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**U.S. Citizenship
and Immigration
Services**

B6

[Redacted]

File: [Redacted] Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

WFO 20154513

[Redacted]

JAN 24 2005

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]

PUBLIC COPY

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
Robert P. Wiemann, Director
Administrative Appeals Office

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 June 15, 1998. The proffered wage as stated on the Form ETA 750 is [REDACTED], which equals [REDACTED] year.

Part B of the Form ETA 750 states that the beneficiary worked for [REDACTED] from July 1994 to November 1997. Part B further states that the petitioner was unemployed from December 1997 to June 8, 1998, the date Part B was completed. The beneficiary does not claim on that form to have worked for the petitioner.

On the petition, the petitioner¹ stated that it was established during 1980 and that it employs 60 workers. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Fullerton, California.

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 name of the petitioner's

¹ The petitioner is identified as [REDACTED] in the Form I-140 petition and the Form ETA 750.

[REDACTED]

employer from July 1994 through November 1997 was [REDACTED] of the same address in Mazatlan that the beneficiary previously provided. Counsel further stated that the beneficiary had worked for the petitioner since 1997 as a cook. 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.² The 1998 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of [REDACTED]. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of [REDACTED] and current liabilities of [REDACTED] which yields net current assets of [REDACTED].

The 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of [REDACTED]. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of [REDACTED] and current liabilities of [REDACTED] which yields net current assets of [REDACTED].

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 \$210,993 and current liabilities of \$70,537, which yields net current assets of \$140,456.

The 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$34,967. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$167,910 and current liabilities of \$65,545, which yields net current assets of \$102,385.

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.

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. 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 \$2,000, \$1,620, \$1,890, and \$2,629.13 during those quarters, respectively.

The petitioner submitted no additional evidence of its ability to pay the proffered wage.

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 \$8,139³ during those four quarters, an amount less than the proffered wage of \$24,960.

The director further noted that the petitioner has filed 12 worker petitions with CIS. Of those twelve,

² The petitioner is identified on those corporate returns as [REDACTED]

³ That amount is rounded to the nearest whole dollar.

[REDACTED]

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 beneficiaries 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 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 it must show the ability to pay the proffered wage.

Counsel further stated 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.

With the appeal, counsel provided the 2002 Form 1120 U.S. Corporation Income Tax Return of [REDACTED]. In the appeal brief, counsel states that [REDACTED] was in partnership with his brothers until 2001 and that the partnership owned four restaurants. Counsel further states that [REDACTED] left that partnership, retaining two of the restaurants and six of the 12 pending petitions, and formed [REDACTED]. Counsel did not state which restaurants are owned by [REDACTED] nor even whether it now owned the restaurant at which the beneficiary would be employed.

The 2002 income tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$2,583 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$45,984 and current liabilities of \$20,603, which yields net current assets of \$25,381.

Counsel also provided the 1998, 1999, 2000, and 2001 Form 1065, U.S. Returns of [REDACTED]. Counsel stated that [REDACTED] Anda is part of that partnership.

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 \$11,347.50, \$10,913.23, \$11,474.01, \$6,843.77, \$2,479.99, and \$8,569.13 during those years, respectively.

Counsel submitted an undated letter from the petitioner's accountant. That letter states [REDACTED] are the sole owners of two restaurants managed under the corporation, [REDACTED]. The accountant did not identify those two restaurants, but stated that they rent their locations from [REDACTED] who own the buildings free and clear.

The accountant further stated, "This is a family owned business and there are small profits left in the

corporation because the corporation is adequately capitalized. This is the reason why you do not see large sums of income left in the company. The accountant further states that the new corporation has the ability to pay the proffered wage.

That a company is adequately capitalized means that it has sufficient liquidity to finance its operations. Adequate capitalization is unrelated to low profits. As such, the accountant's argument is without merit. The accountant's letter offers no evidence of the proposition that the petitioner is able to pay the proffered wage, other than the accountant's own conclusion.

Counsel asserts that the petitioner owns the restaurant's premises and might forego collecting its rent as necessary to pay the proffered wage. Again, counsel is confusing the petitioner and the petitioner's owner. The petitioner in this case is the corporation that owns the restaurant.

Counsel apparently asserts that the petitioner's owner is also the petitioner's landlord. Although the accountant's letter did not make clear that [REDACTED] the owners, were identical to [REDACTED] the landlords, this office will assume that counsel is correct. Counsel is asserting, then, that the petitioner's owner would forego collecting rent payments due from the petitioner as necessary to pay the proffered wage.

The petitioner, however, 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.⁴ 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.

Counsel asserts, but provides no evidence to demonstrate, that the petitioner's compensation of its officers is discretionary. Absent clear and convincing evidence, this office will not find that the petitioner is not obliged, contractually or otherwise, to pay that compensation. The record contains no evidence to demonstrate that the petitioner's officers were able and willing to forego compensation.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 \$11,347.50 during 1998, \$10,913.23 during 1999, \$6,843.77 during 2000, \$2,479.99 during 2001, and \$8,569.13 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

⁴ 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.

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).

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*, 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. *Supra* 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 v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* 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 June 15, 1998. The proffered wage is \$24,960 per year. The calculation of the petitioner's ability to pay the proffered wage is complicated by the fact that the petitioner has nine other petitions for alien workers either pending before CIS or recently approved.⁵ None of the other nine files is currently before this office. The others, although on file with CIS, are not readily available to this office.

The following petitions are currently pending before CIS: [REDACTED] WAC 04 209 52144, and [REDACTED] WAC 03 199 53709.

The following petitions were recently approved by CIS: [REDACTED] WAC 04 025 50579, [REDACTED] WAC 01 039 52713, [REDACTED] WAC 02 204 52580, [REDACTED] WAC 01 154 51524, [REDACTED] WAC 01 039 52234, [REDACTED] WAC 01 275 57289, and [REDACTED] WAC 99 222 51718.

⁵ This office notes that the number of petitions has changed since the decision of denial. This decision will be based on the more current information.

Of those, [REDACTED] and [REDACTED] appear on the petitioner's Form DE-6 reports. The record contains no evidence that the petitioner paid wages to any of the other beneficiaries.

The record shows that the petitioner paid [REDACTED] \$1,500 during the last quarter of 2001, \$1,620 during the first quarter of 2002, \$1,350 during the second quarter of 2002, and \$1,620 during the third quarter of 2002. The petitioner paid [REDACTED] \$2,250 during the last quarter of 2001, \$3,850 during the first quarter of 2002, \$4,650 during the second quarter of 2002, and \$5,070 during the third quarter of 2002. The petitioner paid [REDACTED] \$2,075 during the last quarter of 2001.

The petitioner is obliged to prove the ability to pay the proffered wage of all ten aliens⁶ in order for this petition to be approved. This obligation includes providing the amount of the wage proffered to each of its 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.

Another petition from the instant petitioner that was recently before this office was also for a cook and proffered a wage of \$24,024 per year.⁷ This office shall assume that the proffered wage in the remaining ten cases is similar to the proffered wages in that case and the instant case.⁸ 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 \$241,176 in wages during each of the salient years.⁹

The petitioner has demonstrated that it paid the beneficiary \$11,347.50, \$10,913.23, \$11,474.01, 9,323.76, and \$8,569.13 during 1998, 1999, 2000, 2001, and 2002, respectively. The petitioner has thereby demonstrated that it was able to pay those portions of the aggregated proffered wage during those years. The petitioner has demonstrated that it paid the other beneficiaries \$5,825¹⁰ during 2001 and \$17,560¹¹ during 2002. The petitioner is obliged to demonstrate the ability to pay the remaining \$229,819.50,¹² \$230,253.77,¹³ \$229,269.99,¹⁴ \$226,018.24,¹⁵ and \$215,037.87,¹⁶ 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

⁶ The beneficiary of the instant petition and the nine others.

⁷ The priority date of that other petition is January 16, 1998. Apparently the Department of Labor reassessed the predominant wage of cooks in the petitioner's area during 1998.

⁸ 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 beneficiaries for which it is petitioning, unless it shows that it is not obliged to pay the proffered wage to some number of those beneficiaries.

⁹ $\$24,024 \times 9 + \$24,960$.

¹⁰ $\$1,500 + \$2,250 + \$2,075$

¹¹ $\$1,620 + \$1,350 + \$1,620 + \$3,850 + \$4,650 + \$5,070$

¹² $\$241,176 - \$11,347.50$,

¹³ $\$241,176 - \$10,913.23$,

¹⁴ $\$241,176 - \$11,474.01$,

¹⁵ $\$241,176 - \$9,323.76 - \$5,825$

¹⁶ $\$241,176 - \$8,569.13 - \$17,560$

proffered wages. The petitioner ended that year with \$92,760 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 \$131,193 in net current assets. That amount is also insufficient to pay the remaining portion of the aggregated 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 \$140,456 in net current assets. That amount is also insufficient to pay the remaining portion of the aggregated 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 \$34,967. That amount is insufficient to pay the remaining portion of the aggregated proffered wages. The petitioner ended the year with \$102,385 in net current assets. That amount is also insufficient to pay the remaining portion of the aggregated 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 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

During 2002, [REDACTED] declared taxable income before net operating loss deduction and special deductions of \$2,583. The petitioner's owner declared that [REDACTED] is now the petitioner of six of the original 12 petitions, but did not state which six petitions. Whichever six petitions [REDACTED] now considers itself to be the petitioner for, however, its 2002 taxable income before net operating loss deduction and special deductions is insufficient to pay the proffered wages of those six beneficiaries. The petitioner ended 2002 with net current assets of \$25,381. That amount is also insufficient to pay the proffered wages of any six of the beneficiaries. [REDACTED] has not demonstrated the ability to pay the proffered wage during 2002.

The year 2002 raises an additional issue. Counsel implies that the new corporation, [REDACTED] now owns the restaurant at which the beneficiary would be employed, although counsel did not clearly so state. Counsel is asserting that the new corporation is the successor-in-interest to the original petitioner.

To prevail in this petition the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties,

obligations, and assets of the original employer. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). No such evidence was submitted. In fact, the petitioner's owner's assertion that [REDACTED] retained only two of the original petitioner's restaurants and only six of the original 12 alien worker petitions strongly suggests that [REDACTED] did not acquire all of the original petitioner's assets and liabilities, and is not its successor-at-interest within the meaning of *Dial Repair Shop*. This is an additional reason the instant petition may not be approved.

The petitioner failed to demonstrate that it was able to pay the proffered wage during 1998, 1999, 2000, and 2002. The petitioner failed to demonstrate that [REDACTED] was able to pay the proffered wage during 2002. The petitioner failed to demonstrate that [REDACTED] is the petitioner's successor-at-interest within the meaning of [REDACTED]. For all of these reasons, the appeal must be dismissed.

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.