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

U.S. Citizenship and Immigration Services



B6

[redacted]

FILE [redacted] EAC 03 181 54053 Office: VERMONT SERVICE CENTER Date: OCT 19 2005

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary[1] permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on October 10, 2002. The proffered wage as stated on the Form ETA 750 is $10.72 per hour ($22,297.60 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, petitioner submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (the present beneficiary is substituted for the original), and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center stated that "The original submission contained no

[1] The beneficiary is a substitute beneficiary on the certified Alien Employment application.

documentation that you [the petitioner] possessed the ability to meet the proffered wage in the year of filing, 2002, and continuing to the present," and, it specifically requested:

> Submit the 2002 United States federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax returns. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.
>
> As an alternative you may submit annual reports for 2002 that are accompanied by audited or reviewed financial statements.
>
> If your business reports income for tax purposes based on a fiscal year, submit the appropriate evidence that relates to the date of filing, October 10, 2002.
>
> If the beneficiary was employed by you in 2002[2], submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business.
>
> * * *
>
> Submit copies of Form-941, Employers Quarterly Federal Tax Form for each quarter of 2001 and the first quarter of 2002. Provide the names, social security numbers and dollars paid to each employee.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted the petitioner's Internal Revenue Service (IRS) Form 1120S tax return for year 2001.[3]

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of from the priority date October 10, 2002.

- In 2001, the Form 1120s stated taxable income[4] of <$139,499.00>[5].

The director denied the petition on December 17, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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[2] The beneficiary arrived in the United States on January 25, 2003.

[3] The petitioner also submitted tax returns for other "Dunkin Donuts" business operations under the common control of the shareholders of petitioner. Each of the businesses is separately incorporated.

[4] IRS Form 1120S, Line 21. The fiscal year for the company is October 1, 2001 to September 30, 2002.

[5] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

On appeal, petitioner asserts that additional evidence may be used as CIS has accepted other types of proof of a small employer's to show the ability to pay the proffered wage. Also, counsel asserts, that the factual circumstances of this case should allow the assets of the petitioner's shareholders to be used in this regard.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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*, the court held that the 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 the INS, now 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 v. Thornburgh*, *Supra* at 537. *See also Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

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, CIS will review the petitioner's assets. The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to sufficient pay the proffered wage at any time for 2001 for which petitioner's tax return was offered for evidence.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120s federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

Examining the Form 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in that return indicates the following:

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

- In 2001, petitioner's Form 1120s return stated current assets of <$34,630.00> and $8,659.00 in current liabilities. Therefore, the petitioner had a <$43,289.00> in net current assets for 2001. Since the proffered wage was $22,297.60 per year, this sum is less than the proffered wage.

Therefore, for the year 2001 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Petitioner asserts in his brief accompanying the appeal that there are another ways to determine the petitioner's ability to pay the proffered wage from the priority date through the assets of the petitioner's shareholders and other types of proof of a small employer's[7] to show the ability to pay the proffered wage.[8] According to regulation,[9] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Contrary to petitioner's primary assertion, Citizenship and Immigration Services (CIS), formerly the Service or CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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."

In the record of proceedings counsel also advocates the use of the depreciation deduction, to be used as an asset, to show the ability to pay. (Depreciation as shown on the year 2001 tax return only amounts to $13,735.00. It is not enough to pay the proffered wage of $22,297.60 per year, or to overcome the taxable income loss stated of $139,499.00.) Petitioner cited no legal precedent for his position. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

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[7] Since the petitioner owns or controls four "Dunkin Donut" locations, counsel's comment is relative to other like business enterprises that are sometimes called franchise businesses.

[8] A search of the record of proceedings and an examination of petitioner's brief did not reveal what these other types of proof of a small employer's to show the ability to pay the proffered wage are according to counsel. Counsel mentions that he is aware that profit-loss statements, bank account records, personnel records, may be used to show the ability to pay the proffered wage, but, implies that since the CIS has not requested them, petitioner has been denied the opportunity to submit them. The contents of the Request for Evidence requests evidence required by 8 C.F.R. § 204.5(g)(2), however, it is the policy of the Service and the AAO to review all documentary submittals for their probative value. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

[9] 8 C.F.R. § 204.5(g)(2).

There is established legal precedent against petitioner's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg,* 719 F. Supp. 532 (N.D. Tex. 1989) 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 the court should revise these figures by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Petitioner's contention cannot be concluded to outweigh the evidence presented in the corporate tax return as submitted by petitioner that by any test demonstrates that petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.