

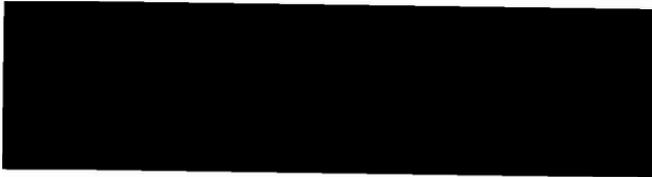


U.S. Citizenship  
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FILE: EAC-03-180-50132 Office: VERMONT SERVICE CENTER Date: MAR 21 2006

IN RE: Petitioner:  
Beneficiary:



PETITION: 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: SELF-REPRESENTED

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign specialty cook, Spanish and Portuguese dishes. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 either 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 petition's priority date, which is the date 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). The priority date in the instant petition is December 6, 1996. The proffered wage as stated on the Form ETA 750 is \$15.75 per hour, which amounts to \$32,760.00 annually. On the Form ETA 750B, first signed by the beneficiary on November 25, 1996, and then corrected by the beneficiary on June 15, 1999, the beneficiary claimed to have worked for the petitioner beginning in April 1993 and ending in January 1998. The ETA 750 was certified by the Department of Labor on October 20, 1999.

The I-140 petition was submitted on May 29, 2003. On the petition, the petitioner claimed to have been established on November 1, 1990, to currently have eight employees, to have a gross annual income of \$615,000.00, and to have a net annual income of \$37,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 23, 2004, the director requested additional evidence relevant to the beneficiary's experience and additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on July 17, 2004.

In a decision dated August 31, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits a brief and no other evidence. The brief is signed by the petitioner's manager. In the brief, in addition to discussing evidence previously submitted for the record, the manager makes several additional factual assertions. Since the brief is signed by the principal's manager, rather than by an attorney, and since it contains factual assertions, the brief itself is an evidentiary document.

In his brief, the petitioner's manager states that the director failed to consider payment for compensation of officers of \$80,600.00 in 1996, which was a lump sum payment. The manager states that the petitioner's loss of \$9,422.00 that year was the result of depreciation and trades made during that year. The manager states that since 1996 all employees have been paid in full and on time, and that all payroll taxes have been paid to appropriate governmental agencies. The manager states that the business has continued to grow, and that since 2004 the petitioner has also had a catering service which has greatly increased the business. The manager also states that it has been very difficult to recruit qualified cooks for the Portuguese and Spanish dishes featured by the petitioner.

The 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 factual assertions of the petitioner's manager contained in the brief submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, first signed by the beneficiary on November 25, 1996 and then corrected by the beneficiary on June 15, 1999, the beneficiary claimed to have worked for the petitioner beginning in April 1993 and ending in January 1998. Moreover in the petitioner's brief, submitted on November 2, 2004, the petitioner's manager states that the beneficiary is considered as a key employee of the petitioner. Nonetheless, the record contains no copies of any Form W-2 Wage and Tax Statements of the beneficiary nor other evidence of any compensation paid by the petitioner to the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 1996, 1997, 1998, 1999, 2000, 2001, 2002 and 2003. The record before the director closed on July 17, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was the most recent return available.

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, that income is reported on Schedule K. An S corporation's total income from its various sources are reported on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. *See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.*

Similarly, some deductions appear only on the Schedule K. The cost of business property elected to be treated an expense deduction under Section 179 of the Internal Revenue Code, rather than as a depreciation deduction, is carried over from line 12 of the Form 4562 to line 8 of the Schedule K. *See Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>; Internal Revenue Service, Instructions for Form 1120S (2003), at 22, available at <http://www.irs.gov/pub/irs-prior/i1120s-2003.pdf>.*

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Line 23 of the Schedule K, for income.

In the instant petition, the petitioner's tax returns indicate no income from activities other than from a trade or business, but they indicate additional relevant deductions for charitable contributions and for section 179 business property expense deductions. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns do not include all of its relevant deductions. For this reason, the petitioner's net income is shown on Line 23 of the Schedule K, for income, as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1996	-\$9,642.00	\$32,760.00*	-\$42,402.00
1997	-\$5,326.00	\$32,760.00	-\$38,086.00
1998	\$747.00	\$32,760.00	-\$32,013.00
1999	\$31,044.00	\$32,760.00	\$1,716.00
2000	\$13,551.00	\$32,760.00	-\$19,209.00
2001	\$4,289.00	\$32,760.00	-\$28,471.00
2002	\$24,719.00	\$32,760.00	\$8,041.00
2003	\$15,087.00	\$32,760.00	\$17,673.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 1996, 1997, 1998, 2000, or 2001. For 2002 and 2003 the above information is sufficient to establish the petitioner's ability to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
1996	\$4,184.00	\$8,685.00	\$32,760.00*
1997	\$8,685.00	\$5,250.00	\$32,760.00
1998	\$5,250.00	\$30,158.00	\$32,760.00
1999	\$30,158.00	\$61,183.00	\$32,760.00
2000	\$61,183.00	\$91,459.00	\$32,760.00
2001	\$91,459.00	\$118,828.00	\$32,760.00
2002	\$118,828.00	\$64,083.00	\$32,760.00
2003	\$64,083.00	\$90,740.00	\$32,760.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 1996, 1997, or 1998. In 1999, 2000, 2001, 2002 and 2003, the year-end net current assets are greater than the proffered wage. Therefore the above information is sufficient to establish the petitioner's ability to pay the proffered wage in those years.

In his brief, the petitioner's manager states that in 1996 the petitioner's two officers were paid a lump sum in the amount of \$80,600.00. The manager states that that figure should be considered as part of the petitioner's financial resources. The manager states that the petitioner paid an additional \$40,389.00 in salaries and wages for its two employees that year and that it had a loss of \$9,422.00 pertaining to depreciation of equipment and to trades that were made for that year.

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 basic rule of law concerning corporations 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); *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.

Nonetheless, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. The shareholders of a corporation have 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. Income Tax Return for an S Corporation.

The petitioner's expenses deductions for compensation of officers are as follows: \$80,600.00 in 1996; \$88,800.00 in 1997; \$86,400.00 in 1998; \$86,400.00 in 1999; \$86,400.00 in 2000; \$84,000.00 in 2001; \$84,000.00 in 2002; and \$86,400.00 in 2003. Each of those amounts is greater than the proffered wage of \$32,760.00.

In his brief, the petitioner's manager states that from 1996 to the present the business has increased significantly. That statement is corroborated by information in the petitioner's tax returns which show the amounts for gross receipts or sales, gross profit, and total income in the amounts shown in the following table.

Forms 1120S, Income, Lines 1c, 3 & 6

Year	Gross receipts or sales	Gross Profit	Total Income
1996	\$669,461.00	\$289,392.00	\$289,392.00
1997	\$686,393.00	\$300,008.00	\$300,008.00
1998	\$730,505.00	\$308,063.00	\$308,063.00
1999	\$827,057.00	\$366,581.00	\$366,581.00
2000	\$896,323.00	\$343,694.00	\$343,694.00
2001	\$935,832.00	\$393,705.00	\$393,705.00
2002	\$940,942.00	\$401,181.00	\$401,181.00
2003	\$932,670.00	\$419,399.00	\$419,399.00

The above figures show steady increases in gross receipts or sales each year, and in gross profit and total income each year.

For the years 1999, 2000, 2001, 2002 and 2003, the above analysis of the petitioner's net income and year-end net current assets show that one or both of those figures are higher than the proffered wage. For the years 1996, 1997 and 1998, the evidence of the petitioner's payments for compensation of officers and of its increasing figures for gross receipts or sales, gross profit and total income are also sufficient to establish the petitioner's ability to pay the proffered wage. Therefore, considering the totality of the circumstances, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In his decision, the director stated the petitioner's net income in each of the years at issue and calculated the petitioner's year-end net current assets for each of those years. The director failed to note the additional relevant deductions on the Schedule K's attached to the petitioner's tax returns, which somewhat reduced the petitioners net income. However, those deductions were not large enough to affect the director's conclusions. The director found that for 1996, 1997 and 1998 both net income and year-end net current assets were less than the offered wage. The director found that for 1999, 2000, 2001, 2002 and 2003 the evidence did establish the petitioner's ability to pay the proffered wage.

The director did not discuss the petitioner's expenses for compensation of officers, nor its figures for gross receipts or sales, gross profit, and total income, nor did the director conduct any other analysis based on the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). However, in certain circumstances it is appropriate to do so. For the reasons stated above, the assertions of the petitioner's manager on appeal are sufficient to overcome the decision of the director.

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 met that burden.

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