

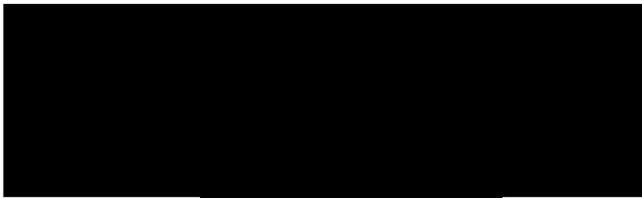
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U.S. Citizenship
and Immigration
Services

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FILE:



EAC 03 220 51580

Office: VERMONT SERVICE CENTER

Date:

AUG 21 2008

IN RE:

Petitioner:

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:



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, Chief
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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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.

On appeal, counsel submits additional evidence.

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. *See* 8 CFR § 204.5(d). 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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$39,291 per year).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in September 1, 1993, and to have a gross annual income of \$1,107,595. According to the tax returns in the record, the petitioner's fiscal year lasts from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on March 5, 2001, the beneficiary did not claim to have worked for the petitioner.¹

With the petition, the petitioner submitted the following documents:

- An original ETA 750;
- Counsel's G-28;
- The petitioner's Form 1120S for the year 2001; and,
- The beneficiary's W-2 (Wage and Tax Statement) for 2001.

¹ On his Form G-325A, the petitioner claims to have worked as a cook for the petitioner January 2001.

The director denied the petition on July 21, 2004, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.²

On August 26, 2004, counsel appealed the denial, which the director found was untimely filed but instead treated it as a motion to motion to reopen. With the motion, counsel submitted:

- A letter dated August 13, 2004, from petitioner's vice president, [REDACTED] stating he plans to have the beneficiary replace him as a cook for the petitioner because he is too busy running all three restaurants of the "ownership," namely the petitioner, the [REDACTED] Restaurant; and the [REDACTED] Corp. D.B.A. [REDACTED]
- Copies of three canceled checks showing "ownership" contributions of \$25,000 to the 603 Second Ave. Corp. restaurant during the years 1994-1996;
- The petitioner's Form 1120S for the year 2002 and 2003;
- Form 1120S for the years 2001 and 2002 for the [REDACTED] and,
- Form 1120S for the year 2002 for the [REDACTED]

On December 7, 2004, the director denied the motion, rejecting counsel's assertion that the assets of the two other restaurants owned by the petitioner's owners could be considered in determining the petitioner's ability to pay the proffered wage, because the petitioner is a separate entity for whom the other corporations have no legal financial responsibility. The director also rejected the assertion that the beneficiary would replace Mr. [REDACTED] as cook and would be paid out of [REDACTED] compensation, the director noting the lack of "evidence of the level of compensation received" by [REDACTED] and further noting that counsel had not made the assertion "on any of the previous filings."

On appeal from the denial of the motion, counsel submits:

- A postal receipt showing the Form I-290B the untimely appeal was mailed on Tuesday, August 24, 2004, which counsel asserts fell on the 33rd day after the decision; and,
- The petitioner's Form 941 (Employer's Quarterly Federal Tax Return) for all quarters for the years 2001 and 2002.³

On appeal, counsel asserts that the Form 941s reveal [REDACTED]'s level of compensation as sufficient to establish the petitioner's ability to pay the proffered wage.

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 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 petitioner has established that it employed and paid the beneficiary \$11,115.25 in 2001, which is \$28,175.95 less than the proffered wage; and

² On November 13, 2002, the director denied the petitioner's earlier I-140 petition because it had not established its ability to pay the proffered wage to the beneficiary. On June 6, 2003, the director rejected the petitioner's appeal as untimely and declined to treat it as a motion to reconsider or to reopen.

³ The returns show \$9,000 in wages for [REDACTED] and from \$2,800 to \$3,111 for the beneficiary.

\$10,832 in 2002, which is \$28,458.90 less than the proffered wage.⁴ The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and 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, CIS will next 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 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.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$39,291.20 per year from the priority date.

In 2003, the Form 1120S stated net income⁵ of \$64,569.

In 2002, the Form 1120S stated net income of \$19,071.

In 2001, the Form 1120S stated net income of \$9,522.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay difference between the wage paid and the proffered wage.

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. We reject, however, the idea that the petitioner's total assets should have

⁴ The record does not contain the beneficiary's W-2 for 2003.

⁵ Ordinary income (loss) from trade or business activities as reported on Line 21.

been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets were as follows:

- For the year 2001, \$13,228;
- For the year 2002, \$(17,478)
- For the year 2003, \$51,268.

Counsel asserts that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date.

Counsel asserts that two other affiliated corporations as well as the petitioner's ownership will help the petitioner pay the beneficiary the proffered wage if need be. Contrary to counsel's assertion, 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.

Counsel also asserts that the petitioner intends to replace its officer, [REDACTED] as the petitioner's cook. The evidence in the record names Feldman as the worker being replaced, and contains competent evidence of the wages paid and full-time employment.⁷ While counsel and [REDACTED] assert that [REDACTED]'s duties are those of the proffered position as set forth on the ETA 750, such assertions do not demonstrate that more money would become available for paying the beneficiary's proffered wage because [REDACTED] receives wages for administrative as well as for kitchen duties. Moreover, [REDACTED]'s own statement suggests that the majority of his wages paid since the year 2001 have been compensation for his performance of duties outside the kitchen.

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.

⁷ [REDACTED] August 13, 2004 letter states, "Since 2001, I have found myself to be too busy with all the restaurants to spend as much time in the kitchen at Mumbles. My plan is to have [the beneficiary] replace me, in addition to his other duties."



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Counsel's assertions on appeal have not overcome the director's finding in his decision to deny the petition. The evidence submitted does not establish that the petitioner 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.