

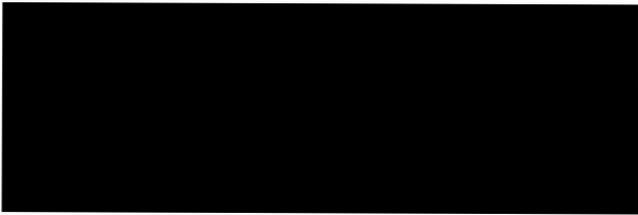


U.S. Citizenship
and Immigration
Services

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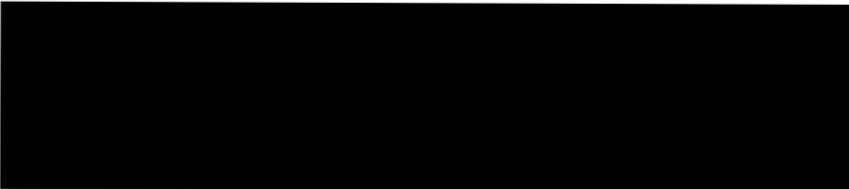
FILE: EAC-05-012-53642 Office: VERMONT SERVICE CENTER Date: **OCT 31 2006**

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.

A handwritten signature in cursive script, appearing to read "R. Wiemann".

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 food preparation and catering company. It seeks to employ the beneficiary permanently in the United States as a sous chef. 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.

On appeal, counsel submits a brief 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$17.00 per hour (\$35,360 per year). On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$875,000, and to currently employ 12 workers. The record indicates the petitioner is structured as a limited liability company (LLC) and files its tax returns on Form 1065, U.S. Return of Partnership Income. The petitioner's fiscal year is based on a calendar year.

The petition was submitted on October 18, 2004 without any regulatory-prescribed evidence but a letter from the petitioner's accountant to establish the petitioner's ability to pay the proffered wage. Therefore, the director issued a request for additional evidence (RFE) on November 18, 2004 requesting additional evidence

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.

establish that the petitioner had the ability to pay the proffered salary of \$35,360 per year as of April 27, 2001, the date of filing and continuing to the present. The director specifically requested either the 2001, 2002, and 2003 United States federal corporate income tax returns, with all schedules and attachments, for the petitioner, or annual reports for 2001, 2002 and 2003 which are accompanied by audited or reviewed financial statements. The director also requested the beneficiary's Form W-2 Wage and Tax Statements from 2001 if the beneficiary was employed since then. In response to the director's RFE, counsel submitted the petitioner's tax returns, Form 1065, U.S. Return of Partnership Income, for the calendar years 2001 through 2003.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage at the time of filing, and therefore, denied the petition on March 7, 2005.

On appeal, counsel asserts that the depreciation and other non-cash deductions should be added back to the net income to demonstrate that the petitioner can 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 claimed that the beneficiary did not start working for the petitioner until 2004. The record does not contain any evidence of the beneficiary's compensation from the petitioner for 2001 through 2003. On appeal the petitioner submits the beneficiary's W-2 form for 2004 and weekly paycheck stubs from February 12, 2005 to April 15, 2005. These documents show that the petitioner paid the beneficiary \$33,697.86 in 2004 and that the petitioner paid the beneficiary at the level of \$16.827 per hour in the first four months of 2005. Therefore, wages actually paid to the beneficiary in 2004 were \$1,662.14 less than the proffered wage and in 2005 the petitioner paid the beneficiary \$0.173 less than the hourly proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is 2001. Thus, even if the petitioner paid the beneficiary the full proffered wage in 2004 and 2005, the petitioner must show its ability to pay the proffered wage not only in 2004 and 2005, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001 through 2003. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Therefore, the petitioner did not establish that it employed and paid the full proffered wage in 2001 through 2003.

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). The petitioner's reliance on its gross receipts, depreciation, or wage expenses 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. On appeal counsel asserts that depreciation should be added back to the ordinary loss or gain in determining the petitioner's ability to pay the proffered wage and submits a letter from the petitioner's accountant to support his assertion. Counsel's reliance on depreciation and non-cash deductions is misplaced. The court in *Chi-Feng Chang* further clearly noted:

Plaintiffs also contend that 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 record contains copies of the petitioner's Form 1065 U.S. Return of Partnership Income for 2001, 2002 and 2003. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$35,360 per year from the priority date.

In 2001, the Form 1065 stated net income² of \$39,019;
In 2002, the Form 1120S stated net income of \$55,786;
In 2003, the Form 1120S stated net income of \$23,195.

Therefore, for the year 2003 the petitioner did not have sufficient net income to pay the proffered wage while its net income in 2001 and 2002 was sufficient to pay the beneficiary the proffered wage. The petitioner established its ability to pay the proffered wage for 2001 and 2002 through its net income, however, failed to establish such ability for 2003. The petitioner is obligated to demonstrate that it could pay the beneficiary the proffered wage in 2003 with its net current assets.

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. We reject, however, counsel's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not

² Where a LLC's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065, U.S. Return of Partnership Income, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22." Where a LLC has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K (page 3 of Form 1065) is a summary schedule of all the partners' shares of the partnership's income, credits, deductions, etc. The net income is reported on Analysis of Net Income (Loss) line 1 Net income (loss). *See* Internal Revenue Service, Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>.

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 LLC's year-end current assets are shown on Schedule L, lines 1 through 6 of Form 1065. Its year-end current liabilities are shown on lines 15 through 17 of Form 1065. If a LLC's end-of-year 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.

Calculations based on the Schedule L's attached to the petitioner's tax return for 2003 yield that the petitioner had current assets of \$22,707, and current liabilities of 58,516, and thus, the net current assets in 2003 were \$(35,809). Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in 2003.

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 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 continuing ability to pay the proffered wage from the priority date. Counsel submits the petitioner's bank statements from January 2004 to March 2005 to establish the petitioner's ability to pay the proffered wage. However, counsel's reliance on the balance in the petitioner's bank account 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 were considered in determining the petitioner's net current assets.

On appeal counsel submits a letter from one of the petitioner's partners and executive chef. In that letter the petitioner advised that the beneficiary was hired in order to replace a sous chef of his company who previously retired. The record does not, however, name the worker, state his wage, verify his full-time employment, or provide evidence that the petitioner has replaced 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 AAO notes that the petitioner's tax returns indicate that the petitioner paid no salaries and wages to its employees during the years 2001 through 2003 despite it claimed to employ 12 workers on the Form I-140.

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.

The partner also promises to make additional capital contributions to the corporation if necessary in any future event that there was no sufficient income from the corporation to pay the beneficiary's salary. Counsel's reliance on future capital contributions to establish the petitioner's ability to pay in the past year is misplaced. First of all, LLC member's capital contribution is reflected on line 21 Partner's capital accounts of Schedule L, Form 1065, which is part of the petitioner's total liabilities. Capital contributions will not increase the petitioner's current assets and decrease the petitioner's current liabilities. Therefore, capital contributions cannot be considered in determining the petitioner's ability to pay the proffered wage. Furthermore, any future capital contribution will not change the petitioner's financial ability in the past. Counsel does not explain how the LLC member's capital contribution in any future event establishes the petitioner's ability to pay the proffered wage in 2003.

The petitioner is a LLC. Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.⁴ An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

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 evidence submitted does not establish 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 not met that burden.

ORDER: The appeal is dismissed.

⁴ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.