



U.S. Citizenship
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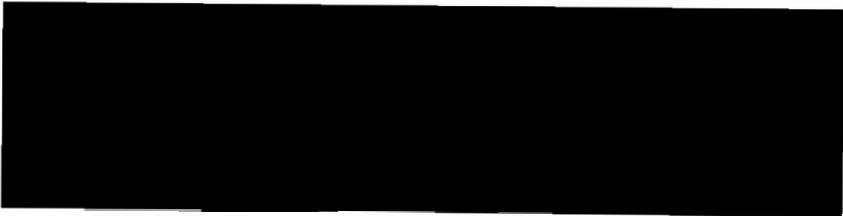
FILE: WAC-04-105-53162 Office: CALIFORNIA SERVICE CENTER Date: MAR 24 2006

IN RE: Petitioner:
Beneficiary:



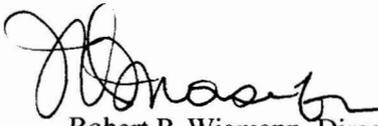
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, California 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 restaurant 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 statement and 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 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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$11.62 per hour (\$24,169.60 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1979, to have a gross annual income of \$901,080,

¹ 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 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.

and to currently employ twenty (25) workers. According to the tax returns in the record, the petitioner's fiscal years lasts from July 1 to June 30. On the Form ETA 750B, signed by the beneficiary on March 28, 2001, the beneficiary claimed to have worked for the petitioner since December 1996.

With the petition, the petitioner submitted the following documents: Form DE-6 Quarterly Wage and Withholding Report for four (4) quarters of 2003, and Form 1120 U.S. Corporation Income Tax Return for 2000 and 2001.

On July 5, 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 (RFE) 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 tax returns for 2002 and 2003, and the beneficiary's W-2 forms for years 1997 and 2003. In response, the petitioner submitted Form 1040 U.S. Individual Income Tax Return for 2002 filed by the owner of the petitioner and the beneficiary's W-2 forms for 1997 and 2003.

On August 10, 2004, the director issued the second RFE specially requesting the petitioner's corporation tax returns for 2002 and 2003 instead of the owner's individual tax returns, Form DE-6 Quarterly Wage Report for the last eight quarters and the beneficiary's W-2 forms for years 1997 to 2003. In response to the second RFE, the petitioner submitted Form 1120 for 2001 and 2002, Form DE-6 for a period from the fourth quarter of 2002 to the second quarter of 2004, and the beneficiary's W-2 forms for 1997 through 2003.

The director denied the petition on October 19, 2004, finding that the evidence submitted with the petition and in response to the RFEs 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 additional income derived from the business demonstrates the petitioner's 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, the petitioner established that it employed and paid the beneficiary \$5,471.99 in 2001, \$11,441.70 in 2002 and \$14,033.68 in 2003. 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 2003. Instead, the petitioner paid partial wages, which is \$18,697.61 less than the proffered wage in 2001, \$12,727.90 less than the proffered wage in 2002 and \$10,135.92 less than the proffered wage in 2003. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage for these 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). 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:

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.

As previously noted the petitioner's fiscal year lasts from July 1 to June 30 every year. The 2000 tax return covers a fiscal year from July 1, 2000 to June 30, 2001 and the priority date in the instant case is April 25, 2001. Therefore, the 2000 tax return is the tax return for the year of the priority date. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the difference between the wage paid and the proffered wage from the priority date.

In 2000, the Form 1120 stated net income² of \$4,531.

In 2001, the Form 1120 stated net income of \$7,945.

In 2002, the Form 1120 stated net income of \$(14,532).

Therefore, for the fiscal years 2000 through 2002, the petitioner did not have sufficient net income to pay the difference between the wage paid and 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 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

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

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. During the fiscal years 2000 and 2002, the petitioner's current liabilities were more than its current assets, thus the petitioner's net current assets for these years were negative. Therefore, the petitioner had insufficient net current assets to pay the difference between the wage actually paid to the beneficiary and the proffered wage in fiscal years 2000 and 2002.

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 difference between the wage paid and 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 additional income derived from the business available to be used to pay the beneficiary the proffered wage and submits the shareholder's individual tax returns and W-2 forms for 2001 and 2002 to document the compensation of officers.

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 1120 U.S. Corporation Income Tax Return. 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 documentation presented here indicates that (Ms. █████ holds one hundred (100) percent of the company's stock. According to the petitioner's Form 1120 Line 12 Compensation of Officers, Ms. █████ elected to pay herself \$60,000 in 2000, \$62,000 in 2001 and \$87,500 in 2002. These figures are supported by Ms. █████ W-2 Forms and individual tax returns for 2000 through 2002, which were submitted for the record. We note here that the compensation received by the company's owner during these years was not a fixed salary and amounted to almost \$100,000 per year.

CIS (legacy INS) has long held that it 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 the present case, however, counsel is not suggesting that CIS examine the personal assets of the petitioner's owner, but, rather, the financial flexibility that the employee-owner has in setting her salary based on the profitability of her restaurant. In presenting an analysis of the petitioner's Quarterly Wage Report (Form DE-6), counsel offers a compelling argument in regard to this issue. The quarterly wage and withholding for this

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

period show not only that the petitioner exercises a large degree of financial flexibility in setting employee salaries, but that the petitioner easily fulfills its salary obligations. Clearly, the petitioning entity is a profitable enterprise for its owner. As previously noted, the restaurant earned a gross profit of \$901,080 in 2001 and \$856,465 in 2002. Officer compensation is not a fixed expense. We concur with the arguments presented by counsel on appeal that a review of the petitioner's gross profit and the amount of compensation paid out to the employee-owner might confirm that the job offer is realistic and that the proffered salary of \$24,169.60 could be paid by the petitioner.

However, counsel does not submit any statement from the officer evidencing that she is willing and be able to forego certain percentage of her officer compensation to pay the beneficiary the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner did not provide sufficient evidence such as a statement of monthly living expenses for her household and evidence that she can still live on and support her family with the surplus after reducing her officer compensation to pay the beneficiary the proffered wage or with other source income including her household living expenses. The petitioner must address this issue in any future procedures.

Therefore, counsel's assertions on appeal did not overcome the director's finding in his decision to deny the petition. The evidence submitted has not established 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 does not meet that burden.

ORDER: The appeal is dismissed.