



U.S. Citizenship  
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FILE:



EAC-03-065-54243

Office: VERMONT SERVICE CENTER

Date: **MAR 28 2006**

IN RE:

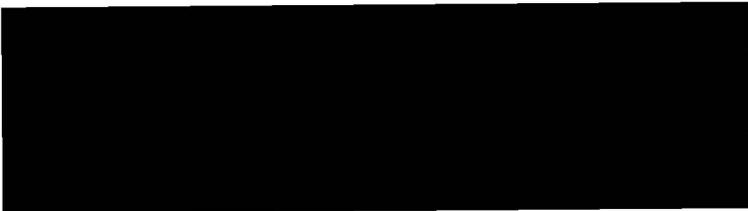
Petitioner:

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 Acting Center Director (Director), Vermont Service Center, denied the preference visa petition, granted a subsequent motion to reopen and affirmed her denial. The matter 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 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 a brief and additional evidence.<sup>1</sup>

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689.60 per year). 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 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.

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 on January 1, 1998, to have a gross annual income of \$1,200,000, to have a net annual income of \$748,707, and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary did not list his employment after October 2000.

With the petition, the petitioner submitted the following documents: the petitioner's tax returns for 1999, 2000 and 2001.

On November 4, 2003, 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 issued a request for 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 the 2002 United States federal income tax return with all schedules and attachments or annual reports for 2002 accompanied by audited or reviewed financial statements, information on the proffered position and copies of Form 941 for the period in question.

In response, the petitioner submitted the beneficiary's W-2 forms for 2001 and 2002, the petitioner's tax return for 2002 and a letter from the petitioner's owner pledging to take a salary reduction to pay the beneficiary the proffered wage.

The director denied the petition on April 20, 2004, finding that the evidence submitted with the petition and in response to her RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. On May 27, 2004 counsel filed notice of appeal on Form I290B. The director rejected the appeal because it was untimely, but accepted it as a motion to reopen (MTR). On September 14, 2004, after a complete review of the record of proceeding, including the MTR, the director determined that the grounds of denial had not been overcome and affirmed the prior decision.

On appeal, counsel asserts that the petitioner's bank statements show that there were more than adequate monthly cash-on-hand and cash flow to pay the beneficiary's monthly salary and that the petitioner's gross income, compensation of officers, depreciation and advertisement expenses illustrate its continuing 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 record of proceeding contains copies of the beneficiary's W-2 forms for 2001 through 2003. The petitioner did not establish that it employed and paid the beneficiary the full proffered wage. Instead, the petitioner paid partial wages in the amounts of \$9,520 in 2001, \$14,000 in 2002 and \$12,880 in 2003, which is \$15,169.60 less than the proffered wage in 2001, \$10,689.60 less than the proffered wage in 2002 and \$11,809.60 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.

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's reliance on the petitioner's gross receipts, wage expense and other expenses 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. Counsel's reliance on depreciation is also misplaced. 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. (Original emphasis.) *Chi-Feng* at 537.

The record contains the petitioner's tax returns for 1999 through 2002. However, since the priority date in the instant case is April 30, 2001, the tax returns for 1999 and 2000 are not necessarily dispositive. The AAO will consider the tax returns for 2001 and 2002. The tax returns demonstrate the following financial information concerning the petitioner's continuing ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage from the priority date.

In 2001, the Form 1120 stated net income<sup>2</sup> of \$(57,457).

In 2002, the Form 1120 stated net income of \$(122,465).

Therefore, for the years 2001 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.

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

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 year 2001 were \$13,526 in 2001, which was \$1,643.60 less than the difference between the wages actually paid to the beneficiary and the proffered wage that year. The petitioner's net current assets during the year 2002 were \$(95,186). Therefore, the petitioner had insufficient net current assets to pay the difference between the wages already paid to the beneficiary and the proffered wage in 2001 or 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 in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that the petitioner's bank statements show that there were more than adequate monthly cash-on-hand and cash flow to pay the beneficiary's monthly salary. Counsel's reliance on the balances in the petitioner's bank accounts is 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 was considered in determining the petitioner's net current assets.

As previously noted, counsel's reliance on gross receipts, advertisement expenses, and depreciation is misplaced. Counsel refers to decisions issued by the AAO, but does not provide published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

On appeal counsel also argues that compensation of officers is a completely discretionary expenses. The amount can be considered as available funds with which a vital employee may be compensated. In response to the director's RFE, the petitioner submitted a letter from its owner pledging that he can reduce his salary by \$500 per period (per week) to pay the beneficiary the proffered wage. 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

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

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.

██████████ (Mr. ██████████ claimed he is the president of the company. The tax returns shows that he was the sole owner until 2000 and has been a 50% co-owner (with the other 50% owned by ██████████ of the restaurant since 2001. According to the petitioner's IRS Form 1120 Schedule E (Compensation of Officers), the owners elected to pay themselves \$83,671 in 1999, \$140,000 in 2000, \$152,000 in 2001, and \$156,000 in 2002, respectively. We note here that the compensation received by the company's owners during these four years was not a fixed salary and amounted to more than \$150,000 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 owners, but, rather, the financial flexibility that the employee-owners have in setting his salary based on the profitability of their restaurant. In presenting a letter from the owner himself, counsel offers a compelling argument in regard to this issue. In his letter dated January 7, 2004 Mr. ██████████ expressly states that "I pledge to take a salary reduction from my salary from ██████████ of \$500 per pay period to fulfill my offer of \$24,689.60 per year salary for the position of Specialty Cook currently being offered to [the beneficiary]." The tax returns for this 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 practice earned a gross profit of \$781,836 in 1999, \$759,581 in 2000, \$748,707 in 2001 and \$726,189 in 2002. Counsel asserts that the compensation of officers is completely discretionary and therefore, these amounts can be considered as available funds with which a vital employee may be compensated. None of these numbers represent fixed expenses. We concur with the arguments presented by counsel on appeal. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owner confirms that the job offer is realistic and that the proffered salary of \$24,689.60 can be paid by the petitioner.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

Counsel's assertions on appeal have overcome the director's finding in her decision to deny the petition. The evidence submitted establishes 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 met that burden.

EAC-03-065-54243

Page 7

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