

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

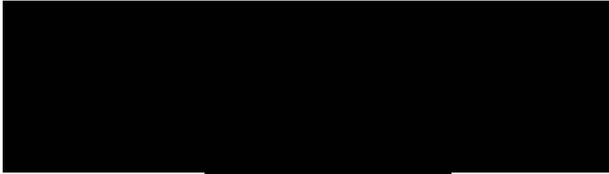
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE:

EAC 05 012 53430

Office: VERMONT SERVICE CENTER

Date: NOV 14 2006

IN RE:

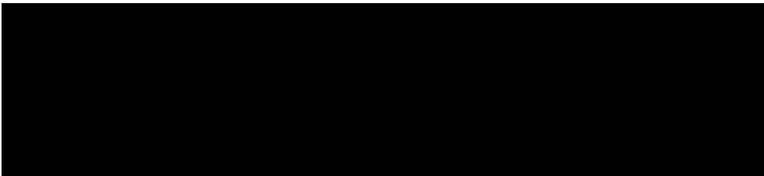
Petitioner:

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 Director, Vermont 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 cook. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits further evidence and contends that the petitioner has demonstrated its continuing financial ability to pay the proffered wage.

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 at 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. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 per year. On Form ETA 750B, accompanying the petition, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the preference petition, the petitioner claims to have been established in 1982 and to have a gross annual income of \$112,511.

In support of its ability to pay the proffered salary, the petitioner submitted a letter, dated July 2, 2004, from Mr. [REDACTED] the petitioner's president. He states the company has the ability to pay the proffered wage and offers the "W2 of my previous employees which will be given to [the beneficiary] once he works in my company." Mr. [REDACTED] lists himself and [REDACTED] for 2001 and provides copies of Wage and Tax Statements (W-2s) for that year showing his own salary of \$26,000 and Mr. [REDACTED] salary of \$10,400, plus offers "ending cash" of \$4,490 to be available to pay the certified wage. The ending cash appears to be the same amount listed as cash on Schedule L of the petitioner's tax return submitted with the petition.

For 2002, Mr. [REDACTED] lists his own salary of \$16,500 as being available to pay the proffered wage, as well as [REDACTED]' salary of \$12,900, and [REDACTED] salary of \$10,100, accompanied by the corresponding W-2s. Similarly, for 2003, Mr. [REDACTED] provides copies of the respective W-2s and states that [REDACTED] salary of \$15,300, Campos' salary of \$15,300, and his own salary of \$26,000 would be available to pay the proffered wage.

Along with Mr. [REDACTED] letter and copies of the relevant W-2s, the petitioner also submits copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, and 2003. They contain the following information relevant to the petitioner's income, compensation paid to employees, and current assets and liabilities.

	2001	2002	2003
Gross Receipts or Sales	\$112,511	\$120,312	\$119,267
Total Income	\$100,928	\$ 77,090	\$ 87,488
Compensation of Officers	\$ 52,000	\$ 29,500	\$ 26,000
Salaries and Expenses	\$ 26,000	\$ 23,000	\$ 30,600
Current Assets (Sched. L)	-\$ 15,510	\$ none listed	\$ none listed
Current Liabilities (Sched. L)	\$ 519	\$ none listed	\$ none listed
Net current assets	-\$ 16,029	\$ n/a	\$ n/a
Taxable income before NOL deduction	-\$ 31,416	-\$ 25,600	-\$ 4,080

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage.¹ Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end 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.

On December 29, 2004, the director denied the petition, concluding that neither the petitioner's reported net income nor its net current assets could support the payment of a proposed wage offer of \$39,291.20 per year in any of the three relevant years. The director declined to consider the wages and salaries already paid out in 2001, 2002, and 2003 concluding that they were already expended and not retained for future use.

On appeal, counsel submits the same W-2s provided to the underlying record and reiterates the assertion that the salaries of [REDACTED] and Mr. [REDACTED] can be used to compensate the beneficiary. She provides another letter from Mr. [REDACTED] dated January 12, 2005. It is similar to the earlier letter provided to the record and contains a similar affirmation that the beneficiary "will replace the employee that is no longer employed. See attach Form W-2-Wage and Tax Statement and up to the extend [sic] of my salary."

¹ 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.

This contention is not persuasive. It is noted that 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, there is no evidence that the position of the previous employees' involved the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and date of termination of the worker(s) who performed the duties of the proffered position. If that employee(s) performed other kinds of work, then the beneficiary could not have replaced him or her. Similarly, officer compensation paid out to Mr. [REDACTED] in 2002 and 2003 represents compensation to one who materially participates in the business. Many of the duties performed by an officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. It is also noted that whether designated as a salary in 2001 or as officer compensation in 2002 and 2003, it is not credible to conclude that Mr. [REDACTED] entire compensation of \$26,000 in 2001 and \$16,500 in 2002, as well as almost 35% in 2003, would have been able to be foregone in order to increase the net income to a level sufficient to meet the proffered wage. It is further noted that the end-of-year cash sum of \$4,490, mentioned by Mr. [REDACTED] relevant to 2001, will not be considered standing alone as a sum available to pay the proffered wage, as it is an isolated figure taken from Schedule L as a current asset and must be balanced against the petitioner's current liabilities as discussed above. It is finally observed that the evidence fails to reveal that anyone in the petitioner's organization has ever received a salary equal to the proffered wage, which also lends doubt to the bona fides of the job offer.

It is further noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, the 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 determining a petitioner's ability to pay a certified wage, CIS will examine whether a petitioner may have employed and paid wages to a beneficiary during a given period. If a petitioner establishes by credible 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. If either the petitioner's net taxable income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, no evidence has been submitted to establish that the petitioner employed and paid wages to the beneficiary.

CIS will then examine the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. As noted above, it will also review a petitioner's current assets and current liabilities as reflected on Schedule L of the tax return as an alternative method of determining a petitioner's ability to pay the proffered wage. 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). 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.

In this case, as noted by the director, the petitioner's 2001 tax return reveals that neither its -\$16,029 in taxable income before the NOL deduction, nor its -\$31,416 in net current assets could support payment of the proposed wage offer of \$39,291.20 or establish its ability to pay during this period. In 2002 and 2003, the petitioner also reported income loss of \$25,600 and \$4,080, respectively, and failed to demonstrate its ability to pay the certified wage in either of these years. As Schedule L of the 2002 and 2003 tax returns did not contain a statement of assets and liabilities, this calculation was not available for these two years. The federal tax returns provided to the record do not establish the petitioner's ability to pay the proposed wage offer of \$39,291.20.

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition. 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.