner in the restaurant business, it is credible to believe that the petitioner has the ability to continue to pay the proffered wage.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has 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 met that burden.

ORDER: The appeal is sustained.