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U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
SRC 02 136 50055

Office: VERMONT SERVICE CENTER

Date: SEP 13 2006

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hotel with a restaurant and banquet facility. It seeks to employ the beneficiary permanently in the United States as a specialty cook of Indian food. 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.

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 day 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). Here, the Form ETA 750 was accepted for processing on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour, which amounts to \$27,040 annually.

With the petition, the petitioner submitted a document entitled "Substitute Form 1099 Seller Statement." This two-page document described the purchase of the petitioner by its present owners from J.F.D. Enterprises, Inc., Ashland, Virginia. The settlement date for the purchase is listed as March 13, 2000. The petitioner also submitted a letter of employment verification for the beneficiary. This letter was written by [REDACTED] Ritegoods Catering, London, England, and stated that the beneficiary worked for the business from November 1985 to May 1998 and prepared Indian dishes and full menus, as well as estimated food consumption, and worked in the packaging of foods, the purchase of groceries and the cleaning of facilities and utensils. Finally, [REDACTED], the petitioner's director of operations, submitted a cover letter that stated the petitioner was a renovated motel in Erie, Pennsylvania with 131 rooms, 35 fulltime employees, and some part time employees. [REDACTED] stated that after the motel was bought, it was noted that there was no Indian restaurant in the area, and people suggested that the petitioner open a food section of Indian delicacies. [REDACTED] stated

that he submitted a copy of the IRS return for tax year 2000 to establish that the petitioner has the ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 14, 2004, the director requested additional evidence pertinent to that ability. The director noted that the petitioner had submitted its Substitute Form 1099 Seller Statement, but stated that this document was only accepted as secondary evidence of the petitioner's ability to pay the proffered wage. The director also noted that the document did not pertain to the 2001 priority date identified on the labor certification. The director specifically requested that the petitioner provide a copy of its 2001 U.S. federal income tax return with all schedules and attachments. The director also noted that the petitioner must demonstrate its ability to pay the proffered wage as of the priority date and continuing to the present.

In response, the petitioner submitted three pages of its 2001 Form 1065, U.S Return of Partnership Income. These pages consisted of the tax return's first page, and Schedules A, B and K, contained on the latter two pages.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 4, 2005, denied the petition. The director stated that the petitioner's initial submission did not include evidence of the petitioner's ability to pay the proffered wage, and that the petitioner's response to the director's request for further evidence consisted of three pages of the petitioner's 2001 partnership tax return. The director stated that this return indicated the petitioner reported a loss of \$160,856 for the year. The director also noted that the tax return's Schedule L balance sheet was not submitted. The director determined that the petitioner had not established its ability to pay the proffered wage as of the priority date year and to the present.

On appeal, counsel submits the petitioner's federal tax return for 2001 that includes the petitioner's Schedule L, and Schedule K-1, Partner's Share of Income, Credits, Deductions, etc. for four partners. Counsel states that the director's decision was erroneous because it relied on the petitioner's reported loss of \$160,856 and the fact that the petitioner did not provide its Schedule L balance sheet to the record.

Counsel states that the petitioner's tax return does not show actual loss, but rather business loss that includes many factors such as depreciation. Counsel states that the actual income of the business must be viewed as well as wages paid by the petitioner. Counsel states that the petitioner's Schedule L for its 2001 partnership tax returns shows a net surplus of \$361,024 after deducting losses of \$160,856. Counsel states that based on this surplus, the petitioner is capable of paying wages of \$27,140.¹

Counsel also states that the petitioner had net profits of \$1,802,139 in tax year 2001 and paid employee salaries of \$470,090. Counsel states that these figures clearly indicate that the petitioner can pay the proffered wage. Counsel also states that the fact that the U.S. Department of Labor accepted the Form ETA 750 and certified the document establishes that the petitioner had the ability to pay the proffered wage. Counsel

¹ The actual proffered wage is \$27,040.

finally concludes by stating that the petitioner thinks that opening an Indian vegetarian cooking section in the motel will easily make more money for the petitioner. Counsel adds that people in the United States are becoming vegetarians and enquiring about Indian vegetarian food.

In a supplemental brief submitted to the AAO on May 15, 2006, counsel reiterates the comments he initially made with the submission of the I-290B appeal, and adds two supplemental grounds. First, counsel states that the Item I Cash in Column D on the Schedule L Balance Sheet indicates cash on hand of \$31,368 that is sufficient to pay the beneficiary's salary of \$27,040. Counsel also states that the ETA Form 750, Part A, column 11 shows the proposed working hours for the beneficiary as from 9 AM to 5 PM. Counsel states that if a one hour break were disallowed from this work schedule, the beneficiary's work schedule would be 35 hours a week, with a resulting weekly salary of \$455, and yearly salary of \$23,660.

It is noted that on appeal counsel states that factors such as depreciation can be considered when viewing the petitioner's business loss. The AAO does not consider the addition of the petitioner's depreciation expenses in its examination of the petitioner's ability to pay the proffered wage based on its net income. The AAO will discuss depreciation expenses and their addition to the petitioner's net income more fully further in these proceedings.

It is also noted that on appeal, counsel states that the petitioner can eliminate a one-hour break from the beneficiary's daily work schedule to reduce the proffered wage. Counsel then states that the proffered wage would be \$23,660. However, the petitioner cannot amend the terms stipulated on the Form ETA 750 which include the hours of work, after the ETA 750 is certified and the priority date is established. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Similarly the petitioner cannot alter the terms of the labor certification after it has been approved.

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. The beneficiary did not indicate on ETA Form 750 that she had worked fulltime for the petitioner as of the priority date and to the present, and the petitioner also did not claim to employ the beneficiary during this period. Thus, the petitioner cannot establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward. In addition, the petitioner is obligated to establish it can pay the entire proffered wage of \$27,040.

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. Contrary to counsel's assertion, CIS does not consider adding back the petitioner's depreciation expenses to arrive at the petitioner's net 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.

The petitioner is structured as a limited liability partnership corporation. The petitioner's net income is the taxable income shown on line 22, ordinary income from trade or business activities. In tax year 2001, the petitioner's partnership tax return indicated ordinary income of -\$160,856. As correctly noted by the director, this sum is not sufficient to pay the proffered wage of \$27, 040.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. In addition, 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.² A partnership corporation's year-end current assets are shown on Schedule L, lines 1 through 6. These assets include the petitioner's available cash. Thus, contrary to counsel's assertion, the year-end cash figure is not available on its own to pay the proffered wage. The petitioner's year-end current liabilities are shown on lines 15 through 17. If a corporation's end-of-year net current assets are equal to or greater than the proffered

² 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.

wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The tax returns reflect the following information for the tax year 2001:

2001	
Taxable income ³	\$ -160,856
Current Assets	\$ 298,654
Current Liabilities	\$ 300,023
Net current assets	\$ 1,369

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of -\$160,856, and net current assets of \$1,369, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner presented no further documentation as to its ability to pay the proffered wage as of the 2001 priority date and continuing in the tax years 2002 to the present. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present.

Although counsel states that the number of hours to be paid to the beneficiary can be reduced by discounting the beneficiary's lunch hour as a paid hour of work, thus lowering the proffered wage, as noted previously, the terms stipulated on the ETA Form 750 may not be changed after the Department of Labor certifies the document. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Neither counsel nor the petitioner can lower the 40 hour work schedule stipulated on the ETA Form 750.

Counsel also asserts that the petitioner's gross receipts or sales of \$1,802,139 and salaries and wages of \$470,090 in tax year 2001 are sufficient to establish the petitioner's ability to pay the proffered wage. In reviewing the totality of the petitioner's circumstances, factors such as the number of employees, the longevity of the business and consistent amounts of gross receipts or salaries paid may be considered. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). However, the record reflects no further information with regard to the petitioner's consistent gross profits following the 2001 priority year. Nor does the record show a pattern of one year of unprofitability in between profitable years, as in *Sonogawa*.

The record also contains inconsistencies with regard to the petitioner's actual number of employees. The I-140 petition filed in 2004 indicates the petitioner has 15 employees, while the petitioner's director of operations in a cover letter dated March 10, 2002 indicates the petitioner has 35 employees, with some part-time employees. These two conflicting numbers suggest the petitioner's workforce has diminished over the period of time in question. Furthermore, with regard to inconsistencies in evidence found in the record,

³ As previously stated, taxable income is the sum shown on line 22, ordinary income (loss) from trade or business activities, IRS Form 1065, U.S. Return of Partnership Income.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states: “It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.” Thus, the petitioner’s actual employees and wages paid to them would need to be clarified prior to using the total amount of wages and salaries paid as an indication of the petitioner’s ability to pay the proffered wage.

On appeal, counsel also notes that the Department of Labor, by certifying the ETA Form 750, demonstrated that the petitioner has the ability to pay the proffered wage. Counsel’s assertion is not persuasive. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Although regulations at 20 C.F.R. § 656.20(c), as in effect at the time of filing,⁴ indicate that a employer applying for a labor certification must “clearly show” that, among issues, the employer has enough funds available to pay the wage or salary offered the alien; and that the wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work, this does not prevent the CIS from analyzing de novo whether the petitioner has the ability to pay the proffered wage. The principal role of DOL, as outlined above, is to certify that there are not sufficient workers who are available to perform skilled or unskilled labor, and that the employment of an alien would not adversely affect the wages and working conditions of U.S. workers similarly employed.

It is also noted that the petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy the same limited liability as the owners of a corporation. It is a legal entity separate and distinct from its owners. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the company are not the debts and obligations of the owners or anyone else.⁵ As the owners and others are not

⁴ Recently the Department of Labor has promulgated new regulations regarding the labor certification process. These new regulations only apply to applications filed on or after the effective date of the regulations, March 28, 2005. Applications filed before March 28, 2005, such as the one before us, are to be processed and governed by the current regulations quoted in this decision. 69 Fed. Reg. 77326-01 (Dec. 27, 2004).

⁵ 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.

obliged to pay those debts, the income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds. The petitioner provided no further evidence of its own ability to pay the proffered wage.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the 2001 priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.
