

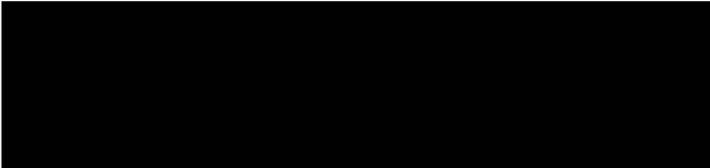
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U.S. Citizenship  
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FILE: EAC 05 040 53318 Office: VERMONT SERVICE CENTER Date: DEC 29 2006

IN RE: Petitioner:  
Beneficiary:



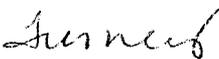
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director (director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal from the director's denial. 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 (DOL), 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 asserts that the director should have issued a request for evidence and contends that the director erred in analyzing the evidence that was submitted. Counsel maintains that the petitioner's financial ability to pay the proposed wage offer has been established.

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) provides:

*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. 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 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$10.90 per hour, which amounts to \$22,672 per annum. On the Form ETA 750B, signed by the beneficiary on April 30, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on November 26, 2004, the petitioner claims to have been established in 1988, and to currently employ twelve workers. In support of its ability to pay the proffered wage of \$22,672, the

petitioner provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, and 2003. They reflect that the petitioner files its federal tax returns using a standard calendar year. The returns contain the following information pertinent to ordinary income, current assets and liabilities, and net current assets:

	2001	2002	2003
Ordinary Income <sup>1</sup>	-\$115,682	-\$ 60,316	-\$ 40,413
Current Assets (Sched. L)	\$ 16,946	\$ 27,624	\$ 5,529
Current Liabilities (Sched. L)	\$ 112,581	\$122,011	\$150,812
Net current assets	-\$ 95,635	-\$ 94,387	-\$145,283

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.<sup>2</sup> Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a readily available resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

In addition to the petitioner's federal tax returns, the petitioner provided copies of the petitioner's Transmittal of Wage and Tax Statements (W-3s) for 2001-2003, a copy of a 2003 federal tax return of a separate corporation, [REDACTED] that represents another business owned by the petitioner's principal shareholder, copies of the principal shareholders' individual tax returns for 2001-2003, as well as their individual "Statement of Financial Condition," dated October 16, 2004. The petitioner further provided two transmittal letters, dated June 14, 2004 and November 2, 2004, from the petitioner's accountant, [REDACTED] to the petitioner's counsel, that were submitted in conjunction with the enclosure of various documents, which were provided to the record. In one letter, Ms. [REDACTED] states that by adding back a combined depreciation expense and the owners' salaries, it would increase the combined net income for both [REDACTED] and the petitioner. In the November 2004 letter, she refers to the provision of copies of the owners' W-2s and the 2004 statement of financial condition, and states that they should help in establishing the petitioner's ability to pay as the business owners have personal assets they are willing to use to fund the petitioner if necessary.

The director denied the petition on February 18, 2005. Declining to consider [REDACTED] and the principal shareholders' individual tax returns, the director noted that the neither the petitioner's ordinary income, nor its net current assets were sufficient to pay the certified wage in any of the year(s) 2001, 2002, and 2003. The director

<sup>1</sup> For the purpose of this review, ordinary income will be treated as net taxable income.

<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

concluded that the petitioner had not established its continuing financial ability to pay the proffered wage beginning at the priority date.

On appeal, counsel asserts that the director should have requested additional evidence of the petitioner's ability to pay the proffered wage in accordance with guidelines set forth in a *Memorandum by William R. Yates, Associate Director of Operations*, "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)" (February 16, 2005), (hereinafter "Yates Memorandum"), which had rescinded an earlier memo from May 4, 2004, that the director had cited in his decision. Counsel also asserts that the director's refusal to consider the evidence relating to the individual financial data of Flipper, Inc. and the petitioner's individual shareholders constituted an abuse of discretion and a disregard for judicial precedent.

These assertions are not persuasive. It must be noted that there were two memos issued on May 4, 2004, by William Yates. One was *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004), which also dealt with requests for evidence specific to employment-based petitions, as well as other adjudicative issues. The other memo was simply titled, "Requests for Evidence (RFE)" and was also dated May 4, 2004. The latter was rescinded by the February 16, 2005 memo. It is unclear which May 4, 2004 memo the director was referring to in his decision as he does not state the exact title.

It is further noted that CIS jurisdiction includes a determination of whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9<sup>th</sup> Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

With regard to the 2005 Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely is offered as guidance.<sup>3</sup> Moreover, in this matter, we do not find that the director should have necessarily requested additional evidence because counsel provided ample documentation, pursuant to 8 C.F.R. 204.5(g)(2), sufficient to render a decision. It would have been helpful if counsel had suggested the nature of the additional evidence that would have been supplied or simply provided it on appeal.

Nor do we disagree with the director's analysis of the evidence that was provided. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current

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<sup>3</sup>See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record contains no indication that the petitioner has employed the beneficiary.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)).

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 depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further 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 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets as noted above.

It is noted that the individual assets of the petitioner's principal shareholder(s) or of Flipper, Inc., will not be considered in reviewing the petitioner's financial ability to pay the proposed salary. The petitioner is the named corporate employer on the preference petition. 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 no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). 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.”

Similarly, with regard to the shareholder(s) purported willingness to fund the petitioner in the future, it is noted that a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts, but must demonstrate the ability to pay the beneficiary's wage from the priority date onwards. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits an individual future guarantee to be utilized in lieu of proving the petitioner's own ability to pay through the prescribed financial documentation set forth in 8 C.F.R. § 204.5(g)(2), which provides that the continuing ability to pay the certified wage commences at the priority date. Whether characterized as a pledge from individual assets or as a promise to periodically loan money, a guarantee is a future promise of payment and does nothing to alter the immediate eligibility of the instant visa petition.

In this case, as noted by the director, neither the petitioner's ordinary income of -\$115,682, nor its net current assets of -\$95,635 could meet the proffered wage of \$22,672 in 2001. In 2002, neither the -\$60,316 in ordinary income, nor the -\$94,387 in net current assets could not meet the certified wage. Similarly in 2003, neither the petitioner's ordinary income of -\$40,413, nor its net current assets of -\$145,283 could pay the proffered salary. The evidence failed to establish the petitioner's continuing ability to pay the proposed wage offer in any of the three relevant years.

Based on the evidence contained in the underlying record and after consideration of the argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.