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U.S. Citizenship  
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Services

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FILE: [REDACTED]  
EAC 04 060 52891

Office: VERMONT SERVICE CENTER

Date: JUL 27 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 Acting Director, Vermont Service Center, denied the instant preference visa petition. The acting director subsequently reopened the matter pursuant to a motion to reopen, then denied the petition again. The matter is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a catering service. 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 acting 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 submitted a brief.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 12, 2001. The proffered wage as stated on the Form ETA 750 is \$18.23 per hour, which equals \$37,918.40 per year.

On the petition, the petitioner did not state the date it was established, the number of workers it employs, its gross annual income, or its net annual income in the spaces provided for that purpose. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The petition indicates that the petitioner would employ the beneficiary in Sagaponack, New York.

In support of the petition, counsel submitted the petitioner's 2001 and 2002 Form 1120, U.S. Corporation Income Tax Return. Those returns show that the petitioner is a corporation, that it incorporated on June 29, 1984, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

The 2001 return shows that during that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$0. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002 return shows that during that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$0. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The acting director decided 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 5, 2004, denied the petition.

With a motion to reconsider/reopen<sup>1</sup> counsel submitted (1) a letter dated August 18, 2004 from the petitioner's accountant, (2) copies of monthly statements pertinent to the petitioner's bank account, (3) 2001, 2002, and 2003 Form W-2 Wage and Tax Statements, (4) 2001 and 2003 Form 1099 Miscellaneous Income statements, and (5) a brief.

The petitioner's accountant's August 18, 2004 letter states that the petitioner's profits are routinely distributed to its two shareholders, resulting in no declared taxable income.

The petitioner's bank statements show that the petitioner had balances of \$172,920.48 and \$85,379.43 at the end of 2000 and 2001, respectively.

The W-2 forms show that the petitioner paid the beneficiary wages of \$18,738, \$21,486.50, and \$21,619.50 during 2001, 2002, and 2003, respectively. The 1099 forms show that the petitioner paid the beneficiary an additional \$3,700 in non-wage compensation during 2001 and \$2,500 in non-wage compensation during 2003. This office notes that the total compensation shown on those forms is \$21,438 during 2001, \$21,486.50 during 2002, and \$24,119.50 during 2003.

In the brief counsel asserts that the service center was obliged to issue a request for evidence in this matter. Counsel asserts, citing 20 C.F.R. 656.20(c)(1), that the Department of Labor (DOL) issues an approved Form ETA 750 only after finding that the petitioner is able to pay the proffered wage and that CIS may overturn this finding only if it determines that the finding was procured by fraud or willful misrepresentation of a material fact.

Counsel further asserts that subchapter C corporations, such as the petitioner, routinely distribute all profits. Counsel notes that during 2001 the petitioner distributed \$333,000 to its two owners and had, therefore, sufficient resources to pay the proffered wage.

Counsel also cites the petitioner's bank balances and the W-2 and 1099 forms submitted as evidence of the petitioner's ability to pay the proffered wage.

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<sup>1</sup> The motion was actually submitted as an appeal. That appeal was untimely filed, and the acting director chose to consider it as a motion pursuant to 8 C.F.R. 103.3(a)(2)(B)(ii).

On October 25, 2004 the acting director reopened the matter, considered the previous decision and the additional evidence, and denied the petition again.

On appeal, counsel submitted copies of the evidence previously submitted with the motion and reiterated the arguments he previously made in that motion.

Counsel's argument that a request for evidence was required in this matter is unconvincing. The regulation at 8 C.F.R. § 103.2(b)(8) states, in pertinent part,

*Request for evidence.* If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by [CIS] prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence . . . .

If the petitioner had neglected to submit some portion of the initial evidence such as copies of annual reports, federal tax returns, or audited financial statements as evidence of its ability to pay the proffered wage, for instance, then the service center would have been obliged to issue a request for evidence. The petitioner, however, submitted two tax returns. The acting director found that the tax returns had failed to demonstrate the ability to pay the proffered wage, rather than that the evidence was incomplete. That the evidence did not show that the petitioner is able to pay the proffered wage does not mean that "initial evidence or eligibility information [was] missing" within the meaning of 8 C.F.R. § 103.2(b)(8). No request for evidence was required in the instant case.

Even if a request for evidence were required the failure to issue it would be harmless error. Counsel was afforded, on appeal, an opportunity to provide additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The opportunity to submit additional evidence would have rendered moot the failure of the service center to issue a request for evidence even if issuance of such a request were required.

Counsel argues that the Department of Labor is responsible for determining whether the petitioner is able to pay the proffered wage and has already made that determination. Counsel argues that, absent fraud or willful misrepresentation of a material fact CIS is not permitted to disturb this finding. In so arguing counsel fails to recognize the difference between invalidating a labor certification (which can only be done pursuant to a finding of fraud or misrepresentation), and denying a visa petition (which CIS has authority to do).

As authority for those assertions counsel cites 20 C.F.R. 656.20(c)(1), which states that the petitioner is obliged to demonstrate the ability to pay the proffered wage. It does not state that DOL will make that determination. Further, nothing in the record indicates that DOL has, in fact, made that determination.

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) provides:

In general. Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

DOL has promulgated regulations to implement these duties. 20 C.F.R. § 656. None of the inquiries assigned to DOL by those regulations, however, involve a determination as to whether the petitioner has demonstrated its ability to pay the proffered wage. This fact has not gone unnoticed by the Federal Circuit Courts of Appeals:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14) [currently found at 212(a)(5)(A)(i)]. *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14).

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Although *Madanay* makes this statement in the context of the determination of the beneficiary's qualifications for the proffered position, the language is equally applicable to the determination of the petitioner's ability to pay the proffered wage.

Relying in part on this decision, the Ninth Circuit Court of Appeals stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983). Again, although that case deals with the beneficiary's qualifications, it makes clear that the DOL makes only two determinations pertinent to the labor certification, and does not decide whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

In *K.R.K. Irvine, Inc. v. Landon*, *supra*, the court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.

*Id.* at 1009. The Ninth Circuit reached a similar decision one year later in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally* *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983).

736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984). *See also* *Black Const. Corp. v. I.N.S.*, 746 F.2d 503 (9<sup>th</sup> Cir. (Guam) 1984) (rejecting argument that once employer's labor certifications had been approved by DOL it was error for INS to deny related immigrant petitions for failure to meet preference status requirements).

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining whether a petitioner has demonstrated that it is able to pay the proffered wage.

CIS's authority, derived from the Act, regulations, and Circuit Court of Appeals precedent, to determine whether the beneficiary has demonstrated its ability to pay the proffered wage compels the conclusion that the issuance of a labor certification does not bind CIS to assume that the petitioner has demonstrated its ability to pay the proffered wage.

Counsel's reliance on the bank statements in this case 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>2</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 reported on its tax returns.

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 petitioner established that it employed the beneficiary during 2001, 2002, and 2003 and paid him \$18,738, \$21,486.50, and \$21,619.50 during those years, respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 that 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 -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be

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<sup>2</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>3</sup> shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$37,918.40 per year. The priority date is March 12, 2001.

The petitioner has demonstrated that it paid the beneficiary \$18,738 during 2001 and must show the ability to pay the \$19,180.40 balance of the proffered wage during that year. During that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$0. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net income during that year. The petitioner ended the year with negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year.

The petitioner has demonstrated that it paid the beneficiary \$21,486.50 during 2002 and must show the ability to pay the \$16,431.90 balance of the proffered wage during that year. During that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$0. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year.

The petitioner demonstrated that it paid the beneficiary \$21,619.50 during 2003 and would ordinarily be obliged to demonstrate the ability to pay the \$16,298.90 balance of the proffered wage. The petition in this matter, however, was filed on December 27, 2003. On that date the petitioner's 2003 tax return was unavailable. The petitioner is excused from demonstrating its ability to pay the proffered wage during 2003 and subsequent years.

The petitioner has not demonstrated that it was able to pay the proffered wage during 2001 and 2002 with its net income or its net current assets. Counsel states, however, that the petitioner pays its net profits to its owners as officer compensation. Counsel argues that therefore, notwithstanding the figures cited above for 2001 and 2002, the petitioner was able to reduce its officer compensation during those years as necessary to pay the proffered wage.

Although CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of a corporation's owner or owners to satisfy the corporation's ability to pay the proffered wage, in the present case, CIS is basing its determination solely on the merits of the petitioning corporation. Specifically, CIS is

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<sup>3</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

basing its determination on counsel's contention that the petitioner can pay the wage because it has the financial flexibility to set the annual compensation of its owner/officers. Counsel offers a compelling argument in regard to this issue. The returns for this period show that the petitioner exercises a large degree of financial flexibility in compensating its officer/owners. Clearly, the petitioning entity is a profitable enterprise for its owners.

The petitioner has two owner/officers. During 2001 the petitioner paid officer compensation of \$333,000, thus reducing its taxable income before net operating loss deductions and special deductions to \$0. The petitioner paid officer compensation of \$343,000 during 2002, again reducing its taxable income before net operating loss deductions and special deductions to \$0. Those figures amply support the proposition that the petitioner pays its net profit to its officers as their compensation, and could have reduced that compensation as necessary to pay the proffered wage. Such a history of payments lends credence to counsel's contention that the petitioner is a viable enterprise and it compensates its sole officer only after satisfying the corporation's other expenses.

Based on the facts of the instant case, this office concurs with the arguments presented by counsel on appeal. A review of the distinctive circumstances in this case reveals the instant petitioner's viability as a profitable corporation and confirms that the job offer is realistic and that the petitioner has shown the continuing ability to pay the proffered salary of \$37,918.40 from the priority date. The AAO will consider the totality of the circumstances concerning the overall magnitude of an entity's business activities when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner has demonstrated 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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.