



U.S. Citizenship
and Immigration
Services



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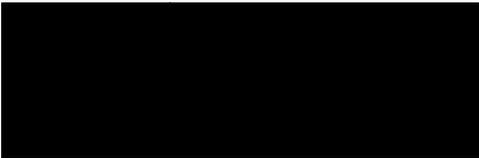
FILE: EAC 02 271 51026 Office: VERMONT SERVICE CENTER

Date: AUG 17 2005

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:



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 preference visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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, the petitioner submits additional evidence and asserts that it has established its continuing financial ability to pay the proffered salary.

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 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 20, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 per year. On the Form ETA 750B, signed by the beneficiary on April 10, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, the petitioner states that it was established in 1998, has a gross annual income of \$125,000, a net annual income of \$25,000, and currently employs three workers.

In support of its ability to pay the proffered wage of \$24,960 per year, the petitioner initially submitted no evidence of its ability to pay the beneficiary's wage offer.

On May 28, 2003, the director requested additional evidence pertinent to the petitioner's financial ability to pay the proposed wage offer beginning on the priority date and continuing until the present. Pursuant to 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that such evidence must consist of either copies of annual reports,

federal tax returns, or audited financial statements. The director also instructed the petitioner to provide a copy of its 2001 federal income tax return or a copy of its 2001 annual report accompanied by audited or reviewed financial statements. The petitioner was further instructed to submit a copy of the beneficiary's 2001 Wage and Tax Statement (W-2) if it employed the beneficiary during that year.

In response, the petitioner, through counsel, submitted a copy of its Form 1120S, U. S. Income Tax Return for an S Corporation for 2001. It reflects that the petitioner files its taxes on the basis of a standard calendar year. It reflects that the petitioner declared ordinary income of -\$2,788. Schedule L of the tax return reflects that the petitioner had \$2,852 in current assets and \$24,678 in current liabilities, resulting in -\$21,826 in net current assets. Besides net income, CIS will consider *net current assets* as an alternative method of examining a petitioner's continuing ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A petitioner's year-end current assets and current liabilities may be found on line(s) 1 through 6 and line(s) 16 through 18, respectively, of Schedule L of a corporate tax return. They represent a measure of a petitioner's liquidity during a given period and an alternate resource out of which to pay a proffered wage. If a petitioner's year-end 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 also supplied a copy of the sole shareholder's individual bank statement as of May 5, 2001, showing a balance of about \$34,000 and a letter from her bank, dated August 4, 2003, indicating that her current personal balance was \$27,770.20. A copy of a letter from the sole shareholder, dated August 7, 2003, claims that her personal funds had been available to pay the proffered wage and that she assumes responsibility to pay the proposed wage to the beneficiary. A copy of a letter, dated July 9, 2003, from "Dr. Gefen & Company," a public accountancy firm, accompanies these documents. It simply states that the petitioner can financially increase its payroll to accommodate an annual salary of approximately \$30,000.

Examining the corporate tax return and other evidence supplied to the record, the director rejected counsel's suggestions of adding back the depreciation expense or the sole shareholder's individual assets to the calculation to the petitioner's net income. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage and denied the petition on October 15, 2003.

On appeal, as well as copies of documents already provided to the underlying record, counsel submits copies of unaudited financial statements covering the nine-month period ending September 30, 2003, as well as a copy of the petitioner's 2000 federal tax return. The 2000 tax return is not relevant to the matter at hand because the financial data predates the visa priority date of April 20, 2001. No financial information relating to 2002 was submitted.

Counsel renews prior contentions submitted to the director with the petitioner's response to the request for evidence. He maintains that, as reflected on the petitioner's 2001 tax return, to accurately consider the

¹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner's ability to pay the proffered wage of \$24,960, one should add back to the petitioner's depreciation expense to the petitioner's net income and add back the value of capital stock and retained earnings amounts listed on Schedule L, as well as individually add back the cash figure reflected on Schedule L. He also asserts that the sole shareholder's personal funds should be considered in addition to the company's assets in evaluating the petitioner's ability to pay the proposed wage offer. He further argues the additional evidence in the form of the financial statements submitted on appeal additionally establishes the petitioner's current ability to pay the proffered wage.

The petitioner's assertion that the sole shareholder's individual assets are an available source to be considered is not persuasive in this case. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court 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." This court additionally found that "[CIS] fully considered the assets section of Schedule L." It also specifically rejected the need to credit other amounts such as unappropriated retained earnings or common stock. Moreover, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee to be utilized in lieu of proving ability to pay through prescribed financial documentation. A guarantee is a future promise of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The director adequately considered the petitioner's assets given on Schedule L. As noted in her decision, the cash balance reflected on line 1 of Schedule L is already factored into the calculation of the petitioner's current assets and current liabilities and will not be considered in isolation of those figures. Moreover, retained earnings are the total amount of a company's net earnings since its inception, minus any payments made to stockholders. Retained earnings are shown on Schedule L of a corporate tax return and, unlike the current assets shown elsewhere on Schedule L, retained earnings actually represent part of the shareholders' equity and also represent the portion of a company's non-cash and non-current assets that are financed from profitable operations rather than from selling stock to investors or borrowing from external sources. Assets of a company's shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay a proffered wage. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid 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 record does not indicate that the petitioner employed the beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will also examine the net income figure 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 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*, 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 536.

Regarding the documentation submitted on appeal consisting of unaudited, compiled financial statements, it is noted that such financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. By their own terms, the financial statements represent part of a compilation. A compilation is a presentation of financial statement information by an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). It is restricted to information based upon the representations of management. See *Barron's Accounting Handbook*, 370-371 (3rd ed. 2000). As these documents are not audited as required by the 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during the period represented.

In this case, as noted by the director, the corporate petitioner's 2001 tax return fails to demonstrate that either its reported net income of -\$2,788 or its net current assets of -\$21,826 was sufficient to pay the certified wage of \$24,960 in 2001. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning at the priority date. In this matter, the petitioner has failed to demonstrate that it has had the continuing financial ability to pay the certified wage beginning April 20, 2001.

Based upon a review of the evidence contained in the underlying record and on appeal, the AAO concludes that the petitioner has failed to persuasively establish that it has 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.

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ORDER: The appeal is dismissed.