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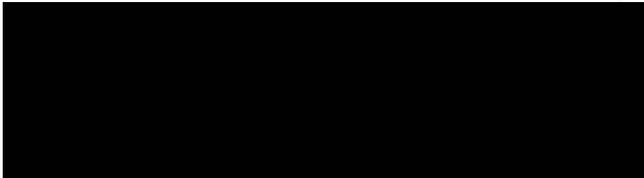


FILE: EAC 04 157 53378. Office: VERMONT SERVICE CENTER Date: FEB 01 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

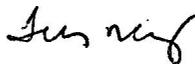
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

*for*   
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty 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 additional 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 is \$11.87 per hour, which amounts to \$21,603.40 per year based on a 35-hour workweek as set forth on Form ETA 750. On Form ETA 750B, signed by the substituted beneficiary on February 2, 2004, the beneficiary does not claim to have worked for the petitioner.

Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed on April 29, 2004, indicates that the petitioner was established on April 14, 2001, has a gross annual income of \$316,193 and currently employs four workers.

In support of its ability to pay the proffered salary, the petitioner initially provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and 2002. The tax returns contained the following information:

	2001	2002
Gross Receipts or Sales	\$88,089	\$316,193
Total Income	\$ 63,946	\$236,380
Compensation of Officers	none listed	none listed
Salaries and Expenses	\$ 13,514	\$ 80,882
Ordinary Income <sup>1</sup>	-\$ 5,370	\$ 4,140
Current Assets (Sched. L)	\$ 18,451	\$ 39,977
Current Liabilities (Sched. L)	\$ 15,051	\$ 7,986
Net current assets	\$ 3,400	\$ 31,991

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. 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.

The petitioner also provided a letter, dated March 11, 2004 from its accountant, "A [REDACTED] CPA, who vouched for the petitioner's ability to pay the beneficiary. Mr. [REDACTED] explains that the petitioner had been incorporated on March 14, 2001 for the sole purpose of purchasing the restaurant operating as "Maurya Indian Restaurant." He advises that the purchase occurred on September 6, 2001 and that all financial information of the I-140 (Immigrant Petition for Alien Worker) petitioner begins at this date, with the petitioner experiencing an increase in revenue in 2002.

On September 3, 2004, the director requested additional evidence, including documentation establishing the petitioner's ability to pay the proffered salary beginning on the April 30, 2001, priority date and continuing until the present.

In response, the petitioner, through former counsel, provided another letter, dated November 17, 2004, from Mr. [REDACTED]. He states that although the petitioner's 2001 tax return reflected only four months of activity, it included non-cash deductions such as depreciation and amortization that would increase the net income. He also describes contributions and withdrawals from the sole shareholder, "[REDACTED]" and suggests that the value of his personal portfolio account should be included for consideration of the petitioner's ability to pay the proffered wage. Former counsel makes the same assertion in his transmittal letter relating to Mr. and Mrs. [REDACTED] residential home equity credit line. Copies of two of the 2001 portfolio statements and a 2004 statement, along with documentation relating to the home equity credit line are submitted in support of this contention. Former counsel also provides copies of Wage and Tax Statements (W-2s) for two of the petitioner's employees, explaining that the certified position of cook is not a new one, as a previous cook had died around December 20,

<sup>1</sup> For the purpose of this review, ordinary income will be treated as net income.

2003. His 2003 W-2 showed \$13,750 in wages. Former counsel also states that Mrs. [REDACTED] manages the restaurant and cooks as needed while her husband is employed at another job.

On January 7, 2005, the director denied the petition. Declining to consider Mr. [REDACTED] personal assets as part of the petitioner's ability to pay the proffered salary, he concluded that the loss reflected on the 2001 tax return failed to demonstrate the financial ability to pay the proposed wage offer.

On appeal, current counsel provides a copy of the petitioner's 2003 corporate tax return. It reflects the following:

Gross Receipts or Sales	\$ 328,919
Total Income	\$ 245,879
Compensation of Officers	none listed
Salaries and Expenses	\$ 81,659
Ordinary Income <sup>2</sup>	\$ 5,582
Current Assets (Sched. L)	\$ 11,181
Current Liabilities (Sched. L)	\$ 1,975
Net current assets	\$ 9,206

Counsel also submits copies of Mr. Gomez' personally held bank and portfolio statements, copies of real estate appraisal and home loan documentation related to Mr. [REDACTED] residence, as well as a copy of *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004)(hereinafter Yates Memo). Counsel states that the Yates Memo directs CIS to consider Mr. [REDACTED] personal assets as the sole shareholder of the petitioner, asserting that as an "S corporation," the tax election provisions of the Internal Revenue Code (IRS) allow earnings to "pass through" to the shareholder's individual tax return and thus minimize tax liability.

It is noted that CIS jurisdiction includes: a determination of whether the petitioner is making a realistic job offer; and the evaluation of a beneficiary's qualifications for the job. CIS is empowered to make a *de novo* determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9<sup>th</sup> Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

With regard to the Yates' memo it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but is merely offered as guidance. That said, the AAO's decision in this case is consistent with the guidelines set forth in the memo.

Contrary to counsel's assertion, Mr. [REDACTED] is not the named petitioner on the I-140. Regardless of any tax avoidance strategy in selecting the corporate structure, it remains that the petitioner and named employer on the I-140 is a corporation and must establish its own continuing ability to pay the proffered salary. Counsel cites no

<sup>2</sup> For the purpose of this review, ordinary income will be treated as net income.

legal authority compelling CIS to view the value of a shareholder's individually held assets as indistinguishable from that of the corporation when evaluating a corporate petitioner's ability to pay the proffered wage. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

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. The petitioner in that case was a closely held family business organized as a corporation. 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."

Counsel suggests on appeal that the Mrs. [REDACTED] has been working as a cook since September 2001 and that as she no longer wishes to work in the restaurant provided a skilled cook can be found. Counsel contends that her wages would be available to pay the beneficiary as a replacement. Counsel offers copies of Mrs. [REDACTED] W-2s in support of this assertion. Counsel's contention regarding the beneficiary's intended replacement of one of the petitioner's employees is not documented by the record, except by former counsel's transmittal letter submitted with the petitioner's response to the request for evidence, and does not, therefore, constitute evidence on this issue. Unsupported assertions of counsel are not evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). If such replacement is contemplated, it should be supported by affidavits and credible documentation such as an individual tax return showing that such compensation could have been foregone during the period given. It is noted that a letter, dated April 28, 2004, contained in the underlying record that was offered with the request to substitute the beneficiary was signed by Mrs. [REDACTED] as "manager," and made no mention of a projected replacement or the extent of her duties as a cook. Moreover, as noted earlier, former counsel had also mentioned a different cook who had died in 2003.

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 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, there is no evidence that the petitioner has employed 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. Additionally, it will 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. The court in *Chi-Feng Chang* further 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. (Original emphasis.) *Chi-Feng* at 536.

Counsel is correct that neither *Elatos* nor *K.C.P. Food Co., Inc.* prohibits CIS' consideration of other evidence aside from federal tax returns, but they do not mandate a different result. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2), provides that a petitioner's ability to pay the proffered wage shall be in the form of federal tax returns, audited financial statements, or annual reports. While this regulation also permits the submission of additional material "in appropriate cases," in this case, such evidence was not probative of the petitioner's ability to pay the certified wage and does not outweigh the evidence presented on the federal tax returns.

In this case, in 2001, neither the petitioner's -\$5,370 in net income, nor its net current assets of \$3,400 were sufficient to cover the proposed wage offer. In 2002, its tax return reflects that its net current assets of \$31,991 were sufficient to establish its ability to pay the proposed wage offer for this year. In 2003, however, neither the petitioner's reported net income of \$5,582 nor its net current assets of \$9,206 was enough to pay the proffered salary of \$21,603.40. The record does not reflect that the corporate petitioner demonstrated its continuing ability to pay the proffered wage beginning at the priority date.

Beyond the director's decision, as set forth above, the regulation at 8 C.F.R. § 204.5(g)(2) provides that a petitioner must establish its continuing ability to pay the certified wage at the time the priority date is established. In this case that date is April 30, 2001. The regulation at 20 C.F.R. § 656.30 also provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. Labor certifications are valid indefinitely unless invalidated by CIS, a consular officer, or a court for fraud or willful misrepresentation of material fact involving the labor certification application. The Department of Labor and the former Immigration and Naturalization Service (INS) agreed that the INS would make a determination regarding whether the employer listed in the labor certification and the employer filing the employment-based immigration petition are the same entity or a successor-in-interest to the original entity. If a successorship-in-interest is shown, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage and that the new petitioner has assumed all the rights, duties, obligations and assets of the original employer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In this case, the I-140 petitioner did not acquire ownership of the petitioning business until four months after the priority date. The current I-140 petitioner is the successor in interest to predecessor, Maurya Indian Restaurant. Its election to use the labor certification approved for Maurya Indian Restaurant in order to sponsor its designated beneficiary obliges it to demonstrate that its predecessor had the ability to pay the proffered wage beginning at the priority date until ownership was transferred in 2001. For this additional reason, the evidence submitted in support of the ability to pay the proposed wage offer in 2001 is not sufficient.

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.