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U.S. Citizenship
and Immigration
Services

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B-6



FILE: LIN 06 103 51740 Office: NEBRASKA SERVICE CENTER Date: NOV 20 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: SELF-REPRESENTED

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 Acting Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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

The record shows that the appeal was properly and timely filed, makes a specific allegation of error in law or fact, and includes additional evidence. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 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 DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$17.46 per hour, which equals \$36,318.80 per year.

The Form I-140 petition in this matter was submitted on February 23, 2006. On the petition, the petitioner stated that it was established on January 1, 1998 and that it employs six workers, including its part-time workers. The petition states that the petitioner's gross annual income is \$143,895 and that its net annual income is \$18,706. On the Form ETA 750, Part B, signed by the beneficiary on February 28, 2001, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Muncie, Indiana.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹ In the instant case the record contains (1) the petitioner's owner's 2000, 2001, 2002, 2003, 2004, 2005, and 2006 Form 1040 U.S. Individual Income Tax Returns, (2) photocopies of monthly statements pertinent to the petitioner's bank accounts and accompanying photocopies of checks, (3) deeds to real property owned by the petitioner and his wife, (4) a spreadsheet showing the alleged values of those parcels of real property and the extent of their encumbrance, and (5) a letter dated August 20, 2006 from the beneficiary to the petitioner. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

A Schedule C attached to the petitioner's owner's 2000 tax return shows that during that year the petitioner returned a net profit of \$19,898. This office notes, however, that because the priority date of the instant visa petition is April 12, 2001, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

A Schedule C attached to the petitioner's owner's 2001 tax return shows that during that year the petitioner returned a net profit of \$14,111.

A Schedule C attached to the petitioner's owner's 2002 tax return shows that during that year the petitioner returned a net profit of \$15,388.

A Schedule C attached to the petitioner's owner's 2003 tax return shows that the petitioner returned a net profit of \$19,219 during that year.

A Schedule C attached to the petitioner's owner's 2004 tax return shows that during that year the petitioner returned a net profit of \$16,258.

A Schedule C attached to the petitioner's owner's 2005 tax return shows that the petitioner returned a net profit of \$15,388 during that year.

A Schedule C attached to the petitioner's owner's 2006 tax return shows that during that year the petitioner returned a net profit of \$33,218.

The acting director denied the petition on August 10, 2006.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, the petitioner's owner asserted that the petitioner's depreciation deductions are "a paper write-off," and suggested that adding them back to the petitioner's net income would yield an index of the petitioner's ability to pay the proffered wage during a given year. The petitioner's owner also stated that hiring the beneficiary would obviate the need for some of the petitioner's part-time workers and that 2/3 of its wage expense would then be available to pay the wages of the proffered position. The petitioner's owner also noted that he owns residential rental property and that the income from those houses is also available to pay the proffered wage.

In the August 20, 2006 letter the beneficiary indicated that he agreed to reclassify the proffered position to cook, rather than chef, and to reduce the hourly wage to \$11 per hour. He also agreed to accept housing in one of the petitioner's owner's rental properties as partial payment of his wages.

On appeal, the petitioner's owner also attempted to reclassify the proffered position as a cook position rather than a chef position. This office notes that the approved Form ETA 750 labor certification states that the position is for a chef, and the petitioner's owner may not now amend that approved labor certification. Notwithstanding the agreement between the petitioner and the beneficiary, the approved labor certification is valid for employment of a chef at \$17.46 per hour. It is not valid for employment of a cook for \$11 per hour.

A petitioner may not make material changes to a petition that has already been filed in an effort to render a deficient petition approvable. *In re Izummi*, 22 I&N Dec. 169, 175. 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner's owner's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and typically cannot show the sustainable ability to pay a proffered wage.² 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 reported on its tax returns.

The petitioner's owner's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to 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 are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although the petitioner's owner suggested they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.³ The petitioner's owner appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

The petitioner's reliance on the undocumented assertion that the beneficiary would assume a portion of the duties of other employees at the petitioner's company, and that, as such, a portion of those individuals' compensation should be considered funds available to pay the proffered wage is misplaced. The petitioner failed to provide any Form W-2 Wage and Tax Statement, or other documentation to identify the employees whose workload would be reduced or to verify what salary the petitioner paid these other workers from the priority date onwards. Also, there is no notarized, sworn statement from the petitioner in the record that attests to the claim that the beneficiary will replace those other workers. Further still, there is no evidence in the record that these other employees performed the duties of the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (Citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190(Reg. Comm. 1972)).

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages,

³ The petitioner's owner did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish, or even suggest, that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

Ordinarily, this office would, in addition, consider the petitioner's net current assets as an additional index of the petitioner's ability to pay the proffered wage. The instant petitioner, however, is a limited liability company (LLC) reporting taxes on a Schedule L attached to its sole owner's Form 1040 U.S. Individual Income Tax Return. As such, this office has no evidence from which the petitioner's net current assets can be derived, and they cannot be considered.

Just as a corporation is a separate legal entity, distinct from its owners or shareholders, *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958), so is an LLC separate and distinct from its members. The debts and obligations of a corporation or LLC are not the debts and obligations of the owners, the members, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), 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 with no legal obligation to pay the wage."

As the members and others are not obliged to pay the petitioner's debts, the income and assets of the members 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. In the instant case, the petitioner must show the ability to pay the proffered wage out of its own funds, without reference to the funds of its sole owner.

The assertion that the petitioner's owner's income from his real estate holdings are available to pay the proffered wage is similarly an offer by the petitioner's owner to pay the petitioner's wage obligations. The offer by the petitioner's owner to pay a portion of the beneficiary's wages by providing him housing in his rental properties similarly constitutes an offer by the petitioner's owner to pay the wage obligation of the petitioner. As is noted above, this office will not consider an offer by anyone other than the petitioner to pay the proffered wage or any portion of it. The funds of the petitioner's owner will not be included in the assessment of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The proffered wage is \$36,318.80 per year. The priority date is April 12, 2001.

During 2001 the petitioner returned a profit of \$14,111. That amount is insufficient to pay the proffered wage. The petitioner provided no reliable evidence of any other funds at its disposal during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner returned a profit of \$15,388. That amount is insufficient to pay the proffered wage. The petitioner provided no reliable evidence of any other funds at its disposal during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner returned a profit of \$19,219. That amount is insufficient to pay the proffered wage. The petitioner provided no reliable evidence of any other funds at its disposal during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner returned a profit of \$16,258. That amount is insufficient to pay the proffered wage. The petitioner provided no reliable evidence of any other funds at its disposal during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

During 2005 the petitioner returned a profit of \$15,388. That amount is insufficient to pay the proffered wage. The petitioner provided no reliable evidence of any other funds at its disposal during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2005.

During 2006 the petitioner returned a profit of \$33,218. That amount is insufficient to pay the proffered wage. The petitioner provided no reliable evidence of any other funds at its disposal during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2006.

The petition in this matter was submitted on February 23, 2006. On that date the petitioner's 2007 tax return was unavailable. The petitioner's 2007 return was never subsequently requested. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2007 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, 2004, 2005, and 2006. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.