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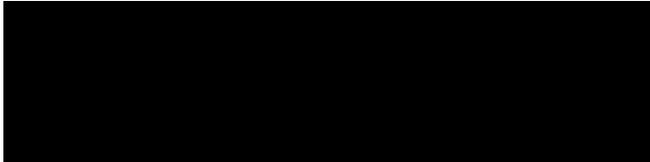
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FILE: WAC-02-198-51525 Office: CALIFORNIA SERVICE CENTER Date: JUL 18 2005

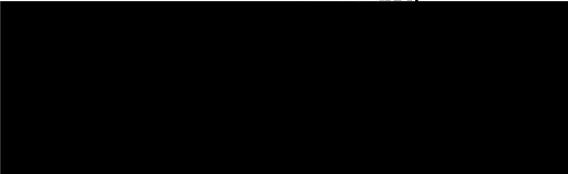
IN RE: Petitioner:



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, 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Persian and [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty 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 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 at 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. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which amounts to \$24,024 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1984, to have a gross annual income of \$142,891, and to currently employ three workers. In support of the petition, the petitioner submitted quarterly wage reports and its Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 1998, 1999, and 2000.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 3, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director requested the petitioner's corporate tax returns from 1998 and onwards.

In response to the director's request for evidence, the petitioner submitted its 2001 corporate tax return and previously submitted evidence. Counsel advised in a responsive letter that "[REDACTED] incorporated a new corporation known as [REDACTED] on July 23, 2001 located at [REDACTED]. This terminating [sic] the original corporation known was the petitioner] located as [REDACTED]."

██████████ and [sic] Ca. 90025” (Emphasis in original). The petitioner submitted articles of incorporation for ██████████ Inc., a statement of its domestic stock corporation, and its federal tax identification number that is different than the petitioner’s federal tax identification number.

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, on April 30, 2003, the director again requested additional evidence pertinent to that ability. The director requested the petitioner’s corporate tax return for 2002. In response, the petitioner submitted evidence that it sought an extension of the deadline for filing its 2002 corporate tax return.

On August 3, 2003, the director requested evidence that the beneficiary complied with the National Security Entry-Exit Registration System (NSEERS). In response, the petitioner stated that the beneficiary is female and had never entered the United States and thus was not subject to NSEERS. The petitioner took the opportunity to also submit the 2002 corporate tax return for ██████████ Inc.

The petitioner’s tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income <sup>1</sup>	\$13,898	\$11,922	\$22,458	\$3,583
Current Assets	\$12,362	\$9,936	\$16,877	\$0
Current Liabilities	\$0	\$24,918	\$47,105	\$0
Net current assets <sup>2</sup>	\$12,362	-\$14,982	-\$30,228	\$0

██████████ Inc.’s tax returns reflect the following information for 2002:

	<u>2002</u>
Net income <sup>3</sup>	\$29,888
Current Assets	\$4,976
Current Liabilities	\$0
Net current assets	\$4,976

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, on December 19, 2003, denied the petition.

On appeal, counsel asserts that the director erred in failing to add together net income and net current asset. The petitioner submits a letter from ██████████ Mr. ██████████ stating the following, in pertinent part:

We are the accountants for [the petitioner], employer ID number [(EIN) ██████████] and this is to acknowledge that at the end of 2001 (final year of this business) the inventory amount was for \$9,450.00 and the bank balance was \$7,427.00, transferred to the new company of Simon’s Caterer’s Inc., EIN number ██████████

<sup>1</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>2</sup> End-of year figures were examined.

<sup>3</sup> See note 1, *supra*.

On appeal, the petitioner submits copies [REDACTED] checking account statements for December 2001 and January 2002.

At the outset, the record of proceeding contains insufficient 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, and obligations of the predecessor company<sup>4</sup>. The fact that 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 documentation pertaining to the creation of Simon Caterer's Inc. does not reflect that [REDACTED] has any relationship to the petitioner and in fact both have different EIN.

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. Without documentary evidence that clearly establishes that [REDACTED] acquired all rights, duties, and obligations of the petitioner, then the petitioner may not rely upon the assets [REDACTED]

Consequently, the 2002 tax return and bank records of [REDACTED] is not deemed substantive and probative evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In any event, counsel's reliance on bank balances would be misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case would have to demonstrate why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, evidence would have to be submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 did not establish that it employed and paid the beneficiary the full proffered wage in 1998, 1999, 2000, 2001, or 2002.

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*

<sup>4</sup> For example, sale and/or purchase agreement, merger and/or acquisition agreement, and/or doing business as documentation, etc.

*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*, 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. 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.<sup>5</sup> 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 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 out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998, 1999, 2000, 2001, or 2002. In 1998, the petitioner shows a net income of only \$13,898 and net current assets of only \$12,362, which are both less than the proffered wage, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in that year.

In 1999, the petitioner shows a net income of only \$11,922, which is less than the proffered wage, and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in that year.

In 2000, the petitioner shows a net income of only \$22,458, which is less than the proffered wage, and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in that year.

In 2001, the petitioner shows a net income of only \$3,583, which is less than the proffered wage, and no net current and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in that year.

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<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The petitioner has not submitted regulatory-prescribed evidence of its continuing ability to pay the proffered wage beginning on the priority date in 2002.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The AAO rejects counsel's argument that the petitioner's net current assets can be added to its net income in any year in order to have sufficient funds to pay the proffered wage as it double-counts the petitioner's income contrary to the utilization of either a cash-basis or accrual-basis of general accounting principles. The first page of a federal tax return is akin to an income statement that includes the petitioner's net income, which is a figure that summarizes the petitioner's revenues, costs, and expenses over a period of time. Schedule L reflects figures for a specific point in time used to compose the final summary presented on the income statement's net income figure. Thus, to add the figures together essentially double counts money and distorts the true picture of the petitioner's financial standing.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, or 2002. Therefore, the petitioner has not established that it 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.