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U.S. Citizenship and Immigration Services

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MAY 16 2006

FILE: WAC-03-227-50158 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California 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 also mentioned that there was discrepant information contained in the evidence pertaining to the beneficiary's qualifications for the proffered position. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 30, 2004 denial, there are two issues in this case including whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and whether or not the beneficiary is qualified to perform the duties of the proffered position.

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 first issue to be discussed is whether or not the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date. 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 January 16, 1998. The proffered wage as stated on the Form ETA 750 is $11.55 per hour ($24,024 per year). The Form ETA 750 states that the position requires two years of

experience. The beneficiary represented on Form ETA 750B, which he signed on May 2, 1999, that he worked for the petitioner from December 1989 until December 1997.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1]. On appeal, counsel submits a letter from Best Bookkeeping Services, Inc., as well as previously submitted evidence. The evidence in the record includes the petitioner's corporate federal tax returns for 1998 through 2001; the petitioner's quarterly wage reports for the last three quarters of 2001, all four quarters of 2000, and all four quarters of 1999 reflecting employment of and wages paid to the beneficiary during that time; tax returns for [redacted]. for 2002 and 2003; quarterly wage reports for [redacted] for the last two quarters of 2002, all quarters in 2003, and the first quarter of 2004, reflecting employment of and wages paid to the beneficiary during part of that time; and unaudited financial statements. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a domestic general partnership from 1998 through 2001. The record contains tax returns for [redacted]. for 2002 and 2003 reflecting a name, address, federal employment identification number (EIN), and ownership different from the petitioner. On the petition, the petitioner claimed to have been established in 1984, to have an "average" gross annual income of $600,000, and to currently employ 19 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

On appeal, counsel asserts that [redacted] has owned the petitioner for 20 years, supported 20 employees, incurred and paid normal business operation expenses, and paid compensation to its partners or officers. A letter from Best Bookkeeping Services, Inc., signed by [redacted] recaps the petitioner's gross sales, net income, and compensation paid to officers. Additionally, [redacted] stated that "the business was originally formed as a partnership named Arthur's Coffee Shop. The company incorporated in 2002 as [redacted] Attached are the Articles of Incorporation."

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 established through its quarterly wage reports that it employed and paid the beneficiary the following amounts for the following years: $14,766 in 1999, $14,819.63 in 2000, $12,040 for 2001. The petitioner is obligated to demonstrate that it can pay the difference between the wages it actually paid the beneficiary and the proffered wage in those years, which would be $9,258 in 1999, $9,204.37 in 2000, and $11,984 in 2001. [redacted] employed and paid the beneficiary $8,700 in 2002 and $3,600 in March 2003 and nothing thereafter. If [redacted] demonstrates that it is a successor-in-interest to the petitioner, it would also have to demonstrate that it could pay the difference between the wages it actually paid to the beneficiary and the proffered wage, which would be $15,324 and $20,424 in 2002 and 2003, respectively.

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 contrary to counsel's assertions. 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the 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 ability to pay the full proffered wage of $24,024 in the priority date year, 1998, and the difference between the wages it actually paid the beneficiary and the proffered wage in 1999, 2000, and 2001, which is $9,258, $9,204.37, and $11,984, respectively:

- In 1998, the Form 1065 stated net income[2] of $25,242.

[2] Ordinary income (loss) from trade or business activities as reported on Line 22.

- In 1999, the Form 1120 stated net income of $22,976.
- In 2000, the Form 1120 stated net income of -$674.
- In 2001, the Form 1120 stated net income of $30,846.

Therefore, in 2000, the petitioner did not have sufficient net income to pay the proffered wage. However, the petitioner's net income in 1998, 1999, and 2001 is greater than the proffered wage and the difference between the actual wages paid to the beneficiary and the proffered wage and therefore demonstrates its ability to pay the proffered wage in those years.

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 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.[3] A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. 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 during 2000 were -$18,444, and therefore, the petitioner did not have sufficient net current assets to pay the difference between the actual wages paid to the beneficiary and the proffered wage in that year.

Therefore, 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 continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets because of the year 2000.

A partnership consists of a general partner(s) and may also have limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment. The record of proceeding does not contain enough information regarding the general partner's personal expenses. As such, the petitioner has not demonstrated that its partners' assets may be utilized to pay the proffered wage.

Additionally, the record contains no evidence that [redacted] qualifies as a successor-in-interest to the petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties,

[3]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.

and obligations of the predecessor company. Even if the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In the instant petition, the petitioner was a domestic general partnership owned equally by [redacted] and [redacted] is 100% owned by [redacted] and is an S corporation with a different address and EIN than the petitioner's address and EIN. Although the record of proceeding contains documentation concerning [redacted]s incorporation and business license, there is no documentation that shows that [redacted]. assumed all rights, duties, and obligations of Arthur's Coffee Shop. The AAO notes that the beneficiary's employment at the petitioning entity as reported in quarterly wage reports drops off in 2002 around the time that the petitioner allegedly incorporated while remaining the same entity. Instead of demonstrating seamless transition, this could indicate a change even impacting the sponsorship of this petition. The record of proceeding does not contain sufficient evidence that [redacted] is a successor-in-interest to the petitioner.

Even if it did, however [redacted], reports $1,921 in net income[4] and -$10,160 in net current assets[5] in 2002, and $9,251 in net income and -$4,633 in net current assets in 2003, which are insufficient to demonstrate that it could pay the difference between the wages it actually paid to the beneficiary in 2002 and 2003 and the proffered wage. Thus, [redacted] could not demonstrate its continuing ability to pay the proffered wage even if the record of proceeding reflected that it was a successor-in-interest to the petitioner.

For an S corporation, there are other considerations, however. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [redacted] holds 100% percent of that company's stock. According to [redacted] 2002 and 2003 IRS Form 1120S Compensation of Officer reported on Line 7 of page 1, he elected to pay himself $38,000 in 2002 and $55,000 in 2003. [redacted]s quarterly wage reports corroborate those amounts. CIS (legacy INS) has long held that it 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 the present case, however, CIS would not be examining the personal assets of the petitioner's owners, but, rather, the financial flexibility that employee-owners have in setting their salaries based on the profitability of

[4] An S corporation reports its net income on Line 21, which is Ordinary income (loss) from trade or business activities.

[5] An S 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.

their corporation. The record of proceeding does not contain evidence that would demonstrate that [redacted] could or would forego any portion of his officer's compensation in 2002 or 2003 that could be redistributed towards having sufficient funds to pay the difference between the wages actually paid to the beneficiary and the proffered wages in those years if [redacted]. could even establish that it is a proper successor-in-interest to the petitioner.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The second issue to be discussed in this case is whether or not the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for the petitioner from December 1989 through December 1997. Prior to that, he represented that he worked for Restaurant Denny's (Denny's) in Tijuana, Mexico, from February 1987 through November 1989.

With the petition, the petitioner submitted a letter from the beneficiary stating that there was a typographical mistake on the Form ETA 750B and he worked for Denny's from February 15, 1981 through June 30, 1984. The petitioner submitted a letter dated 1984 in Spanish with a certified English translation on Denny's

letterhead and signed by the Head of personnel with a phone number. That letter verified that the beneficiary was employed by Denny's full-time from February 15, 1981 until June 30, 1984 as an "American cook specialist with hamburgers, sandwiches, omelets, etc." In his RFE, the director requested evidence to clarify the discrepant represented dates of employment at Denny's and a letter meeting the regulatory requirements of 8 C.F.R. § 204.5(l)(3). In response, the petitioner resubmitted the same 1984 letter from Denny's with a declaration from the beneficiary stating that he made a mistake on the Form ETA 750B and Denny's is no longer in business so he cannot obtain another letter from them for additional clarification. On appeal, counsel reasserts that the discrepancy in years was due to a typographical error on the Form ETA 750B.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation—*
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) ***Skilled workers.*** If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO concurs with the director's determination that the 1984 letter from Denny's did not provide enough details concerning the beneficiary's employment at that restaurant to establish his qualifications to perform the duties of the proffered position, which are extensive as delineated on the Form ETA 750B, and do not merely involve cooking hamburgers, sandwiches, and omelets.

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.