

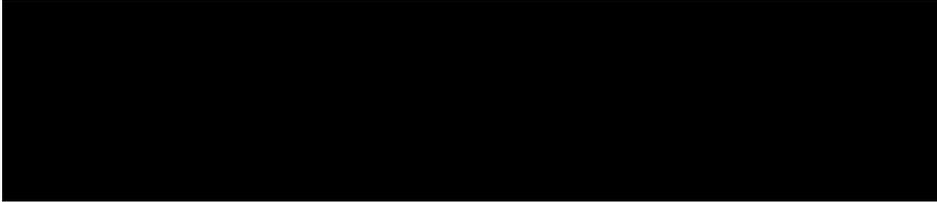
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

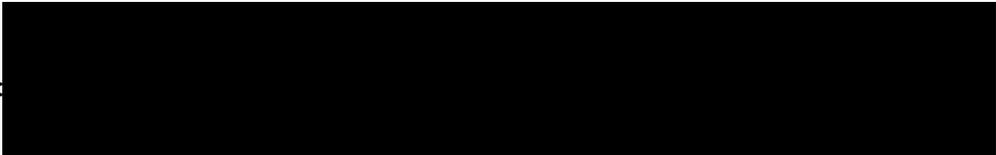
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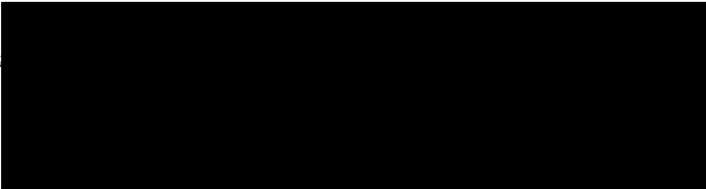
Office: TEXAS SERVICE CENTER Date: **MAR 25 2005**

IN RE: Petitioner:
Beneficiary:



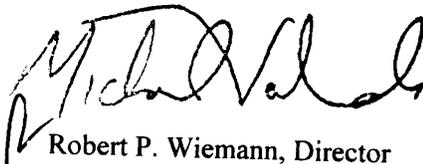
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, Texas 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 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 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$8 per hour, which equals \$16,640 per year.

On the petition, the petitioner stated that it was established during 1998 and that it employs 15 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since September 1998. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Birmingham, Alabama.

In support of the petition, counsel submitted the 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns of [REDACTED]. Those returns show that [REDACTED] reports taxes based on a fiscal year running from September 1 of the nominal year to October 31 of the following year.

The 1998 return shows that [REDACTED] declared taxable income before net operating loss deduction and special deductions of \$4,344.41 during its 1998 fiscal year, which ran from September 1, 1998 to October 31, 1999.

The corresponding Schedule L shows that at the end of that fiscal year Natori had current assets of \$20,097.77 and current liabilities of \$8,904.43, which yields net current assets of \$11,193.34.

The 1999 return shows that [REDACTED] declared a loss of \$26,866 as its taxable income before net operating loss deduction and special deductions during its 1999 fiscal year, which ran from September 1, 1999 to October 31, 2000. The corresponding Schedule L shows that at the end of that fiscal year [REDACTED] had current assets of \$11,466 and current liabilities of \$7,653, which yields net current assets of \$3,813.

The 2000 return shows that [REDACTED] declared taxable income before net operating loss deduction and special deductions of \$36,702 during its 2000 fiscal year, which ran from September 1, 2000 to October 31, 2001. The corresponding Schedule L shows that at the end of that fiscal year Natori had current assets of \$21,719 and current liabilities of \$15,951, which yields net current assets of \$5,768.

Because the priority date is April 24, 2001, evidence pertinent to the petitioner's finances during previous periods is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Because that priority date fell within the petitioner's 2000 fiscal year, however, the petitioner's 2000 tax return contains relevant evidence.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on July 9, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested the petitioner's 1999, 2000, and 2001 Form W-2 Wage and Tax Statements.

In response, counsel submitted the nominal 2001 Form 1120 U.S. Corporation Income Tax Return of [REDACTED] Incorporated. That return shows that during [REDACTED] 2001 fiscal year, which ran from September 1, 2001 to October 31, 2002 [REDACTED] declared taxable income before net operating loss deduction and special deductions of \$5,363. The corresponding Schedule L shows that at the end of that fiscal year [REDACTED] current liabilities exceeded its current assets.

Counsel submitted the petitioner's Form W-2 Wage and Tax Statements and Form W-3 transmittals for 1999, 2000, and 2001. The 2001 W-3 shows that the petitioner paid wages of \$82,377.64 during that calendar year. The W-2 forms show that the petitioner employed six, twelve, and nineteen people during those three years, respectively. They show that the petitioner employed the beneficiary during 2000 and 2001 and paid her \$8,681.37 during 2001. Again, evidence pertinent to the 1999 and 2000 calendar years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The W-2 forms do not indicate that the petitioner employed the beneficiary during 1999.

Finally, counsel submitted the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the second quarter of 2003. That return shows that the petitioner paid wages of \$53,497.72 during that quarter.

Counsel also submitted a copy of the Request for Evidence with handwritten notes in answer to inquiries contained in the Request for Evidence. Counsel stated, in his letter of August 25, 2003, that the petitioner's accountant wrote those notes. Those notes state that the petitioner in this matter is [REDACTED] Incorporated dba [REDACTED] and that it reports wage expense on page two of Schedule A at line three, Cost of

Labor. Those notes also cautioned that the W-2 forms submitted pertain to calendar years, whereas the petitioner reports taxes based on a fiscal year. The notes emphasize that [REDACTED] Incorporated is a separate corporation.

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 October 18, 2003, denied the petition.

In the decision of denial the director noted that the total wages shown on the petitioner's W-3 transmittals is not the same as the amount shown as Cost of Labor on the petitioner's tax returns.

On appeal, counsel submits a letter from an accountant, dated November 20, 2003. That letter notes, correctly, that the petitioner reports taxes based on a fiscal year ending in August whereas the W-2 and W-3 forms report wages based on a calendar year. The accountant further states that the petitioner's profitability is improving each year¹ and that the owners of the corporation also own other restaurants. The accountant notes that although the petitioner's 1999 return showed a loss its subsequent returns have shown a profit. The accountant states that the petitioner is still in business and is doing very well. The accountant further states that the shareholders are personally able to pay the proffered wage. The accountant concludes, "I believe a competent review of the tax returns and the financial position of the owners of the Petitioner would result in the conclusion [that] [REDACTED] Inc. has the ability to pay [the beneficiary]."

The accountant is correct that wages shown on a W-2 form in a given calendar year need not necessarily match the wages shown on a tax return of the same nominal year if the return is based on a fiscal year. The accountant's assertion that [REDACTED] Incorporated is able to pay the proffered wage, however, is inapposite. [REDACTED] Incorporated, as the petitioner's own accountant previously observed, is a corporation separate from [REDACTED] Incorporated dba [REDACTED] the petitioner in this case.

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 (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.² As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others, including other corporations they own, and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. In conclusion, the petitioner must show the ability to pay the proffered wage out of its own funds.

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.

¹ The petitioner's 2001 tax return does not support the accountant's assertion that the petitioner's profitability is improving each year, nor does any other evidence in the record demonstrate that the petitioner's profitability improved during that year.

² 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.

In the instant case, the petitioner established that it employed and paid the beneficiary \$8,681.37 during the 2001 calendar year. The petitioner provided no other evidence of any wages it paid to the beneficiary after the priority date. In order to compare the amount paid during the 2001 calendar year with amounts shown on the petitioner's tax returns this office must consider what portion was paid during the petitioner's 2000 fiscal year and what portion was paid during the petitioner's 2001 fiscal year. Because the petitioner provided no evidence to show what amount the petitioner paid the beneficiary during individual months, this office is forced to make an assumption pertinent to that distribution. Absent any evidence to the contrary, this office will assume that the amount paid to the beneficiary was in level payments throughout the year.

Because the petitioner's fiscal year begins on October 1, this office will apportion three-quarters of the 2001 calendar year amount to the petitioner's 2000 fiscal year and one-quarter to the petitioner's 2001 fiscal year. Having demonstrated that it paid the beneficiary \$6,511.03 and \$2,170.34 during its 2000 and 2001 fiscal years, the petitioner must demonstrate the ability to pay the balance of the proffered wage during those years.

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 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 \$16,640 per year. The priority date is April 24, 2001.

As was noted above, the priority date falls within the petitioner's 2000 fiscal year. The petitioner has demonstrated that it paid the beneficiary wages of approximately \$6,511.03 during its 2000 fiscal year and must demonstrate the ability to pay the \$10,128.97 balance of the proffered wage during that fiscal year. During that fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of \$36,702. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

Having demonstrated that it paid the beneficiary wages of approximately \$2,170.34 during its 2001 fiscal year the petitioner must demonstrate the ability to pay the \$14,469.66 balance of the proffered wage during that fiscal year. During its 2001 fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,363. That amount is insufficient to pay the balance of 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 the proffered wage any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during its fiscal year 2001.

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