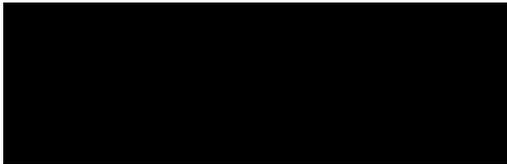


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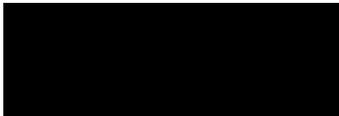
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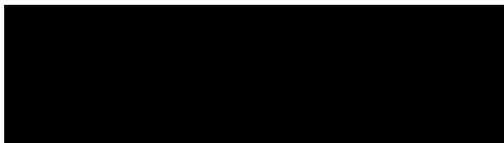
Petitioner:

Beneficiary:



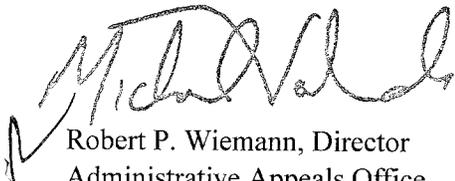
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, California Service Center, denied the preference visa petition that 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 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 granting 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 May 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which equals \$24,024 per year.

On the petition, the petitioner stated that it was established during 1990. The petitioner stated that its gross annual income is \$417,660, but declined to state its net income or the number of workers it employs in the spaces provided. Those blank spaces are contained in Part 5 of the petition.

On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 1999. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Los Angeles, California.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner reports taxes pursuant to the calendar year and that during 2001 it reported ordinary income of \$18,799. The corresponding Schedule L shows that at the

end of that year the petitioner had current assets of \$3,630 and current liabilities of \$2,765, which yields net current assets of \$865.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on September 3, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during 2001 and 2002 and the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters. Finally, the Service Center requested that the petitioner complete Part 5 of the petition.

In response, counsel submitted pay stubs, copies of pay stubs, and copies of checks showing amounts the petitioner paid to the beneficiary since October 13, 2003 for work performed since September 29, 2003. Counsel also provided the petitioner's Form DE-6 reports for the last quarter of 2002 and the first three quarters of 2003, and a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation.

The Form DE-6 Quarterly Wage Reports show that the petitioner employed from 14 to 15 workers during those quarters, but do not show that the petitioner employed and paid the beneficiary during any of those quarters.

The 2002 return shows that during that year the petitioner declared ordinary income of \$13,660. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$7,964 and current liabilities of \$5,101, which yields net current assets of \$2,863.

In a letter dated November 17, 2003, counsel stated that until September 29, 2003, the petitioner paid the beneficiary in cash and that no W-2 forms are available for 2001 and 2002. Counsel further stated that the petitioner employs 15 workers.

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 March 10, 2004, denied the petition.

On appeal, counsel provides copies of statements of bank accounts of the petitioner and the petitioner's owner. Counsel also provides Form DE-6 Quarterly Wage Reports for all four quarters of 2001 and 2002 and the last quarter of 2003, and a copy of the 2003 W-2 form showing wages it paid the beneficiary.

Counsel asserts that the petitioner obviously has the ability to pay the proffered wage because the beneficiary is working for the petitioner and being paid that amount. Counsel asserts that the petitioner has been paying the proffered wage to the beneficiary since May 1999, but provides no evidence in support of that assertion. In explanation, counsel notes that the petitioner did not place the beneficiary on its official payroll until September 2003 because she was unable to work legally in the United States until that time.

Counsel concedes that the petitioner is unable to provide contemporaneous records to show any payments until October 2003, but notes that the Form ETA 750, Part B, stating that the beneficiary worked for the petitioner beginning during May of 1999, was signed under penalty of perjury. Counsel notes that the Form ETA 750 was signed on March 13, 2001, and states that it could not, therefore, have been falsified in anticipation that the petition would otherwise be denied.

Counsel's assertion that, because the Form ETA 750, Part B, was executed on March 13, 2001, its contents are necessarily reliable is without merit. Counsel has produced no reliable evidence of the assertion that the petitioner employed and paid the beneficiary prior to September 29, 2003. Further, that the Form ETA 750, Part B was signed under the penalty of perjury is no guarantee of the veracity of the signatory or the information the form contains. Further still, even if the beneficiary's statement were taken as demonstrating that the petitioner employed the beneficiary as stated, it does not demonstrate that the wage paid to the beneficiary prior to September 29, 2003 was equal to the proffered wage.<sup>1</sup> Finally, the record contains no evidence that, prior to September 29, 2003, the beneficiary worked full-time.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.<sup>2</sup> Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

The bank statements pertinent to the petitioner's owner's account are not merely unconvincing, but entirely inapposite. The petitioner 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, 50 (BIA 1958; AG 1958). 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). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner shall not be further considered.

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<sup>1</sup> In fact, the record contains a pay stub dated October 13, 2003, covering the pay period from September 29, 2003 to October 12, 2003. That pay stub shows that during that pay period the petitioner paid the beneficiary only \$11.50 per hour, rather than the \$11.55 proffered wage. On the priority date, May 27, 2001, if wages were paid to the beneficiary, they may have been less still.

<sup>2</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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 did not establish that it employed and paid the beneficiary during 2001 and 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, 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 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 total 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 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income 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 proffered wage is \$24,024 per year. The priority date is May 27, 2001.

The petitioner reported ordinary income of \$18,790 during 2001. That amount is insufficient to pay the proffered wage. At the end of that year, the petitioner had net current assets of \$865. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it with which it could have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner reported ordinary income of \$13,660 during 2002. That amount is insufficient to pay the proffered wage. At the end of that year, the petitioner had net current assets of \$2,863. That amount is

insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it with which it could have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 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 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.