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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: LIN-03-190-51937 Office: NEBRASKA SERVICE CENTER

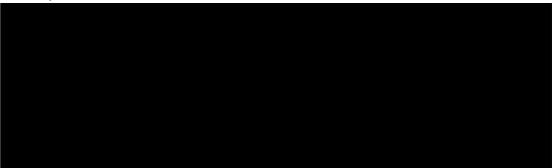
Date: FEB 03 2006

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 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.

The petitioner is a Russian restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food 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, 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. See 8 CFR § 204.5(d). 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 December 9, 2002. The proffered wage as stated on the Form ETA 750 is \$28,000 per year. The Form ETA 750 states that the position requires four years of experience in the proffered position and one year supervisory background.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of \$943,862, and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on November 27, 2002, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents: 2000 and 2002 federal corporate income tax returns for Eurogourmet, Inc. (Eurogourmet) with an employer identification number (EIN) of 41-

1821120, date of incorporation 7/21/1995, and address in Shorewood, MN; 2002 corporate federal income tax return for the petitioner reflecting an EIN of 41-19993680, date of incorporation 1/25/2001, and address at the same location as Eurogourmet; and incorporation paperwork for Eurogourmet.

On January 22, 2004, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested audited profit/loss statements, bank account records, and/or personnel records.

In response, the petitioner submitted an unaudited personal financial statement pertaining to the petitioner's owner; investment funds held by the petitioner's owner; various bank account statements in the petitioner's owner's name; the petitioner's owner's investment portfolio; a letter from [REDACTED] (Mr. [REDACTED]) CPA, who states that the petitioner's restaurant would benefit from the addition of two Russian chefs and provides a projection for 2003 that does not state it was calculated pursuant to an audit; Mr. [REDACTED] letter also describes Eurogourmet's business as a retail food store and deli that "has been operating for about eight years. It has weathered the storms of a new business and has been profitable the last couple of years"¹; an unaudited projection of profit and loss for 2003 for the petitioner; 2003 federal corporate tax returns for the petitioner and Eurogourmet; Eurogourmet's and the petitioner's quarterly federal tax returns for the last quarter of 2003 and first quarter of 2004 that do not reflect wages paid to the beneficiary; evidence that the petitioner's owner and Eurogourmet have lines of credit available for their use; and a letter from the Eurogourmet and the petitioner's owner, [REDACTED] (Mr. [REDACTED]), who urged the director to successfully complete the case.

The director denied the petition on May 27, 2004, finding that the evidence submitted with the petition and in response to its request for evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel cites to cases that found in favor of a petitioning entity's ability to pay the proffered wage in instances where the following was considered: the beneficiary's ability to generate income, wages actually paid by the petitioner to the beneficiary, and sources pledged to the entity. Counsel cites to *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989); *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988)²; and unpublished AAO decisions. The petitioner resubmits evidence previously submitted.

At the outset, counsel's references to multiple decisions issued by the AAO do not provide published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS) are binding on all its employees in the administration of the Act, unpublished decisions are not

¹ Mr. [REDACTED] letter also describes the petitioner's business as a new enterprise with its first full year of operations in 2002. He states that it "is not uncommon for new businesses to show substantial losses in the first year of operations," and references the events on September 11, 2001 as an additional reason for the restaurant's losses in that year because of the "immigration shutdown" and inability to have "authenticate [sic] Russian chefs in place by the end of that year."

² Counsel cited to it as "Gospel Baptist Portland Church" but used the 730 F. Supp. 441 (D.D.C. 1988) numerical assignment.

similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Additionally, the decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the proffered wage. The entity in the instant case is not a church for a for-profit business. Additionally, although not explicitly stated, presumably counsel cited to *Full Gospel* so that CIS would treat its owner's line of credit as evidence of its ability to pay, even though a line of credit creates an expense and a debt, whereas a parishioner's pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the line of credit³. Regardless, there is no evidence that the lines of credit belong to the petitioner but rather to the petitioner's owner and Eurogourmet.

Contrary to counsel's assertion, 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 or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. 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." Both the petitioner's

³ In calculating the ability to pay the proffered salary, CIS will not augment a petitioner's net income or net current assets 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).

Since the line of credit is a "commitment to loan" and not an existent loan, the petition would have had to establish that the unused funds from the line of credit are available at the time of filing the petition. 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). Moreover, 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. 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).

owner and Eurogourmet are separate from the petitioner and neither of their assets may be considered in determining the petitioner's continuing ability to pay the proffered wage.

Counsel's reliance on the balances in the petitioner's owner's bank and investment accounts 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, as noted above, the petitioner's owner's assets cannot be considered with respect to the petitioner's continuing ability to pay the proffered wage⁴.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying the projected financial statements, the AAO cannot conclude that they represent audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through 2003.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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:

⁴ Even if they could, no evidence was submitted to demonstrate that the funds reported on the bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$28,000 per year from the priority date.

In 2002, the Form 1120S stated net income⁵ of -\$161,465.

In 2003, the Form 1120S stated net income of -\$220,736.

Therefore, for the years 2002 through 2003, the petitioner did not have sufficient net income to pay the proffered wage⁶.

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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

⁵ Ordinary income (loss) from trade or business activities as reported on Line 21. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See Internal Revenue Service, Instructions for Form 1120S, 2003*, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, *Instructions for Form 1120S, 2002*, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

⁶ Eurogourmet's net incomes were also less than the proffered wage in 2002 and 2003.

⁷ 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.

liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets during 2002 were -\$226,882.

The petitioner's net current assets during 2003 were -\$21,050.

Therefore, 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 continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets⁸.

Finally, counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion⁹. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

⁸ Eurogourmet's net current assets were also negative in both 2002 and 2003.

⁹ As noted above, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. at 715 (BIA 1993).