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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: EAC 02 056 51680 Office: VERMONT SERVICE CENTER Date: DEC 30 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the instant preference visa petition. Subsequently, the director granted a motion to reopen/reconsider and denied the petition again. The matter 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 and denied the petition accordingly.

On appeal, counsel 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 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 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 Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $23,000 per year.

On the petition, the petitioner stated that it was established on July 26, 2000. The petitioner did not state the number of workers it employs. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Indiana, Pennsylvania.

In support of the petition, counsel submitted the first page of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. That return states that the petitioner declared a loss of $19,466 as its taxable income before net operating loss deduction and special deductions during that year. Because the corresponding Schedule L was not submitted with that return, the Service Center then had no information pertinent to the petitioner's net current assets at the end of that year.

Because the priority date of the petition is April 30, 2001, however, evidence pertinent to the petitioner's finances during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel submitted no other evidence of the petitioner's ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on January 29, 2002, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center specifically requested that, if the petitioner employed the beneficiary during 2000, it submit the 2000 W-2 form showing the amount it paid him. The Service Center also specifically requested a copy of the petitioner's 1999 tax return.

In response, counsel submitted a letter, dated March 8, 2002, in which she noted that, as the petitioner was established during July of 2000, it has no 1999 income tax return. Counsel provided a complete copy of the petitioner's 2000 tax return. The Schedule L submitted with that return shows that at the end of 2000, the petitioner's current liabilities exceeded its current assets.

Counsel argued that the petitioner's total assets, its gross receipts, its growth, and its interest in hiring additional staff are all indices of its ability to pay the proffered wage.

As to the beneficiary's W-2 forms, counsel stated that they were unavailable. Counsel also stated that, as the beneficiary is relying on employment experience gained with another employer, evidence pertinent to his claim of employment for the petitioner is irrelevant.[1]

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, on August 13, 2002, denied the petition.

Subsequently, counsel submitted a motion to reopen/reconsider. With the motion counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of $12,167 during that year. The corresponding Schedule L shows that at the end of the year the petitioner's current liabilities exceeded its current assets.

In a letter dated September 20, 2002, counsel noted the amount of the petitioner's total income, its total salaries and wages, and its expectation of increasing receipts as evidence of its ability to pay the proffered wage.

The Director, Vermont Service Center, granted the motion to reopen/reconsider. After reviewing the evidence and the motion, the director again denied the petition.

On appeal, counsel submits a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of $10,931 as its taxable income before net operating loss

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[1] Although counsel is incorrect as to the reason, counsel is correct that the 2000 W-2 forms would have no direct relevance to any material issue. As was observed above, evidence pertinent to prior years is not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date, April 30, 2001.

deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel noted that the petitioner's owner's family owns three other Cozumel restaurants. Again, counsel stressed the petitioner's total income and its wage expenses and argued that the petitioner has demonstrated the ability to pay the proffered wage. Counsel argued that the petitioner's losses during each of the salient years are not indicative of inability to pay wages.

On a Form 1120 U.S. Corporation Income Tax Return, Line 11, "Total Income" is an interim measure. That is; it is the result of subtracting some expenses from gross receipts, Cost of Goods Sold, for instance, but not others, for instance, salaries and rent. Counsel's reliance on that statistic as an index of the petitioner's ability to pay the proffered wage is misplaced, as is her reliance on the amount of the petitioner's wage expense.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner petitioner's gross receipts or total income exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[2] or otherwise increased its net income,[3] the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

Counsel also argues that the petitioner's growth and its anticipated future growth are indices of its ability to pay the proffered wage. To date, the petitioner's growth has not resulted in any profit. To date, therefore, its growth has not demonstrated that it is able to pay the proffered wage. Counsel submitted no evidence from which one might reasonably conclude that the petitioner's anticipated future increases in gross receipts, if ever realized, would result in a profit.

Counsel notes that the petitioner's owner's family owns other similar restaurants. If that statement is at all relevant, counsel must mean to imply that the petitioner's family might contribute funds as necessary to pay the proffered wage.

The petitioner, however, is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else.[4] As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

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[2] The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employees wages, and that those obviated wages would be sufficient to cover the proffered wage.

[3] The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

[4] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

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, although the petitioner and the beneficiary stated, on the Form ETA 750, Part B, that the petitioner has employed the beneficiary since October 2000, the petitioner did not provide W-2 forms or any other evidence of wages it has paid to the beneficiary. The petitioner has not, therefore, established 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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 corporate 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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $23,000 per year. The priority date is April 30, 2001.

During 2001, the petitioner declared a loss of $12,167. The petitioner cannot show the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with negative net current assets. The petitioner cannot show the ability to pay any portion of the proffered wage out of its

net current assets during that year. The petitioner has not demonstrated that any other funds were available to it 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 declared a loss of $10,931. The petitioner cannot show the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with negative net current assets. The petitioner cannot show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were available to it 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.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. 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 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.