U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

AUG 02 2004

File: LIN 02 200 53860 [redacted] Office: NEBRASKA SERVICE CENTER Date:

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: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision 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, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The 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 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.

On appeal, the petitioner submits a brief and additional evidence.

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.

Eligibility in this matter hinges on the petitioner's 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 Department of Labor. *See* 8 C.F.R. 204.5(d). Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $11.82 per hour, which equals $24,585.60 per year.

The petition and the Form ETA 750 both identify the petitioner as Toreros Mexican Restaurant, [redacted] Renton, Washington. The petition states that the petitioner has 17 employees and gross receipts of $571,819. The petition and the Form ETA 750 both state that the beneficiary will work at Torero's Federal Way [redacted] Federal Way, Washington.

With the petition, one of the petitioner's owners[1] submitted a letter, dated April 5, 2002. In that statement, the owner asserted that the petitioner has 150 employees and grosses $7,150,000 annually. The owner states that, upon approval of the petition, the beneficiary will have a permanent position at Torero's Federal Way. That owner stated that he is also the majority owner of Torero's Benson/Rodriguez Benson, Inc., which he further stated earned a net profit of $45,078 in 2001. Finally, that part owner stated that the two restaurants, considered together, have the ability to pay the proffered wage.

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[1] That part owner, Teodoro Rodriguez, states that he owns 25% of Torero's Federal Way/Mexico y Tu, Inc.

With the petition the petitioner also submitted the 2001 Form 1120S U.S. Income Tax Returns for an S Corporation of both [redacted] Federal Way.[2] The return of [redacted] shows that it declared ordinary income of $21,224 during 2001. The corresponding Schedule L shows that at the end of that year its current liabilities exceeded its current assets.

On July 5, 2002, the Director, Nebraska Service Center issued a Request for Evidence in this matter. The director requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date and stipulated that the evidence must include either copies of the petitioner's annual reports, federal tax returns, or audited financial statements. The director also requested evidence of the relationship to the petitioner of the two corporations for which the petitioner submitted tax returns. Finally, the Service Center requested evidence that those two entities' income and assets are available to pay the proffered wage.

In response, the petitioner submitted a letter, dated September 12, 2002, from the same part owner who submitted the April 5, 2002 letter described above. The September 12 letter states that the petitioner's part owner also owns a majority share of eight other [redacted] that, together, have more than 100 employees and have the ability to pay the proffered wage. The petitioner's part owner stated that, because he is the majority owner of the chain[3], which he founded, he views the operation as one entity, although each restaurant is a separate corporation. The letterhead confirms that 817 S. 3rd Street, Suite 1, Renton, Washington, is the location of the corporate offices of the Torero's Family Restaurant chain.

That letter contains a list of the nine restaurants. The first pages and the Schedules K-1 from the 2001 Form 1120S U.S. Income Tax Returns for an S Corporation of eight of those nine restaurants were also submitted. Those partial returns confirm that each of the restaurants is a separate corporate entity. The list indicates that Torero's Federal [redacted] has 15 employees.[4]

With that letter, the petitioner provided another copy of the 2001 Form 1120S, U.S. Income Tax Return for an S Corporation [redacted] A cover sheet confirms that this restaurant would be the beneficiary's worksite.

The petition states that the petitioner is Torero's Mexican Restaurant, [redacted] Renton, Washington. The record does not contain any evidence that such a company actually exists, only that the nine Torero's restaurants use that as an office address for common functions. The record contains no

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[2] The return [redacted] does not support the assertion made in the letter of April 5, 2002, that it earned net income of $45,078. The year during which Rodriguez-Benson, Inc. dba Torero's Benson allegedly earned that amount remains unknown.

[3] Although the part owner characterizes himself as the majority owner of the entire chain, the evidence indicates that he owns only 25% of Mexico y Tu, Inc. aka Torero's Federal Way.

[4] That list also states the share of the stock of eight of the Torero's restaurants that the writer owns and the share his wife owns. The writer owns 100% of one of the restaurants, 87.5% of two of the restaurants, and 75% of two others. The writer owns 37.5% and his wife 37.5% of Rodriguez [redacted] tle, and 25% each of [redacted] Torero's Federal Way. The writer owns 19% of yet another restaurant. The list does not state what percent, if any, the writer owns of the last of the Torero's restaurants. Thus, although the writer may own a majority of the stock of the restaurants collectively, he does not own a majority of the stock of each individual restaurant and does not own a majority of the stock of [redacted] Way.

evidence to indicate that Torero's Mexican Restaurant, of that Renton address, employs anyone. If it does not, then it is not a United States employer capable of petitioning for an alien worker within the meaning of 8 C.F.R. § 204.5(l)(1). In any event, the record contains no tax information pertinent to a specific Torero's Mexican Restaurant located at that address. If this petition is analyzed as a petition by Torero's Mexican Restaurant at [redacted] in Renton, then it must fail, as the petitioner provided no evidence pertinent to the finances of that entity.

One of the returns provided is for [redacted] Federal Way. The petition and the ETA 750 both indicate that this restaurant is located at 1900A Sea Tac Mall, Federal Way, Washington, and that the beneficiary will be employed there. Although the petition and the ETA 750 both state that Toreros Mexican Restaurant [redacted] Washington, is the prospective employer, that address seems to belong to the umbrella corporate office that conducts the business of the various restaurants. As the petition and the ETA 750 indicate that the beneficiary will work a [redacted] Way, 1900A Sea Tac Mall, this office finds that Mexico y Tu, Inc. dba Torero's Federal Way is expected to employ the beneficiary and pay his salary. This office will, therefore, [redacted] Federal Way as the petitioner in this matter and 817 South 3rd Street as merely a mailing address. This approach, in addition to being indicated by the location at which the beneficiary would be employed, is the interpretation most favorable to the petitioner.

The petitioner also provided a list of the employees at each of the Torero's restaurants and a notarized statement, dated September 16, 2002, stating that Torero's Mexican Restaurants employ more than 188 workers, have annual gross sales of $7,000,000, and have the ability to pay the proffered wage. Finally, the petitioner provided the 2001 Form 1040 joint income tax return of the minority owner who provided the letters described above, and of his wife.

The director issued a decision in this matter on December 4, 2002. The director noted that the 2001 ordinary income and depreciation deduction of [redacted] Federal Way, combined, equal more than the annual amount of the proffered wage, but that the petitioner has a petition pending for another beneficiary who will also work at [redacted] Federal Way, and that those amounts, combined, are insufficient to cover the annual amount of both beneficiaries' proffered wages. Further, the director noted that the record contains no evidence that the petitioner has paid any wages to the beneficiary in the past. The director stated that each corporation is a separate entity for the purposes of establishing the ability to pay the proffered wage. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition.

On appeal, the petitioner submits another letter, dated January 6, 2003, from the same minority owner who previously submitted letters in support of the petition. The minority owner argues that the nine restaurants are "run under the same administrative umbrella," that he directs the business operations of all nine restaurants, that all of the restaurants benefit from centralized ordering, strategic business planning, and sharing employees and managers as necessary. The petitioner's minority owner argues that all of the restaurants "function together as a single business entity," and implies that the restaurant chain should, therefore, be treated as a single employer for immigration purposes. The minority owner states that because he exercises control over all of the restaurants, he "can authorize the use of funds from one restaurant to meet the payroll needs of another restaurant in order to pay the (proffered) wage."

The petitioner's minority owner provided four pages of the 2001 Form 1120S U.S. Income Tax Return for an S Corporation of Torero, Inc. dba Torero Rainier, apparently to demonstrate his ability to shift funds from one corporate entity to another, That return was filed under the same taxpayer ID number shown on the petitioner's list of restaurants, mentioned above, as belonging to Torero's Renton/Torero Restaurant, Inc. Statement 10, Other Current Assets, of the 2001 Schedule L submitted with that return notes that seven of the other Torero's restaurants owe varying current amounts to that particular Torero's, ranging from $173 to $6,493. That minority owner states that he commonly transfers funds from one of his restaurants to another as necessary.

The petitioner's minority owner may have demonstrated that he is able to lend funds of one of his corporations to another as is convenient to his purposes, but that is insufficient. He has not demonstrated that any of his individually incorporated restaurants would be obliged to pay the debts and obligations of any one of the others if that other restaurant became unprofitable or the payment became inconvenient otherwise.

A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders, including the income and assets of other companies which they own, cannot be considered in determining the petitioning corporation's, ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980). As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter.

Moreover, there does not appear to be a parent/subsidiary relationship between any of the Toreros restaurants and the petitioner. The Schedules K-1 submitted with the petitioner's tax returns reflect that four individuals own it. Citizenship and Immigration Services (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). Moreover, in response to the request for additional evidence, the minority shareholder stated that the chain of restaurants had pending petitions for 13 other beneficiaries. Thus, even if we could consider the income or assets of the other restaurants, the petitioner would need to demonstrate that the other restaurants could pay not only the wages of the beneficiary of the instant petition, but also the wages of any employee(s) they may be petitioning for themselves. Given the petitioner's choice to list a nonexistent "holding company" as the "petitioner" for all petitions, and without the record of each petition before us, we cannot determine which restaurant is petitioning for which beneficiary.

The Form ETA 750 identifies [redacted] Federal Way at 1900A Sea Tac Mall, Federal Way, Washington as the location where the beneficiary will work. Because the beneficiary will be employed at the premises of that corporation, this office has determined, above, that corporation to be the intended employer who is expected to pay the proffered wage. This office finds that corporation to be the *de facto* petitioner in this case. Information pertinent to the finances of that restaurant, and that restaurant only, will be considered in determining the ability of the petitioner to pay the proffered wage.

The petition and the list of Torero's restaurants both stated that the petitioner has 17 employees. The petitioner does not, then, employ 100 or more employees. As such, the petitioner is obliged to demonstrate the ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. The petitioner submitted its 2001 tax return for that purpose.

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 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 that 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, 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 the CIS should have considered income before expenses were paid rather than net income.

The Service Center included the petitioner's depreciation deduction in the calculation of the funds available to pay the proffered wage. This office disagrees with that inclusion. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a 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. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang,* 719 F. Supp. at 537. *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054. 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.

The priority date is April 27, 2001. The proffered wage is $24,585.60 per year. During 2001 the petitioner declared ordinary income of $21,224. That amount is insufficient to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001 out of its income. The petitioner ended that year with negative net current assets. The petitioner has not, therefore, demonstrated the ability to contribute any amount toward paying the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available with which it might have paid the proffered wage during 2001. The petitioner, therefore, has not demonstrated that it was able to pay the proffered wage during 2001.

As stated above, the petitioner has a petition pending for another beneficiary. In order for this petition to be approved, the petitioner must demonstrate the ability to pay the proffered wages of all of the beneficiaries for whom it has petitioned, rather than merely this one beneficiary. Because the petitioner has failed to

demonstrate the ability to pay the proffered wage of even this instant beneficiary, however, this office need not reach the additional calculations pertinent to multiple beneficiaries.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on 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. This decision is without prejudice toward future filings. In future petitions, however, the petitioner should specify the entity, corporate or otherwise, which will employ the beneficiary, and demonstrate the ability of that particular entity to pay the proffered wage.

ORDER: The appeal is dismissed.