



U.S. Citizenship  
and Immigration  
Services



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FILE: LIN 03 210 51370 Office: NEBRASKA SERVICE CENTER

Date: 007 2 1 2008

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican style specialty food cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and asserts that the petitioner's continuing ability to pay the proffered wage has been established.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [Citizenship and Immigration Services (CIS)].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the petition's priority date is July 17, 2002. The beneficiary's salary as stated on the labor certification \$15.00 per hour, which amounts to \$31,200 per year. Form ETA 750B, signed by the beneficiary on July 12, 2002, does not indicate that the petitioner has employed the beneficiary.

On Part 5 of the visa petition, filed June 27, 2003, the petitioner claims that it was established in 2000, employs eight workers, and has a gross annual income of \$541,396.

The petitioner initially submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for the year 2002 as evidence of its ability to pay the proffered wage of \$31,200 per annum. The corporate tax return indicates that the petitioner files its returns based on a standard calendar year. In 2002, the petitioner reported net taxable income of \$19,094 before the net operating loss (NOL) deduction. Schedule L of the tax return reflects that the petitioner had \$44,594 in current assets and no current liabilities, resulting in net current assets of \$44,594. Besides net income, CIS will review a petitioner's net current assets as a measure of its liquidity and as

an alternative available resource out of which the proffered wage may be paid. A petitioner's current assets and current liabilities are shown on line(s) 1(d) through 6(d) and line(s) 16(d) through 18(d) of Schedule L. The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the year.<sup>1</sup> 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 also initially submitted copies of five different bank letters itemizing various balances for different Mexican restaurants. None of the tax identification numbers listed on the letters matched that of the petitioner's given on the preference petition. Accompanying these letters are copies of a bank statement from May 2003. It is not clear whether this account is the petitioner's or whether it belongs to one of the other three related restaurants. The petitioner additionally provided copies of the 2002 tax returns from each of three other restaurants. Each tax return reflects that the filer bears a different name and address from the petitioner and is organized as a separate corporation with different tax identification numbers than that of the petitioner's.

On February 6, 2004, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage as of the July 17, 2002, priority date and continuing until the present.

In response, counsel resubmitted copies of the petitioner's 2002 corporate tax return along with a copy of a gross monthly sales report for 2003. It shows that the petitioner generated approximately \$632,000 in sales. Counsel also resubmitted the corporate tax returns for the other three Mexican restaurant that she claims the petitioner owns, as well as previously submitted bank letters and gross monthly sales reports for these entities. Counsel's transmittal letter states that the petitioner had not yet filed its 2003 federal tax return.

The director denied the petition on May 11, 2004. The director concluded that the petitioner's corporate tax return did not demonstrate sufficient net income to cover the proffered wage.

On appeal, counsel submits a copy of the petitioner's 2003 corporate tax return, stating that it had not been available earlier. It shows that the petitioner reported \$81,107 in net taxable income before the NOL deduction. Schedule L reflects that the petitioner had \$52,222 in current assets and no current liabilities, resulting in \$52,222 in net current assets. Counsel contends that the director should have considered the petitioner's net current assets on the 2002 return and should have also considered the petitioner's increase in gross sales from 2002 to 2003.

Counsel's point about the recognition of the petitioner's net current assets is well taken. 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 matter, the record does not suggest that the petitioner has employed the beneficiary.

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<sup>1</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.

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 review 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). Showing that the petitioner's gross receipts reached a certain level, as is argued here, is not sufficient. It is not reasonable to consider gross revenue without also reviewing the expenses incurred in order to generate that 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 the Service should have considered income before expenses were paid rather than net income.

As the tax returns and other documentation show that the other restaurants are separate corporate entities, their financial documentation will not be considered as probative of the petitioner's individual ability to pay the proffered annual salary. 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). CIS need not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass).

In this case, as indicated above, the petitioner's net current assets of \$44,594 was sufficient to pay the proffered wage in 2002. Similarly, as shown by its 2003 corporate tax return submitted on appeal, either its \$81,107 net taxable income of its net current assets of \$52,222 was also well above the proposed wage offer of \$31,200 per year. Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.