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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: WAC 05 023 53722 Office: CALIFORNIA SERVICE CENTER Date: FEB 20 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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner<sup>1</sup> is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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.

According to the petition, the petitioner's business was established in 2000, and, at the time the petition was prepared, employed 40 individuals.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address,

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<sup>1</sup> While counsel has captioned the appeal (CIS form I-290B) in the name of Avila's El Ranchito's IV Inc., and evidence has been submitted by the petitioner's accountant, in that name, the name of the petitioner on the I-140 petition and, the employer on the labor certification is Sergio's El Ranchito Inc. If this matter is pursued, the relevance of exhibits submitted for Avila's El Ranchito's IV Inc., should be examined. The federal employer identification numbers are different. However, should there in fact be a successor in interest to the petitioner in this matter the record contains no evidence that Avila's El Ranchito's IV Inc. qualifies as a successor-in-interest to Sergio's El Ranchito Inc. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, 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. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 C.F.R. § 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 19, 2001.<sup>2</sup> The proffered wage as stated on the Form ETA 750 is \$8.95 per hour (\$18,616.00 per year). The Form ETA 750 states that the position requires two years of experience.

On appeal, counsel submits a legal statement and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor and related pertaining documentation; a restaurant menu; the petitioner's accountant's letter dated October 20, 2004 with compiled financial statements<sup>3</sup> dated December 31, 2003; U.S. Internal Revenue Service Form 1120S tax returns for 2001, 2002, and 2003; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined, *inter alia*, the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested pertinent evidence of the petitioner's ability to pay

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<sup>2</sup> It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid 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."

<sup>3</sup> A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. *See* 8 CFR § 204.5(g)(2). Non-audited financials have limited evidentiary weight in CIS deliberations in these matters. The statements presented were not audited.

the proffered wage beginning on the priority date that would include wages paid to the beneficiary. The director requested the beneficiary's U.S. federal tax returns for 2001, 2002, 2003 and 2004 as well as the beneficiary's W-2 Wage and Tax Statements.

In response to the request for evidence, counsel submitted, *inter alia*, copies of the following documents: the beneficiary's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for years 2001, 2002, 2003 and 2004; IRS transcripts of the beneficiary's tax returns for those same years, and, the beneficiary's Wage and Tax Statements (W-2) for those same years.

The director denied the petition on June 22, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the director failed to indicate that there was a "challenge" to the petitioner's ability to pay the proffered wage in the request for evidence issued in this matter;<sup>4</sup> that the director's findings were "illogical and erroneous on net assets;" that the expert "testimony" evidence presented is uncontested; and, the director's denial is arbitrary, capricious and illogical.

Counsel has submitted copies of the following documents to accompany the appeal statement: an explanatory statement from counsel dated July 12, 2005; the director's decision dated July 22, 2005; the request for evidence dated April 14, 2005; the petitioner's accountant's letter dated July 11, 2005; a county assessment "Record of Audit Findings;" five bank business checking statements; three pages entitled "Petty Cash" dated "01," "02" and "03;" and, a U.S. Internal Revenue Service Form 1120S tax return Form 1120S for 2004.

Counsel makes additional assertions in his statement dated July 12, 2005, besides those stated on the appeal form as filed on July 18, 2005. Counsel states, that the petitioner's "assets" should include an additional \$30,000.00 based upon a county assessment "Record of Audit findings" for the business "smallwares," furniture and other non-disclosed property; that the petitioner's accountant's letter dated July 11, 2005, is an expert opinion of additional assets that "must be included ... [in the] valuation of the company assets for 2001, 2002 and 2003," and, that the "cash bank [sic] and/or excess cash actually in the petitioner's accounts on the close of business in each year in question" is sufficient to pay the proffered wage.

Counsel contends that the Form 1120S for 2004 shows sufficient taxable income to pay the proffered wage. Counsel is correct. Also, counsel states that the correct standard for evaluating the evidence in this matter is the preponderance of evidence. Counsel is correct.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary

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<sup>4</sup>Counsel asserts that since the director did not request additional evidence concerning the ability to pay that, therefore, the petitioner could not prove its ability to pay. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. There is no regulatory requirement for CIS to issue such a request. When petitions on their face, do or do not demonstrate eligibility for the preference visa classification sought, the director may review and act upon the petition as submitted. If the required initial evidence does not establish ability to pay, the CIS adjudicator may deny the petition since the petitioner has not met his or her burden to establish eligibility for the requested benefit. See 8 CFR § 103.2 (b)(8), and, INA § 291, 8 U.S.C. § 1361; 20 C.F.R. § 656.2. See *Matter of Chawathe*, A 74 254 994 (AAO Jan. 11, 2006). Further, as this present appeal demonstrates, the petitioner may introduce additional evidence and introduce case precedent in support of its position in a *de novo* review.

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. Evidence was submitted to show that the petitioner employed the beneficiary since 1998.

According to the beneficiary's W-2 statements submitted by the petitioner, [REDACTED] paid the beneficiary's wages in the amounts of \$8,528.33, \$5,959.41, \$14,060.99, and \$14,571.56 for years 2001, 2002, 2003 and 2004 respectively. The federal employer identification number (FEIN) for that corporation is [REDACTED] (the number is obscured for privacy purposes). The FEIN is not the same as the petitioner's which is [REDACTED]. The petitioner is located in Huntington Beach, California. [REDACTED] is located in Newport Beach, California. [REDACTED] is neither the petitioner or employer here under the labor certification and wages paid by [REDACTED] IV Inc. to the beneficiary cannot be evidence of the petitioner's ability to pay the proffered wage. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

The petitioner did not pay the beneficiary wages during those years. As set forth below, the petitioner must demonstrate that it is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the 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. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng* at 537.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$18,616.00 per year from the priority date of April 19, 2001:

- In 2001, the Form 1120S stated a loss<sup>5</sup> of <\$5,885.00>.<sup>6</sup>

<sup>5</sup> Internal Revenue Service Form 1120S, Line 21, states the petitioner's ordinary business income or loss. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs->

- In 2002, the Form 1120S stated net income of \$5,810.00.
- In 2003, the Form 1120S stated net income of \$1,954.00.
- In 2004, the Form 1120S stated net income of \$31,370.00.

Since the proffered wage is \$18,616.00 per year, the petitioner was unable to pay the proffered wage from net income in years 2001, 2002 and 2003.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has net income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage or the difference between wages actually paid and the proffered wage, at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence. Also, in the subject case the petitioner has not paid the beneficiary the proffered wage in tax years 2001, 2002, 2003, and 2004 from an examination of the evidence submitted found in the record of proceeding.

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.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation'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.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$32,128.00 and \$41,307.00 in current liabilities. Therefore, the petitioner had <\$9,179.00> in net current assets. Since the proffered wage is \$18,616.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$42,542.00 and \$39,468.00 in current liabilities. Therefore, the petitioner had \$3,074.00 in net current assets. Since the proffered wage is \$18,616.00 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120S return stated current assets of \$24,672.00 and \$20,161.00 in current liabilities. Therefore, the petitioner had \$4,511.00 in net current assets. Since the proffered wage is \$18,616.00 per year, this sum is less than the proffered wage.
- In 2004, petitioner's Form 1120S return stated current assets of \$60,308.00 and \$16,293.00 in current liabilities. Therefore, the petitioner had \$44,015.00 in net current assets. Since the proffered wage is \$18,616.00 per year, this sum is more than the proffered wage.

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02/i1120s.pdf, (accessed February 15, 2005). Here the petitioner on Line 5 of the return for each year did not state "Other income or loss" on that line.

<sup>6</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

<sup>7</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the period 2001 through 2003 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states, that the petitioner's "assets" should include an additional \$30,000.00 based upon a county assessment "Record of Audit findings" for year 2004, and, that the petitioner's accountant's letter dated July 11, 2005, is an expert opinion of additional assets<sup>8</sup> that "must be included ... [in the] valuation of the company assets for 2001, 2002 and 2003."

The petitioner states that since the county assessor assessed "an additional" \$30,000.00 for "office furniture and equipment"<sup>9</sup> and "smallwares"<sup>10</sup> in years 2001 through 2004, that these constitute "additional current assets" that must be added to the petition in this evaluation. According to regulation,<sup>11</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined not personal property assessments.

It is unclear why a change of property assessment constitutes independent, objective evidence of the value of current assets, or, why the petitioner's tax returns state a lower asset value. Counsel provides no case precedent for the inclusion of the accountant's opinion in this matter or why it is probative evidence. Further, counsel contends that the "cash bank and/or excess cash actually in the petitioner's accounts on the close of business in each year in question" is sufficient to pay the proffered wage. Counsel states that the business' inventory and cash assets evidence the ability to pay the proffered wage in combination with other assets. As already stated, "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. As already discussed above net current assets after including liabilities were less than the proffered wage in every year except year 2004.

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. We reject the petitioner'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 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.

According to the petitioner's accountant, the petitioner owner's personal assets are evidence of the petitioner's corporation ability to pay the proffered wage. Contrary to counsel's assertion, Citizenship and Immigration Services (CIS) 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

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<sup>8</sup> Apparently, the petitioner has accepted the county's assessment increases, and a consequence of this might be an amendment to the petitioner's tax returns for years 2001 to 2004, but no such amendments are in evidence.

<sup>9</sup> Contrary to the accountant's statement, office furniture is not included in current assets since furniture generally has a useful life longer than one year.

<sup>10</sup> The term "smallwares" is not defined in the record.

<sup>11</sup> 8 C.F.R. § 204.5(g)(2).

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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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 advocates the use of the cash balance of the business accounts and petty cash accounts to show the ability to pay the proffered wage. Counsel's reliance on the balances 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 cash specified on Schedule L that were considered above in determining the petitioner's net current assets.

Counsel also includes among his contentions cash stated on Schedule "L" of the tax returns submitted. Correlating the cash amounts stated in counsel's contention with the petitioner's tax return for each year, it is clear that counsel is suggesting combining petitioner's taxable income each year with the cash also received by the business for that year as stated on Schedule "L" as current assets. CIS will consider separately, the net income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. To add the net income and net current assets would be duplicative of petitioner's taxable income. Also, on Schedule "L" it is the net current asset figure that is important as calculated above. Again, counsel is disregarding the use of Schedule "L", that it is a balance sheet that shows both current assets and current liabilities. Therefore, the cash and other current assets are reduced as is calculated above to reach the net current asset figure.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns for years 2001, 2002 and 2003 as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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 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.