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**U.S. Citizenship
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FILE: Office: TEXAS SERVICE CENTER Date: **JUN 26 2006**

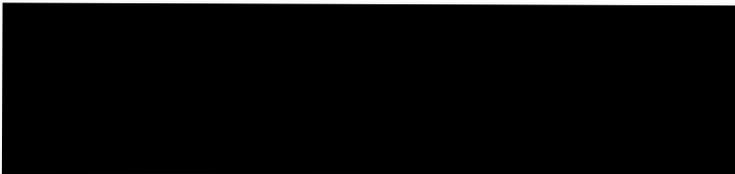
SRC-04-027-51114

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a 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 additional evidence.¹

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on December 4, 2002. The proffered wage as stated on the Form ETA 750 is \$9.64 per hour or \$20,051.20 per year. On the petition, the petitioner claimed to have been established on October 8, 1991, to have a gross annual income of \$565,000, and to have a net income of \$28,000, and to currently employ 5 workers. According to the tax returns in the record, the petitioner was elected as an S corporation on October 10, 1991 and the petitioner's fiscal years last from October 1 to September 30. On the Form ETA 750B, signed by the beneficiary on October 28, 2002, the beneficiary did not claim to have worked for the petitioner.

The record of proceeding contains the following financial documents submitted with the initial filing and in response to the director's request for additional evidence (RFE) pertinent to the petitioner's ability to pay the proffered wage: the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 and

¹The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

2002, financial statements as of November 30, 2002 and June 30, 2004, Form W-2 Wage and Tax Statements for 2003, Form 941 Employer's Quarterly Federal Tax Returns for four quarters of 2003, and the first three quarters of 2004, and Statement of Financial Condition as of June 30, 2002 for Sze Wing and Anh Hoan Chan.

On November 15, 2004, the director denied the petition, finding that the petitioner's fiscal 2002 federal tax return shows a net income of \$11,991 and negative net current assets, and therefore, did not establish that it had the ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submits two letters from the petitioner's CPA and the owner asserting that the petitioner had the ability to pay the proffered wage beginning on the priority date.

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 submit the W-2 forms issued by the petitioner for the year 2003, however, none of them was for the beneficiary. The petitioner did not establish that it employed and paid the proffered wage to the beneficiary during the years.

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). Both counsel and the petitioner's CPA asserts on appeal that the director's decision ignores the fact that gross sales of the petitioner have consistently been greater than \$500,000 per year for several years. The petitioner's reliance on its gross sales receipts and on wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to officers 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 an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 and 2002. The petitioner's 2001 tax return indicates that it was filed by the petitioner for a period from October 1, 2001 to September 30, 2002. In the instant case the priority date is December 4, 2002, therefore, the 2001 tax return is not necessarily dispositive of the petitioner's continuing ability to pay beginning on the priority date. The director has correctly considered the petitioner's tax returns for 2002 and thereafter. The record does not contain the petitioner's tax returns for 2003 (covering the fiscal year from October 1, 2003 to September 30, 2004). Therefore, the only tax return pertinent to the petitioner's ability to pay the proffered wage before the AAO is the petitioner's tax return for 2002. The petitioner's tax return for 2002 stated net income² of \$11,991. Therefore, the petitioner did not have sufficient net income to pay the proffered wage in 2002, the year of the priority date in the instant case.

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.³ 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.

Calculations based on the Schedule L's attached to the petitioner's tax return for 2002 yield that the petitioner had current assets of \$(895.00) and current liabilities of \$9,563.00, therefore, net current assets were \$(10,458.00) in that year. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage for the year 2002.

Therefore, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage in 2002 through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel submitted the petitioner's unaudited financial statements as of November 30, 2002 and June 30, 2004. In response to the RFE, counsel indicated that the financial statements were audited by a CPA. However, the financial statements submitted were unaudited. 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

² Ordinary income (loss) from trade or business activities as reported on Line 21.

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

audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the response to the RFE are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. A compilation is the management's representation of its financial position and is the lowest level of financial statements relative to other forms of financial statements. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Furthermore, the financial statements show that the petitioner had a loss of \$3,440.75 for 9 months ended June 30, 2004, and its current liabilities were over its current assets by \$13,783.78. Therefore, the financial statements submitted would not establish that the petitioner had either sufficient net income or net current assets to pay the proffered wage in the fiscal year 2003 even if they were audited and had been accepted as probative and relevant evidence to demonstrate the petitioner's ability to pay.

Counsel also submitted the financial statements for the petitioner's owner. Counsel's reliance on the **shareholder's assets in determining the petitioner's ability to pay is misplaced.** 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. The petitioner in the instant case is structured as an S corporation. Therefore, financial statements for the owners cannot establish the petitioner's ability to pay the proffered wage.

The CPA letter submitted on appeal argues that a significant portion of the salaries paid to the owners of \$66,483 could be reallocated to pay for new employees. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return for an S Corporation. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. The petitioner's 2002 tax return shows that there are two shareholders and each of them holds 50% of the shares. However, counsel and CPA did not submit any documents to support the proposition that the shareholders would or could forego any of their compensation from the petitioner, nor did they submit the shareholders' W-2 forms to support these figures. 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)). Therefore, the officers' compensation rule is not acceptable in the instant case.

Counsel advised with a letter from a CPA that the beneficiary will replace one of the two owners as a cook. The record does not, however, state the owner's wage as cook, verify his full-time employment, or provide evidence that the petitioner has replaced or will replace him with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, the beneficiary could not have replaced the owner to perform the management duties.

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for three (3) more workers, using similar priority dates.⁴ The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Therefore, the petitioner must show that it had sufficient income to pay all the wages to each beneficiary at their own priority date until each of them obtains lawful permanent residence. In the instant case, the petitioner failed to establish its ability to pay the proffered wage even to the instant beneficiary.

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 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.

⁴ The petitioner filed the I-140 petition SRC-04-007-53048 on October 8, 2003, SRC-04-027-51763 on November 6, 2003 and SRC-04-043-51943 on December 1, 2003.