



U.S. Citizenship
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Services

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FILE:

EAC 02 288 51578

Office: VERMONT SERVICE CENTER

Date: JUN 11 2008

IN RE:

Petitioner:
Beneficiary:

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

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the preference visa petition. Subsequent to obtaining information regarding the petitioner from the U.S. Consulate General, Guangzhou, China, the director served the petitioner with a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will remain revoked.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). A notice of intent to revoke is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Notwithstanding Citizenship and Immigration Services' (CIS') burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty foreign food cook. 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 revoked the petition's approval accordingly.

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

As set forth in the director's original November 2, 2005, NOR, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO finds that the director had good and sufficient cause to revoke the approval of this petition.

Section 203(b)(3)(A)(i) of 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 or seasonal 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. 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 [CIS].

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 7, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (35 hour week) or \$21,603.40 annually.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's statement, a copy of the petitioner's bank statement, dated November 10, 2005, showing a balance of \$139,729.13, a copy of the petitioner's property assessment for 2005 showing the property located at 0717-0719 H Street, N.W., Washington, DC 20001 was assessed at \$1,530,230, and a copy of a deed, dated March 21, 1996, with addendum. Other relevant evidence includes copies of the petitioner's 2001 through 2004 Forms 1120-A, U.S. Corporation Short-Form Income Tax Returns. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2004 Forms 1120-A reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$29,775, \$41,341, \$29,042, and \$28,142 respectively. The petitioner's 2001 through 2004 Forms 1120-A do not reflect the petitioner's net current assets for any relevant year.

The deed shows that [REDACTED] and [REDACTED] purchased the property, "Lot lettered "A" in [REDACTED], Executor's subdivision of original lot 3 in Square Four Hundred Twenty-eight (428) as per plat recorded in Liber W.F. at folio 11B in the Office of the Surveyor for the said District; said property now taxes as Lot 811 in Square 428" on March 21, 1996 from O.C.C., Inc.

On appeal, counsel states:

- a. The Center Director erred in revoking the approval of I-140 immigrant petition for the beneficiary.
- b. The petitioner has the financial ability to pay the proffered wage of \$21,603.40 per year to the beneficiary as a cook in its restaurant.
- c. The petitioner has a savings and checking account of \$139,729.13 (Exhibit "A").

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

- d. The real property at the restaurant premises is assessed at \$1,530,230 (Exhibit "B"). It is owned by [REDACTED] and [REDACTED], his wife (Exhibit "C"). They are the shareholders of the petitioning corporation.
- e. The federal tax returns for 2001, 2002, 2003 and 2004 show net income of \$29,775, \$41,341, \$29,042, and \$28,142, respectively which is more than sufficient to pay the proffered wage to the beneficiary.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. 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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750, signed by the beneficiary on April 1, 2001, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary to establish that the petitioner employed the beneficiary during the pertinent years, 2001 through 2004. Therefore, the petitioner must establish its ability to pay the entire proffered wage of \$21,603.40 from the priority date of April 7, 2001 and continuing until the beneficiary obtains lawful permanent residence.² *See* 8 C.F.R. § 204.5(g)(2).

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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*

² It is noted that the petitioner has filed an additional seven immigrant petitions (five petitions since 2001). Therefore, the petitioner must establish that it had sufficient funds to pay all of the proffered wages from the 2001 priority dates and continuing to the present. Counsel has stated that the other seven beneficiaries did work for the petitioner, but have left. However, no evidence has been submitted to support counsel's claims. In fact, the evidence of record indicates that many of the beneficiaries never worked for the petitioner. Furthermore, two of the other beneficiaries have already received their lawful permanent resident cards while the remaining beneficiaries still have approved petitions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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 Chang* at 537.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A, U.S. Corporation Short-Form Income Tax Return. The petitioner's tax returns demonstrate that its net incomes in 2001 through 2004 were \$29,775, \$41,341, \$29,042, and \$28,142, respectively. The petitioner could not have paid the proffered wage of \$21,603.40 in 2001 through 2004 from its net income and also pay the wages of the additional beneficiaries petitioned for with the 2001 and later priority dates.

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. 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. 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its 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 out of those net current assets. The petitioner's net current assets are not reflected on its tax returns for 2001 through 2004,

³ 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.

and the petitioner provided no regulatory-prescribed evidence to establish its net current assets. The petitioner has not established that it could have paid the proffered wage of \$21,603.40 in 2001 through 2004 from its net current assets or pay the additional wages of the other beneficiaries.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$21,603.40 based on its net incomes, its savings and checking account, and on the value of the real property that serves as the restaurant's premises.

Counsel is mistaken. Counsel's reliance on the balance 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Only submitting one statement from November 2005 does not establish the petitioner's continuing ability to pay the proffered wage of \$21,603.40 from the priority date in 2001.

The real property at the restaurant premises is considered to be a long-term asset (having a life longer than one year), and its value is not considered to be readily available to pay the proffered wage to the beneficiary as the property is not easily converted into cash. Therefore, the AAO will not consider the real estate property of the petitioner's premises when determining the petitioner's ability to pay the proffered wage of \$21,603.40 and the wages of the additional beneficiaries. In addition, 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 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. 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."

While the petitioner's 2001 through 2004 net incomes (\$29,775, \$41,341, \$29,042, and \$28,142, respectively) do appear to be sufficient to pay the wages of one employee in 2001, 2003 and 2004 and two employees in 2002, they are not sufficient to pay all the wages of the beneficiaries petitioned for with priority dates of 2001 and later.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the

Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has not provided any evidence that unusual circumstances have been shown to exist that parallel those in *Sonogawa*, nor has it been established that 2001 through 2004 were uncharacteristically unprofitable years for the petitioner. In addition, there is no evidence of the petitioner's reputation in the industry. Furthermore, although the petitioner has submitted four tax returns, 2001 through 2004, none of those tax returns show that the petitioner had sufficient funds to pay the proffered wage of \$21,603.40 and the additional wages of the other beneficiaries petitioned for.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salaries offered as of the priority date of the petitions and continuing until the beneficiaries obtain lawful permanent residence.⁴

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director revoking the petition's approval.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition's approval remains revoked.

⁴ It is noted that a review of public information at <http://mblr.dc.gov/corp/lookup/status.asp?id=115021>, accessed on May 28, 2008, reveals that the petitioner's (United Family, Inc.'s) status as a domestic business corporation in the District of Columbia has been revoked. If the petitioner pursues this matter further, it must establish its valid corporate existence.