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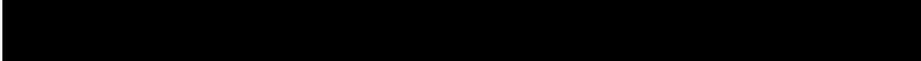
**U.S. Citizenship
and Immigration
Services**

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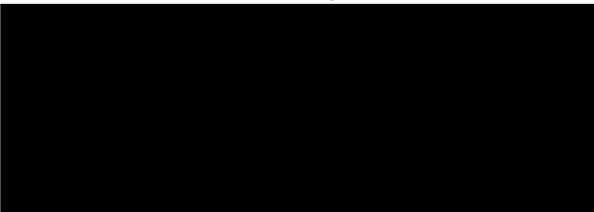
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FILE:  Office: CALIFORNIA SERVICE CENTER Date: JUN 14 2005
WAC 03 040 56184

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 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 chef. 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 April 5, 2001. The proffered wage as stated on the Form ETA 750 is \$35,000 per year.

On the petition, the petitioner stated that it was established during 1976 and that it employs 20 workers. The petition states that the petitioner's gross annual income is \$818,259 and that its net annual income is \$42,572. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in San Francisco, California.

In support of the petition, counsel submitted the 2001 Form 1120 U.S. Corporation Income Tax Return of [REDACTED] Incorporated. The return shows that the address of [REDACTED] Incorporated is in [REDACTED] Park, California.¹ With the petition, counsel submitted no other evidence pertinent to the petitioner's ability to pay the proffered wage.

¹ This office notes that, even if [REDACTED] incorporated, of Menlo Park demonstrated that it is petitioner, [REDACTED] Corporation dba [REDACTED] of San Francisco, the priority date in this matter is April 5, 2001 and the

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 March 25, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center specifically requested IRS printouts showing the petitioner's tax data for "2001 to the present," and the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters.

In response, counsel submitted the California Form DE-6 Quarterly Wage Reports for all four quarters of 2002 and the first quarter of 2003 of the petitioner, Ajanta Corporation of San Francisco. Those reports show that the petitioner employed between 19 and 21 workers during each of those quarters but do not show that it employed the beneficiary.

Counsel submitted 2000 and 2001 IRS printouts of tax data of the petitioner, Ajanta Corporation of San Francisco. Those printouts show that the petitioner declared a loss as its taxable income before net operating loss deduction and special deductions during each of those years, but do not show figures from which the petitioner's net current assets can be calculated.

In addition, counsel submitted a cover letter and a letter from the petitioner's accountant, both dated June 16, 2003. Those letters state that the petitioner's fiscal year 2002 tax return was unavailable because the petitioner's fiscal year ends on August 31 and the 2002 fiscal year was not, therefore, complete.

On July 1, 2003 the Service Center issued another request for evidence. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested, *inter alia*, 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 specifically requested that the evidence of the petitioner's ability to pay the proffered wage include evidence pertinent to 2002.

In response, counsel submitted copies of the petitioner's 2000, 2001, and 2002 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner is a corporation and reports taxes pursuant to a fiscal year running from September 1 of the nominal year to October 31 of the following year.

The 2000 return shows that during the fiscal year running from September 1, 2000 to October 31, 2001 the petitioner declared a loss of \$2,743 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The 2001 return shows that during the fiscal year running from September 1, 2001 to October 31, 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$41,180 during that year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had current assets of \$54,511 and current liabilities of \$34,586, which yields net current assets of \$19,925.

return covers a fiscal year beginning on October 1, 2001. That tax return could not, in itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2002 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$23,478 during the fiscal year running from September 1, 2002 to October 31, 2002. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

In a cover letter, dated September 22, 2003, counsel asserted that the petitioner has employed the beneficiary since June of 2000, but provided no evidence to support that assertion. Counsel emphasized the amount of the petitioner's total wage expense. Counsel indicated that his records do not indicate that he provided CIS with the tax returns [REDACTED] Incorporated, but stated that [REDACTED] is another restaurant owned by the petitioner's owner.

On October 23, 2003 the petitioner issued a third Request for Evidence in this matter. The Service Center noted that counsel had stated that the petitioner employed the beneficiary beginning in 2000. The Service Center requested copies of the 2001 and 2002 Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary.

In response, counsel submitted a letter, dated January 14, 2004, from the petitioner's owner. The petitioner's owner stated that the petitioner had issued no W-2 forms to the beneficiary during 2001 or 2002. The petitioner's owner stated that the petitioner had started declaring the wages it paid to the beneficiary during the last quarter of 2003. Counsel submitted a W-2 form showing that during 2003 the petitioner paid the beneficiary \$3,743.32

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 January 28, 2004, denied the petition.

On appeal, counsel provides (1) letters, dated February 24 and February 26, 2004, from the petitioner's owner, (2) partially legible copies of the petitioner's California Form DE-6 Quarterly Wage Report for the last quarter of 2003, (3) newspaper articles and printouts of web content attesting to the quality of the food available at the petitioner's restaurant, and (4) copies of the petitioner's unaudited income statement for the period from September 1 to December 31, 2003 and its unaudited balance sheet as of December 31, 2003.

The petitioner's owner's February 24, 2004 letter is notarized and stresses that the petitioner opened during 1976 and has an annual payroll in excess of \$200,000. The petitioner's owner's other letter states that [REDACTED] worked as a chef for the petitioner until April 2003, when he ceased work due to medical considerations, and that the beneficiary has taken over his position.

The quarterly report confirms that the petitioner paid the beneficiary wages of \$3,743.32 during the last quarter of 2003.

In a cover letter dated February 25, 2004 counsel emphasizes the amount of the petitioner's gross receipts, its gross profit, and its total salaries and wages during the salient years in arguing that the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.² Counsel also

² In argument, counsel mistakenly characterizes the petitioner's \$41,180 taxable income before net operating loss

urges that the petitioner's spending on advertising, office expenses, parking expenses, janitorial services, and travel could have been decreased or eliminated as necessary to pay the proffered wage. Counsel offered no evidence, however, that those expenses could have been decreased or eliminated without causing an adverse effect on the petitioner's receipts.

Counsel also noted that the petitioner's owner stated that the beneficiary replaced a previous [REDACTED]. Counsel argued that the salary previously paid to [REDACTED] therefore, now available to pay wages to the beneficiary. Finally, counsel argued that the petitioner's many years of operation and meeting its payroll obligations demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reliance on the amount petitioner's gross receipts, gross profit, and payroll expenses is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses³ or otherwise increased its net income,⁴ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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.

Counsel's reliance on the petitioner's other expenses, those for advertising, office supplies, parking, janitorial services, and travel, is similarly misplaced. Counsel argues that the expenses could have been reduced or entirely obviated, but offers no evidence that the petitioner would, then, have operated more profitably, or even without a loss. The petitioner would, presumably, decline to pay for advertising unless it believed that the advertising would result in a net gain. The petitioner apparently, therefore, believes that to eliminate it would result in a net loss, and not result in additional funds available to pay wages.

The office supplies, parking, and janitorial services, if the petitioner had been able to reduce or eliminate them and operate more profitably, also would have been reduced or eliminated previously. Even the petitioner's travel expenses were claimed as expenses of the business, thus indicating that they were necessary to the business. See 26 USC Subtitle A, Chapter 1, Subchapter B, Part VI, Sec. 162. – Trade or business expenses. Counsel's implication, on appeal, that they were superfluous, with evidence to support that assertion, is unconvincing. Generally, funds spent on various expenses will not be considered to have been available to pay the proffered wage.

deduction and special deductions as a net operating loss of \$41,180.

³ The petitioner might be able to demonstrate, for instance, rather than merely allege, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁴ The petitioner might also be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

The petitioner's owner has asserted that [REDACTED] worked for the petitioner as a chef, and counsel argues that the wages previously paid to [REDACTED] are now available to pay the proffered wage to the beneficiary. The record contains no documentary evidence, however, to demonstrate that Mr. Tiwana was the petitioner's chef. The petitioner's owner's assertion, made on appeal after the evidence previously submitted was found insufficient to show the petitioner's ability to pay the proffered wage, is not convincing evidence.⁵

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel does not appear to have intentionally proffered the tax returns of [REDACTED] Incorporated. Even if he had, this office notes that 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 who have 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 considered.

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 established that it employed and paid the beneficiary \$3,743.32 during 2003. It submitted no evidence of any wages it paid to the beneficiary during any other year.

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.*

⁵ Even if the evidence demonstrated that the petitioner employed [REDACTED] as a chef, as the petitioner's owner states, the record contains no evidence that the petitioner paid him any wages during the 2000 and 2001 calendar years and, therefore, no evidence that it paid him any wages during the petitioner's 2000 fiscal year, during which the April 5, 2001 priority date fell. The 2002 and 2003 wage reports, therefore, would not assist the petitioner in showing its ability to pay the proffered wage during the petitioner's 2000 fiscal year, a period during which the petitioner is obliged to demonstrate its ability to pay the proffered wage.

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 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 \$35,000 per year. The priority date is April 5, 2001, which, as was noted above, fell within the petitioner's 2000 fiscal year.

During its 2000 fiscal year the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its profits. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage during that year out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during its 2000 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

During its 2001 fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of \$41,180. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

During its 2002 fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of \$23,478. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage during that year out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during its 2002 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2002 fiscal year.

The petitioner has demonstrated that it paid the beneficiary \$3,743.32 during the last quarter of 2003. That quarter fell within the petitioner's 2003 fiscal year. Having demonstrated that it paid the beneficiary \$3,743.32, it only obliged to demonstrate the ability to pay the \$31,256.68 balance of the proffered wage

during that fiscal year. The appeal in this matter, however, was submitted on February 27, 2004. On that date the petitioner's 2003 fiscal year had not ended, and the petitioner's 2003 tax returns, therefore, were unavailable. The petitioner is therefore excused from providing evidence relevant to its 2003 fiscal year or later years.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during its 2000 and 2002 fiscal years. 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.