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U.S. Citizenship
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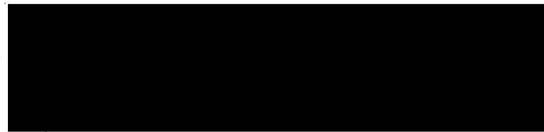
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FILE: LIN 05 098 50906 Office: NEBRASKA SERVICE CENTER

Date: DEC 18 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:

SELF-REPRESENTED

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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a pizza shop. 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, the petitioner states that based on its short-term employees and the wages paid to the petitioner's owners, the petitioner has sufficient finances to pay the proffered wage. The petitioner submits additional documentation.

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 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 December 16, 2002. The proffered wage as stated on the Form ETA 750 is an hourly of \$12, or an annual salary of \$24,960. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on March 2, 1998, and to have a gross annual income of \$654,386, and a net annual income of \$369,871. The petitioner indicated it had eight employees. In support of the petition, the petitioner submitted an IRS Form 1120S, U. S. Income Tax Return for an S Corporation, for [REDACTED] Youngstown, Ohio. This business has the same Employer Identification Number as the petitioner's that is identified on the I-140 petition. This document indicates that the petitioner had ordinary income of -\$21,922 in tax year 2002. The petitioner also submitted a translated document issued in Bialystok, Poland, that the beneficiary was employed as a cook in Tarkas Restaurant, and earned a monthly salary of 32,000 "zls". The original letter was signed by an agent

██████████ The petitioner also submitted a letter from ██████████ ██████████ Ridgewood, New York, undated, that noted the petitioner's employer's total liabilities and the shareholder's equity equaled \$159,562.

On March 29, 2005, the director denied the petition. In his denial of the petition, the director stated that the petitioner's 2002 tax return showed total income of \$369,871, an ordinary income loss of -\$21,922, and cash assets of \$30,307. The director determined that the petitioner had not provided sufficient evidence to establish its ability to pay the proffered wage of \$24,960 as of the December 16, 2002 priority date and onward, and denied the petition.

On appeal, Mr. ██████████ the petitioner's co-owner, states that the petitioner's income is \$654,386 with gross profits of \$369,871 and employee wages amounting to \$158,041. Mr. ██████████ states that several of his employees are students who will soon be looking for other areas of employment and are not long-term employees. In addition, the petitioner's owner states that the wages identified in the petitioner's tax return of \$158,041 include his wages and his wife's wages that total \$24,550. The petitioner's owner continues that since he and his wife are interested in pursuing other business ventures, they will need the beneficiary to manage the business and will utilize the wages paid presently to the petitioner's owner and his wife and the adjusted wages paid presently to employees to be transferred /adjusted to pay the beneficiary's proffered salary of \$24,960. The petitioner's owner states that his wife works fulltime as a registered nurse, that he has other business incomes, and that his sole income is not from the petitioner. Mr. ██████████ also stated that the wages paid to him and his wife, namely \$24,000, would not impact their lifestyle. The petitioner's owner submits his wife's W-2 Form for tax year 2002 that indicates she earned \$50,739.49 from Humility of Mary Health Partners. The petitioner's owner submits his 2002 W-2 form from the petitioner in the amount of \$20,800, and that of his wife in the amount of \$3,750. The petitioner's owner also submits the petitioner's Form 1120S federal tax return for tax year 2002. This document indicates that Mr. ██████████ is a 50 per cent shareholder in the petitioner, while Mr. ██████████ is also a 50 per cent shareholder.

On appeal, Mr. ██████████ one of the petitioner's 50 per cent shareholders, states that several of the petitioner's employees are short term college students and that he and his wife also receive wages from the petitioner. Mr. ██████████ states that the short term wages of the students and his and his wife's wages can be applied to the beneficiary's proffered wage. 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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." In the instant petition, Mr. ██████████ not stating that his assets be utilized to pay the proffered wage, but rather his wages and those of his wife, that totaled \$24,550. To the extent that Mr. ██████████ wishes to use his own wages provided by the petitioner, as opposed to any other outside financial assets, the AAO will examine this issue. However, upon examination, the use of Mr. and Mrs. ██████████ wages, documented by W-2 forms submitted on appeal, as opposed to the petitioner's other financial assets is not viewed as persuasive. In part, it is not persuasive as any examination of Mr. ██████████ wages lead to an examination of his other financial assets. For example, although Mr. ██████████ states that he has other

business income and as a result the use of his wages and his wife's wages to pay the beneficiary would not affect his lifestyle, Mr. [REDACTED] provided no further documentation on his other business income. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

While Mr. [REDACTED] did provide documentation on his wife's wages from her fulltime employment, the record contains no further explanation of the couple's financial responsibilities, including any other dependents. In addition, the payment of wages for services performed is an obligatory responsibility of the petitioner, not a discretionary one. While the payment of officer compensation may be viewed as discretionary, the payment of wages to employees is obligatory. It is also noted that the record is not clear as to whether Mr. [REDACTED] presently performs the same duties as the duties of the beneficiary, namely, cook, and thus, Mr. [REDACTED] wages could be available for payment of the proffered wage, if both he and the beneficiary performed the same work duties, namely, cook.

With regard to the suggested use of the wages of short-term employees to pay the proffered wage, Mr. [REDACTED] submits no further documentation, such as Forms 941, or payroll records, as to any actual wages paid by the petitioner to the short term employees. See *Matter of Soffici*, (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Second, Mr. [REDACTED] does not clarify whether no more short-term employees would be hired by the petitioner in the future, thus making these wages available to pay the proffered wage. The record is not clear as to whether the use of such short term employees is a one time occurrence, or short term employees always work for the petitioner.

It is also noted that Mr. [REDACTED] states that the beneficiary is needed to manage the petitioner since both he and his wife are interested in pursuing other business ventures. However, the Form ETA 750 submitted to the record and certified by the Department of Labor (DOL) only certifies the beneficiary's employment as an Italian cook. Mr. [REDACTED] description of the future employment of the beneficiary raises a problematic issue as to the nature of the beneficiary's actual job.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not state nor did it establish that it employed and paid the beneficiary the full proffered wage in 2002 and onward. Therefore the petitioner has the obligation to establish it can pay the entire proffered wage of \$24,960 as of the 2002 priority date and onward.

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, CIS will next 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). 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng* at 537.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2002 shows the following amount of ordinary income: -\$21,922. This figure fails to establish the ability of the petitioner to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. 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. Rather, 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. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its 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 out of those net current assets. The petitioner submitted the following information for tax year 2002:

	2002
Ordinary Income	\$ -21,922
Current Assets	\$ 31,915

Current Liabilities	\$ 11,277
Net current assets	\$ 20,638

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary in tax year 2002. In 2002, the petitioner shows a net income of -\$21,922, and net current assets of \$20,638, and has not, therefore, demonstrated the ability to pay the entire proffered wage of \$24,960 based on its net income or net current assets.

As stated previously, the wages paid to one of the petitioner's shareholders and his wives are not viewed as additional funds with which to pay the proffered wage. Therefore, the petitioner has not demonstrated that any other funds are available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2002 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, another reason exists to deny the instant petition. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Upon review of the record, the petitioner has not provided sufficient evidence to establish that the beneficiary has the requisite three years of work experience as a cook of Italian food as stipulated on the Form ETA 750. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986), and also *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The letter of work verification submitted to the record does not identify the period of time worked by the beneficiary at the Tarkas restaurant. It also does not provide any description of the beneficiary's work duties. Furthermore, the Form ETA 750, Part B, identifies the beneficiary's work experience at a restaurant identified as "██████████" from May 1987 to October 1989, a period of time less than three years. Thus, the petitioner has not established that as of the 2002 priority year date, the beneficiary had the requisite three years of work experience, and was thus qualified to perform the duties of the proffered position. For this additional reason, the petition shall be denied.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.