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

U.S. Citizenship and Immigration Services

B6

[redacted]

File: WAC 02 201 52526 Office: CALIFORNIA SERVICE CENTER Date: OCT 1 2 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 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and 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 statement 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.

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. Here, the Form ETA 750 was accepted on January 16, 1998. The proffered wage as stated on the Form ETA 750 is $11.55 per hour, which equals $24,024 per year.

Part B of the Form ETA 750 states that the beneficiary worked for Restaurante Rancho Grande in Guadalajara, Jalisco, Mexico, from March 1995 to July 1997. Part B further states that the beneficiary was unemployed from August 1997 to October 5, 1998, the date Part B was completed.

With the petition, counsel submitted a letter, dated June 3, 2002, in which he stated that representations on the Form ETA 750, Part B pertinent to the beneficiary's employment history were incorrect and that the misrepresentations had been caused by a computer error. Counsel stated that the beneficiary worked as a full-time cook from February 1990 to February 1992 [redacted] Restaurant in Cuatla, Jalisco, Mexico. Counsel further stated that the petitioner had employed the beneficiary as a full-time cook from September 1992 to the date of that letter. The beneficiary also signed that letter.

Counsel also submitted copies of the petitioner's 1998, 1999, 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. The 1998 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $47,380. The corresponding Schedule L

shows that at the end of that year the petitioner had current assets of $175,418 and current liabilities of $82,158, which yields net current assets of $93,260.

The 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $29,795. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $213,028 and current liabilities of $62,114, which yields net current assets of $150,914.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $71,181. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $211,493 and current liabilities of $70,537, which yields net current assets of $140,956.

The 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $34,697. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $168,410 and current liabilities of $65,545, which yields net current assets of $102,865.

On November 8, 2002 the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center noted that the tax returns submitted were unsigned and specifically requested signed copies of the petitioner's tax returns from 1998 through 2001. The Service Center also specifically requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters.

Further, the Service Center noted that, in the revised version of the beneficiary's employment history, the petitioner's attorney stated that the petitioner had employed the beneficiary since 1992. The Service Center asked the petitioner to provide IRS printouts of the Form W-2 Wage and Tax Statements, from 1996, showing the wages paid for that employment.

In response, counsel submitted signed copies of the petitioner's tax returns for 1998 through 2001 and the requested California Form DE-6 Quarterly Wage Reports. Counsel did not submit the requested W-2 forms and did not explain their absence. The petitioner submitted no additional evidence of its ability to pay the proffered wage.

The Form DE-6 Quarterly Wage Reports submitted are for the last quarter of 2001 and the first three quarters of 2002. Those reports show that the petitioner employed the beneficiary during all four of those quarters and paid him $2,606.24, $2,757.37, $2,808, and $3,267.05 during those quarters, respectively.

The director issued a decision in this matter on July 27, 2003. The director noted that the four quarterly wage reports submitted showed that the petitioner had paid the beneficiary only $11,438.66 during those four quarters, an amount less than the proffered wage of $24,024.

The director further noted that the petitioner has filed 12 worker petitions with CIS. Of those twelve, eight were "expensed" on the petitioner's quarterly wage reports and the other four did not appear on those reports. The four that did not appear on those quarterly reports were previously approved. The director noted that during 1998, 1999, 2000, and 2001, the petitioner did not have the ability to pay the

proffered wage to the four approved beneficiary's who were not listed on the quarterly reports.

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 July 27, 2003, denied the petition.

On appeal, counsel asserts that "the properties occupied by the restaurants are owned free and clear by the petitioner, and the restaurant pays rent to the petitioner." This office notes that counsel has confused the petitioner for the petitioner's owner. The petitioner, which will employ the beneficiary, is the restaurant, and must show the ability to pay the proffered wage.

Counsel further stated, but provided no evidence to show, that payments of rent for the building could be used to pay the proffered wage. Counsel also stated that the petitioner's compensation to officers was discretionary, but provided no evidence in support of that assertion. Counsel stated that a portion of the petitioner's cost of labor, shown at Line 3, Schedule A on each year's return, was paid to the beneficiary and the beneficiaries of the petitioner's of the other pending petitions. Counsel did not provide any evidence of how much of that labor expense was paid to beneficiaries of pending petitions.

With the appeal, counsel provided the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. Counsel also provided the 1998, 1999, 2000, 2001, and 2002 Form W-2 Wage and Tax Statements showing wage payments by the petitioner to the beneficiary. Those W-2 forms show that the beneficiary received $9,530.49, $9,343.74, $9,741.36, $11,110.47, and $12,109.56 during those years, respectively.[1]

The 2002 income tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $13,087 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $167,339 and current liabilities of $44,231, which yields net current assets of $123,108.

Counsel submitted a letter, dated August 14, 2003, from the petitioner's accountant. That letter states that the family of the petitioner's owner also owns a partnership [redacted] Partnership, that operates other restaurants. The accountant noted that the petitioner is a family-owned business and reports small profits, preferring to pay out bonuses to its owners. The accountant stated that the petitioner has more than sufficient revenue to pay the proffered wage to the beneficiaries of all of the petitions. Copies of the 1998, 1999, 2000, 2001, and 2002 Form 1065 U.S. Return of Partnership Income of [redacted] Partnership were also submitted with the appeal.

The director appeared to find a discrepancy between the beneficiary's employment history as stated on the Form ETA 750, Part B and that stated in counsel's letter. This office concurs. The beneficiary initially claimed to have worked at a restaurant in Guadalajara from March 1995 to July 1997 and to have been unemployed from August 1997 to October 5, 1998. Subsequently, the beneficiary claimed to have worked in a restaurant in Cuatla from February 1990 to February 1992 and to have worked for the petitioner beginning during September 1992. Counsel attributes the discrepancies to a computer error, but did not explain how a computer could generate the incorrect but detailed employment history

[1] This office notes that the petitioner has never provided 1996 or 1997 W-2 forms showing the amounts the petitioner paid to the beneficiary during those years, although the director specifically requested those forms on November 8, 2002.

submitted on the Form ETA 750.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Counsel asserts that the petitioner might forego various payments, including its rent, in order to pay the proffered wage. By claiming those various payments as business deductions, the petitioner has indicated that they are necessary to its business.[2] Counsel now implies that they are unnecessary. A letter from an accountant asserts that the petitioner's owner's family owns another business, a partnership, and implies that they might use funds from that other business to pay the proffered wage if necessary.

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, the stockholders, or anyone else.[3] 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 or to forego payments due to them, 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.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 submitted W-2 forms which establish that it employed and paid the beneficiary $9,530.49 during 1998, $9,343.74 during 1999, $9,741.36 during 2000, $11,110.47 during 2001, and $12,109.56 during 2002. Those amounts fall short of the proffered wage.

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, it must demonstrate the ability to pay the balance of the proffered wage. 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).

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[2] 26 USC Subtitle A, Chapter 1, Subchapter B, Part VI, Sec. 162. – Trade or business expenses. (a) In general -- There shall be allowed as a deduction all the ordinary **and necessary** expenses paid or incurred during the taxable year in carrying on any trade or business. [Emphasis supplied.]

[3] 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.

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* 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. 632 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, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang*, 919 F. Supp. at 537. See also *Elatos,* 632 F. Supp. at 1054.

The petitioner's net income, however, 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 priority date is January 16, 1998. The proffered wage is $24,024. The calculation of the petitioner's ability to pay the proffered wage is complicated by the fact that the petitioner has filed 11 other petitions for alien workers. Only one of the files pertinent to the other 11 petitions is currently before this office. The other ten, although presumably on file with CIS, are not readily available to this office.

Ordinarily, this office would add together the amounts of the twelve proffered wages, subtract the amounts the petitioner actually paid to the twelve beneficiaries during a given period, and determine whether the remaining evidence demonstrated that the petitioner was able to pay the balance of the proffered wages during that period. In the instant case, the wage proffered in ten of those cases is unknown to this office. The names of, and amounts paid to, ten of the beneficiaries are also unknown.

The petitioner is obliged to prove the ability to pay the proffered wage of all twelve aliens in order for this petition to be approved. This obligation includes providing the amounts of the proffered wages of each petition and the names of the beneficiaries. The petitioner provided no such information. In determining the petitioner's ability to pay the proffered wage, this office is obliged to make some assumptions.

The other petition from the instant petitioner that is before this office is also for a cook and proffers a wage of $24,960 per year.[4] This office shall assume that the proffered wage in the remaining ten cases is

[4] The priority date of that other petition is December 7, 1998. Apparently the Department of Labor reassessed the predominant wage of cooks in the petitioner's area during 1998.

similar to the proffered wages in the two cases present in this office.[5] For those ten cases, this office shall use $24,024, the lower figure, as the proffered wage. The petitioner is obliged to show the ability to pay $289,224 in proffered wages during each of the salient years.[6]

The petitioner has demonstrated that it paid the beneficiary $9,530.49, $9,343.74, $9,741.36, $11,110.47, and $12,109.56 during 1998, 1999, 2000, 2001, and 2002, respectively. The other record before this office also contains 1998, 1999, 2000, 2001, and 2002 W-2 forms showing that the petitioner paid that other beneficiary $11,347.50, $10,913.23, $11,474.01, 9,323.76, and $8,569.13 during those years, respectively. The petitioner has also demonstrated that it was able to pay those portions of the aggregated proffered wage during those years. The amount the petitioner has demonstrated that it paid to both beneficiaries during those same years was $20,877.99, $20,256.97, $21,215.37, $20,434.23, and $20,678.69. The petitioner is obliged to demonstrate the ability to pay the remaining $268,346.01, $268,967.03, $268,008.63, $268,789.77, and $268,545.61 during those years.

During 1998, the petitioner declared taxable income before net operating loss deduction and special deductions of $47,380. That amount is insufficient to pay the remaining portion of the aggregated proffered wages. The petitioner ended that year with $93,260 in net current assets. That amount is also insufficient to pay the aggregated proffered wages. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wages. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner declared taxable income before net operating loss deduction and special deductions of $29,795. That amount is insufficient to pay the remaining portion of the aggregated proffered wages. The petitioner ended the year with $150,914 in net current assets. That amount is also insufficient to pay the proffered wage. The petitioner did not demonstrate that any other funds were available with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner declared taxable income before net operating loss deduction and special deductions of $71,181. That amount is insufficient to pay the remaining portion of the aggregated proffered wages. The petitioner ended the year with $140,956 in net current assets. That amount is also insufficient to pay the proffered wage. The petitioner did not demonstrate that any other funds were available with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner declared taxable income before net operating loss deduction and special deductions of $34,697. That amount is insufficient to pay the remaining portion of the aggregated proffered wages. The petitioner ended the year with $102,865 in net current assets. That amount is also insufficient to pay the proffered wage. The petitioner did not demonstrate that any other funds were

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[5] If this assumption is incorrect and prejudices the petitioner's case, the error may be redressed upon a motion. If such a motion is filed, the petitioner should demonstrate either that it is paying or is able to pay the proffered wage to all twelve beneficiaries, unless it shows that it is not obliged to pay the proffered wage to some number of those beneficiaries.

[6] $24,024 x 11 + $24,960.

available with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002, the petitioner declared taxable income before net operating loss deduction and special deductions of $13,087. That amount is insufficient to pay the remaining portion of the aggregated proffered wages. The petitioner ended the year with $123,108 in net current assets. That amount is also insufficient to pay the proffered wage. The petitioner did not demonstrate that any other funds were available with which to pay the proffered wage during that year. 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 1998, 1999, 2000, 2001, and 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.