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**U.S. Citizenship  
and Immigration  
Services**

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FILE: EAC-04-077-50367 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 preference visa petition was denied by the Acting Center Director (Director), Vermont Service Center, and came before the Administrative Appeals Office (AAO) on appeal. The AAO rejected the appeal as untimely. The AAO is reopening the matter on its own motion, withdrawing its prior decision to reject the appeal as untimely and replacing it with the foregoing. The appeal will be dismissed.

The petitioner is an Italian 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 indicated that he would submit a brief and/or evidence to the AAO within 30 days. Counsel dated the appeal September 30, 2004. As of this date, more than 20 months later, the AAO has received nothing further. The AAO sent a fax to counsel on February 13, 2006 informing counsel that no separate brief and/or evidence was received to confirm whether or not he would send anything else in this matter, and as a courtesy, providing him with five (5) days to respond. To date, more than five (5) months later, no reply has been received.

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 February 10, 2003. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour (\$21,840 per year<sup>1</sup>). The Form ETA 750 states that the position requires two (2) years experience in the job offered.

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<sup>1</sup> The Form ETA 750 indicates that the total hours per week is 35, therefore, the annual salary should be

On the petition, the petitioner claimed to have been established in 1973, to have a gross annual income of \$340,287.00, to have a net annual income of \$2,508.00, and to currently employ 3 part-time workers. On the Form ETA 750B, signed by the beneficiary on January 15, 2003, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 2002 as evidence to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director denied the petition on August 31, 2004, finding that the evidence submitted with the petition 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 director erred in failing to consider depreciation, cash balance and rents paid to the owner of the petitioner in determining the ability to pay the proffered wage.

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, neither the petitioner nor the beneficiary claimed that the beneficiary worked for the petitioner and submitted evidence of the beneficiary's compensation from the petitioner. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through the present.

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).

Counsel asserts on appeal that rents the petitioner paid in the amount of \$134,721.00 should be considered as available funds to pay the proffered wage since the owner of the business is also the owner of building. Counsel's reliance on the petitioner's rent expenses is misplaced. First of all, rents the petitioner paid are a part of business expenses and cannot be considered as a part of net income for the petitioner. Secondly, counsel did not submit evidence showing the owner of the petitioner is also the owner of the building. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). Finally, the petitioner in the instant case is structured as a corporation. The rents paid to the owner of the petitioner would be income or assets of the owner individual. 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

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\$21,840. However, the director miscalculated the annual salary as \$16,800 in her decision.

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 *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. Counsel asserts on appeal that the director failed to consider the sum of \$48,383.00 of accumulated depreciation and the depreciation of \$2,251.00. Counsel's reliance on adding depreciation back to net income is misplaced. The court in *Chi-Feng Chang* specifically 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 in the record of proceeding shows that the petitioner is structured as a C corporation. The record of proceeding contains a copy of the petitioner's 2002 tax return. According to the tax return in the record, the petitioner's fiscal year lasts from March 1 to February 28. The petitioner's 2002 tax return covers its fiscal year from March 1, 2002 to February 28, 2003 and the priority date in the instant case is February 10, 2003. Further, the petitioner's tax return for its fiscal year of 2003 (from March 1, 2003 to February 28, 2004) was not due yet at the time of filing the petition on January 22, 2004. Therefore, the petitioner's tax return for its fiscal year of 2002 is the only regulatory-prescribed evidence to be considered in determining the petitioner's continuing ability to pay the proffered wage. The 2002 tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$21,840 per year from the priority date.

In 2002, the Form 1120 stated net income<sup>2</sup> of \$2,508.

Therefore, for the petitioner's fiscal year of 2002 (the year of the priority date), the petitioner did not have sufficient net income to pay the 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

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<sup>2</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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.<sup>3</sup> 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 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 the fiscal year of 2002 were \$1,986.00. The petitioner had insufficient net current assets to pay the proffered wage.

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 assets.

Counsel asserts on appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel claims on appeal that the petitioner had an average cash balance of \$7,367.50 available to pay the proffered wage while the petitioner's tax return shows in Schedule L that the petitioner had cash in the amount of \$3,984 at the end of the fiscal year. It appears that counsel would rely on the balance of the petitioner's bank account. However, counsel did not submit any bank statements for the petitioner. Counsel's reliance on the balance in the petitioner's bank account would be 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 return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered in determining the petitioner's net current assets.

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.

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<sup>3</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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**ORDER:** The appeal is dismissed.