U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

JUN 15 2004

File: EAC 02 081 53597 Office: VERMONT SERVICE CENTER Date:

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 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 preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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

The petitioner must demonstrate eligibility 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. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on December 1, 1997. The proffered wage as stated on the Form ETA 750 is $17.61 per hour, which equals $36,628.80 per year.

With the petition, the petitioner submitted copies of its 1997 and 1998 Form 1120S U.S. Income Tax Returns for an S Corporation. The 1997 return shows that the petitioner declared ordinary income of $2,580 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1998 return shows that the petitioner declared ordinary income of $885 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Although the petition was submitted during January of 2002, the petitioner did not submit tax returns or other financial documentation for 1999 or 2000, and did not explain that omission.

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 March 5, 2002, requested

additional evidence pertinent to that ability. The Service Center noted that the petitioner must establish its ability to pay the proffered wage beginning on the priority date and continuing until the present.

The request for evidence also asked and stated the following:

> Will the prospective employee fill a newly created position? If your answer is no, how long has this position existed? . . . . Identify the former employee, submit evidence of the salary paid to him or her, and document that the position was vacated. Submit copies of Form 941 [Employer's Quarterly Tax Returns] for the period in question.

The questionnaire was returned. The questionnaire indicated that the position was newly created. The remaining questions did not, therefore, apply and were not answered. The requested quarterly tax returns were not submitted.

With that questionnaire, counsel submitted a letter, dated March 31, 2001, from an accountant. That letter states that, based upon a compilation, the petitioner had the ability to pay the proffered wage from December 31, 1997 to the date of the letter. The accountant emphasized, however, that the "information is the responsibility of management," and that the accountant did not express an opinion on it.

Counsel submitted another letter, dated April 23, 2002, from another accountant. The accountant stated that the petitioner and [redacted] which the accountant states are two different businesses owned by the same two individuals, had recently engaged him. The accountant further stated that, as of that date, the petitioner did not have the ability to pay the proffered wage, but that the petitioner and Beth Torah Kosher Caterers, together, were able to pay it. The accountant concluded that,

> The selected information above has been compiled by me and, as such, I have not audited or reviewed this information and do not express an opinion on it. This information is the representation and the responsibility of management.

The petitioner submitted no evidence of the limited liability company's financial situation or its relationship to the petitioner.

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 September 5, 2002, denied the petition.

On appeal, counsel asserts that the proffered position is not a new position, but has previously been filled by part-time workers. In support of that assertion, counsel provides a letter, dated September 27, 2002, from the petitioner's manager. That letter states that part-time and temporary employees previously filled the position, because the petitioner was unable to find a full-time kosher cook.[1] The manager further stated that the petitioner previously indicated that the position was newly created because the language of the request for evidence appeared to ask whether the petitioner had previously employed a full-time cook in the position. That letter further states that the petitioner will eliminate "a significant portion" of part-time, temporary employees when it is able to hire a full-time cook.

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[1] This office questions why finding several part-time kosher cooks who are unwilling to work full-time is easier than finding one full-time kosher cook, but declines to base today's decision, in whole or in part, on that issue.

Counsel also provides a letter, dated September 13, 2001, from the manager to the U.S. Department of Labor. That letter also indicates that part-time workers had filled the proffered position.

Counsel stated that he was providing the petitioner's 1997 and 1998 Form W-2, Wage and Tax Statements. In fact, counsel provided the 1998 Form W-2, Wage and Tax Statements of 31 employees, but no 1997 W-2 forms. Counsel provided no evidence from which this office could determine which of those employees were cooks, or which the beneficiary would replace. Counsel observed that the total wages paid by the petitioner greatly exceeded the proffered wage.

Counsel also asserted that many part-time, temporary employees would be eliminated when the petitioner is able to employ a full-time cook. Counsel provided no evidence, however, from which this office might identify those employees and their salaries. As such, this office cannot calculate how much of the salaries paid to other employees should be included in the calculation of the funds available to pay the proffered wage.

When questioned, the petitioner initially indicated that the proffered position is a newly created position. Subsequently, the petitioner indicated that it is not, and that its previous misstatement was the result of a misunderstanding. Such a shift in position might call into question the credibility to the petitioner's statements. Because the petitioner did not state which employees the petitioner would replace, however, this office need not reach that issue. Even if the representation that the proffered position is a pre-existing position is believed, this office has no evidence from which it can calculate, or even estimate, the funds which would be made available by the beneficiary's replacing part-time cooks.

The first accountant's letter, dated March 31, 2001, stated that the petitioner has the ability to pay the proffered wage but that the accountant expressed no opinion. Those statements are mutually contradictory. That letter does little to support the petitioner's position.

The second accountant's letter, dated April 23, 2002, stated that the petitioner **did not** have the ability to pay the proffered wage on that date, but that the petitioner and another company under the same ownership, together, did.

The petitioner 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 or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders, including other companies they own, and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter. The petitioner must show the ability to pay the proffered wage out of its own funds.

Although the accountant represented that the petitioner and Beth Torah Kosher Caterers are separate businesses, the petitioner, on the petition, represented that Beth Torah Kosher Caterers is a d/b/a name of the petitioner. In either event, the outcome is the same. If Beth Torah is a name under which the petitioner does business, then its profits are properly part of the petitioner's own profits, should be included in the determination of the petitioner's ability to pay the proffered wage, and are included on its tax return. If Beth Torah is a separate company, then its profits are not part of the petitioner's profits, have no place in the determination of the petitioner's ability to pay the proffered wage, and are not included on the petitioner's tax return. In either event,

only the petitioner's own tax return, and only the funds shown on the petitioner's tax return will be considered in the determination of the petitioner's ability to pay the proffered wage.

Both accountants' letters state that they were prepared pursuant to a compilation, rather than an audit. As such, the representations in those letters are the representations of management. The representations of management are insufficient to demonstrate the ability to pay the proffered wage. This office will determine, from the other evidence provided, whether the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reliance on the amount of the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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 the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

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 paid the beneficiary an amount at least equal to the proffered wage during that period, CIS 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

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, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The priority date is December 1, 1997. The proffered wage is $36,628.80 per year. During 1997, the petitioner declared ordinary income of $2,580. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated, therefore, that it was capable during 1997 of paying any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during 1997. The petitioner has failed, therefore, to demonstrate the ability to pay the salient portion of the proffered wage during 1997.

During 1998 and ensuing years, the petitioner is obliged to show the ability to pay the entire proffered wage. During 1998, the petitioner declared ordinary income of $885. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated, therefore, that it was capable during 1998 of paying any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during 1998. The petitioner has failed, therefore, to demonstrate the ability to pay the proffered wage during 1998.

The petitioner failed to submit evidence pertinent to its ability to pay the proffered wage during 1999 and 2000. Therefore, the petitioner has failed to demonstrate the ability to pay the proffered wage during those years.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, and 2000. 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.

ORDER: The appeal is dismissed.