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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 07 133 50880 Office: VERMONT SERVICE CENTER Date: JUN 27 2007

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 Center Director (director), Vermont Service Center, and on appeal, the Administrative Appeals Office (AAO) remanded the case to the director for further investigation and entry of a new decision. The director denied the petition and certified the decision for review before the AAO. The director's decision to deny the petition will be affirmed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

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) provides:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

In this matter, the director initially determined that the petitioner<sup>1</sup> had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the May 3, 2001, priority date of the visa petition and denied the petition on January 21, 2005. The certified wage as stated on the ETA 750A is \$14.00 per hour, which amounts to \$29,120 per year. The director's decision was based upon the evidence consisting of the petitioner's 2001 federal tax return and copies of its 2001 bank statements. The director concluded that the petitioner's 2001 net income of \$7,057 was insufficient to pay the proffered wage of \$29,120 in the year of filing. He additionally determined that petitioner's current assets of \$22,050 did not exceed its current liabilities (\$-0-) by an amount sufficient to pay the proffered wage. The director further observed that the petitioner's 2001 bank statements did not represent a sustainable source out of which the proposed wage offer could be covered.

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<sup>1</sup> On Part 5 of the petition, filed on February 17, 2004, the petitioner claimed to have been established in 1994, to have a gross income of \$200,000, a net annual income of \$12,000, and to currently employ six workers.

The petitioner, through counsel, filed an appeal on February 22, 2005. Counsel asserted that the petitioner had employed the beneficiary and has had the continuing financial ability to pay the proffered salary. Counsel provided a copy of the petitioner’s 2004 federal corporate tax return, as well as copies of the petitioner’s payroll records for January and February 2005, which showed, for that period time, that the beneficiary was paid at a weekly rate equivalent to the proffered wage. Counsel also asserted that the petitioner’s 2001 depreciation expense, as a non-cash deduction, should be applied toward the payment of the proposed salary and that \$50,000 taken as “other assets” (Item 14, Sched. L) represents a liquor license that could easily be converted to cash. Counsel also claimed that there was an additional \$7,000 available as cash on hand in cash registers and safes, etc., that was not reflected as part of the bank statements.

The AAO rendered a decision on September 6, 2006, determining that because the record suggested that the petitioner had employed the beneficiary since May 2000, then the petitioner should have been allowed to provide evidence of wages paid to the beneficiary. The AAO noted that no financial documentation relevant to 2002 and 2003 was contained in the record although the petition was filed in February 2004. The AAO remanded the case to the director to obtain additional financial information from the petitioner consistent with these observations and to issue another decision based upon the record.

On remand, the director requested on November 6, 2006, that the petitioner provide additional evidence that it has had the continuing ability to pay the proffered wage of \$29,120 as of the date of filing, May 3, 2001, and continuing to the present. The director additionally instructed the petitioner to provide its 2002, 2003, and 2005 federal income tax returns, as well as copies of the beneficiary’s Wage and Tax Statements (W-2s) if it had employed and paid the beneficiary in 2001, 2002, 2003, 2004, and 2005.

In response, the petitioner, through counsel, provided its 2002, 2003, and 2005 Form 1120, U.S. Corporation Income Tax Returns. Along with its 2001 and 2004 tax returns, relevant to the petitioner’s taxable income before the net operating loss (NOL) and special deductions,<sup>2</sup> current assets, and current liabilities, they reflect the following:

	2001	2002	2003	2004	2005
Taxable Income before NOL and special deduction(s) (Form 1120)	\$7,057	-\$ 7,411	\$7,125	\$29,233	\$5,769
Current Assets (Sched. L)	\$22,050	\$20,044	\$4,386	\$34,004	\$9,895
Current Liabilities (Sched. L)	\$ -0-	\$-0-	\$-0-	\$-0-	\$-0-
Net current assets <sup>3</sup>	\$22,050	\$20,044	\$4,386	\$34,004	\$9,895

<sup>2</sup> For the purpose of this review, the petitioner’s taxable income before the net operating loss and special deductions will be treated as its net income and is found on Line 28 of page 1 of its tax returns.

<sup>3</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. Net current assets are the difference between the petitioner’s current assets and current liabilities and represent a measure of a petitioner’s

The petitioner additionally resubmitted copies of the beneficiary's payroll records for January and February 2005, as well as a W-2 issued by the petitioner to the beneficiary. It shows that the petitioner paid the beneficiary a total of \$4,493.12 in wages during 2005.

The petitioner also submitted a copy of the sole shareholder's individual mutual fund account statement as of December 2002, 2003, and 2005, as well as a copy of an individually held savings account as of December 2003, and copies of documents relating to the petitioner's liquor license. Along with these submissions, counsel's transmittal letter asserts that the owner's personal assets be considered as reflected on these individual accounts, as well as the depreciation expense taken on the corporate tax returns, the cash assets shown on line 1 of Schedule L of the corresponding tax return, and the \$50,000 identified as the value of the petitioner's liquor license, specified on line 14 of Schedule L, and which counsel states was replaced with a second liquor license in anticipation of expansion.

On April 16, 2007, the director determined that the petition should be denied and certified the decision to the AAO for review. The petitioner was afforded thirty days to submit any additional materials in support of its decision.<sup>4</sup> The director found that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage. He declined to consider evidence of the company's owner's personal assets. He concluded that while the petitioner had demonstrated its ability to pay the proffered wage in 2004 through either its net income or net current assets, the petitioner had not established its ability to pay the proffered salary of \$29,120 in any of the other pertinent years.

It is noted that the petitioner is a corporation. As observed by the director, CIS will not consider the personal assets of the owner is assessing the corporate petitioner's continuing 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.

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liquidity during a given period. Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a readily available resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified 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.

<sup>4</sup> This office has received nothing further to the record.

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).

CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003). The *Sitar* court considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, 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." applicable to the instant petition, which deals with a corporation. See also, *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980).

As noted in the AAO's previous decision, CIS will examine the net income figure reflected on a petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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 as counsel advocates here on appeal. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, 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.

If an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage. As set forth above, they are the difference between *current* assets and liabilities. (Emphasis added.) In this case, the tax returns happen to show that the petitioner's net current assets consisted entirely of reported cash on hand (line 1 of Schedule L) because it declared no other current assets or current liabilities. As stated in our previous decision, however, we do not accept counsel's suggestion that the petitioner's liquor license which was designated as a \$50,000 longer-term asset (whether the first or a replacement liquor license) on the Schedule L balance sheet of each of the corporate returns, should be included in this calculation, as it presumably has a business use and would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

To the extent that the petitioner paid wages less than the proffered salary, those amounts will also be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. As the record now stands, the only evidence of wages paid was submitted as the beneficiary's 2005 W-2 showing paid \$4,493.12 paid to the beneficiary, or \$24,626.88 less than the proffered wage.

With respect to the 2001 corporate bank statements, we note that the petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2), consisting of federal tax returns, annual reports, or audited financial statements are not applicable or otherwise provide an inaccurate financial picture of the petitioner. Bank statements generally show only a portion of a petitioner's financial status as they do not identify relevant liabilities or other encumbrances. In this respect, the 2001 bank statements will not be considered as a substitution for the evidence prescribed by the regulation. As noted in the earlier AAO decision, cash assets, including cash in registers or safes, should also be shown on the corresponding federal tax return as part of the listing of cash on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. In this instance, there is no evidence that the funds represented the 2001 bank statements offered on appeal somehow represent additional available funds.

As found by the director, neither the petitioner's net income of \$7,057, nor its net current assets of \$22,050 was sufficient to cover the certified wage of \$29,120 in 2001 and did not establish its ability to pay.

In 2002, neither its reported -\$7,411 in net income, nor its \$20,344 in net current assets was enough to pay the proffered salary and did not establish its ability to pay in this year.

In 2003, the petitioner's net income of \$7,125 was \$21,995 less than the proffered wage and its net current assets of \$4,386 was \$24,734 less than the certified salary. Neither was sufficient to meet the wage and did not establish the petitioner's ability to pay in this year.

In 2004, its ability to pay was demonstrated through either its net income of \$29,233 or its net current assets of \$34,004.

In 2005, the beneficiary was paid \$24,626.88 less than the proffered salary of \$29,120. Neither the petitioner's net income of \$5,767 nor its net current assets of \$9,895 could cover the \$24,626.88 shortfall. The petitioner's ability to pay the proffered wage has not been established during this year.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning at the priority date. In this matter, based upon the evidence submitted to the underlying record, on appeal and on remand, the petitioner failed to establish its ability to pay the proffered wage in four out of the relevant five years. The petitioner has not demonstrated its continuing financial ability to pay the certified salary as of 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 director's decision to deny the petition is affirmed.