

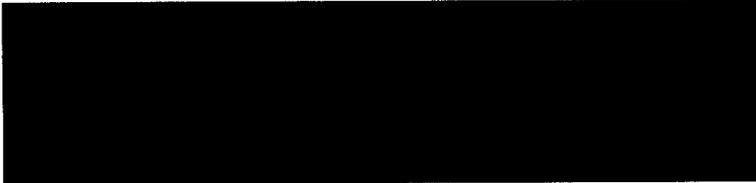


U.S. Citizenship
and Immigration
Services

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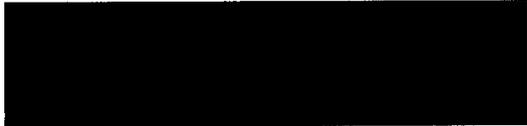
JUL 11 2005
Date:

FILE: [Redacted] Office: VERMONT SERVICE CENTER
EAC 03 076 51971

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 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 specialty 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, the counsel submits a brief 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.

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 June 21, 2001. The proffered wage as stated on the Form ETA 750 is \$20,592.00 per year. The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1065 U.S. Corporation Income Tax Return for 2000, and, copies of documentation concerning the beneficiary's qualifications.

The tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$20,592.00 per year from the priority date.

- In 2000, the Form 1065 stated taxable income¹ of <\$22,137.00>.²

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, the Vermont Service Center on November 24, 2003 requested evidence pertinent to that issue.

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 specifically requested:

Submit the 2001 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 return. 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.

If the beneficiary was employed by you in 2001 and submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, the Service Center received the petitioner's Internal Revenue Service (IRS) Form 1065 tax return for years 2001, and a copy of the Wage and Tax Statement for beneficiary for 2002.³

The tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$20,592.00 per year from the priority date.

- In 2001, the Form 1065 stated taxable income of <\$12,075.00>.⁴

The director denied the petition on February 25, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage of \$20,592.00 per year beginning on the priority date.

On appeal, counsel submitted the 2002 tax return:

- In 2002, the Form 1065 stated taxable income of \$18,000.00.

Counsel also submitted a letter from a certified public accountant, and, she resubmitted the above tax returns. The petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy the same limited liability as the owners of a corporation. It is a legal entity separate and distinct from its

¹ Form 1065, Line 22.

² 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.

³ Counsel denies receiving or responding to the Request for Evidence ("RFE"). The RFE found in the Record of Proceedings is stamped by the Service Center as received on December 16, 2003; it is written upon answering questions posed by the RFE, and, it includes the petitioner's 2001 tax return and the beneficiary's "W-2" statement.

⁴ 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.

owners. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the company are not the debts and obligations of the owners or anyone else.⁵ As the owners and others are not obliged to pay those debts, the income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, 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. The petitioner provided no evidence of its own ability to pay the proffered wage.

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.

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 pay the proffered wage at any time between the years 2000 through 2002 for which petitioner's tax returns are 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 1065 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.

⁵ 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.

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

Examining the three Form 1065 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets never exceeded its current liabilities.

- In 2002, petitioner's Form 1065 return stated current assets of \$27,977.00 and \$181,861.00 in current liabilities. Therefore, the petitioner had <\$153,884.00> in current net assets for 2002. Since the proffered wage was \$20,592.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1065 return stated current assets of \$19,284.00 and \$67,766.00 in current liabilities. Therefore, the petitioner had a <\$48,482.00> in current net assets for 2001. Since the proffered wage was \$20,592.00 per year, this sum is less than the proffered wage.
- In 2000, petitioner's Form 1065 return stated current assets of \$15,727.00 and \$67,683.00 in current liabilities. Therefore, the petitioner had a <\$51,956.00> in current net assets for 2000. Since the proffered wage was \$20,592.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2000 through 2002 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's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Petitioner's counsel cited no legal precedent for his position. Counsel asserts that depreciation is a component to be added to the petitioner's taxable income. Since depreciation is a deduction in the calculation of taxable income on tax Form 1065, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel'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 these figures should be revised by the court 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.

Counsel asserts that the petitioner is viable despite the losses expressed in the aforementioned tax returns, that the business is growing and has cash reserves⁷. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case,

⁷ The petitioner demonstrates an average current net asset loss of \$84,774.00 for the three years examined.

the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the tax years examined were uncharacteristically unprofitable years for the petitioner.

We reject the petitioner's assertion that the petitioner's total assets should have 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.

The fact that the owner of petitioner has another business is not probative of the ability to pay the proffered wage by petitioner. 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). 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."

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.