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20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



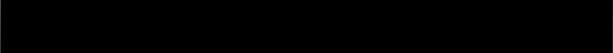
U.S. Citizenship  
and Immigration  
Services

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FILE:  Office: VERMONT SERVICE CENTER Date: **APR 14 2006**  
EAC 04 029 51129

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Other Worker Pursuant to § 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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty foreign food cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief, previous documentation, and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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) 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 25, 2001. The proffered salary as stated on the labor certification is \$12.00 per hour or \$24,960 per year.

With the petition, counsel submitted copies of the petitioner's 2001 and 2002 Forms 1120S, U.S. Income Tax Returns for an S Corporation, copies of the petitioner's 2001 and 2002 Forms 941, Employer's Quarterly Federal Tax Returns, copies of the petitioner's 2001 and 2002 Forms 1040, U.S. Individual Income Tax Returns, copies of the 2001 and 2002 Forms W-2, Wage and Tax Statements, issued by the petitioner for its employees during those two years, a copy of a letter from [REDACTED], a letter from [REDACTED] accountant, a list of businesses and properties owned by the petitioner's owner, and a copy of the 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation, for [REDACTED] of which the petitioner's owner is a 25% owner. The 2001 tax return reflected an ordinary income or net income of -\$135,197 and net current assets of \$22,998. The 2002 tax return reflected an ordinary income or net income of -\$33,997 and net current assets of \$32,270. The owner's

2001 Form 1040 reflected an adjusted gross income of \$148,123, and the owner's 2002 Form 1040 reflected an adjusted gross income of \$182,461. The petitioner's 2001 and 2002 Forms 941 did not show that the petitioner employed the beneficiary in 2001 and 2002.<sup>1</sup> Likewise, there were no Forms W-2 or Forms 1099-MISC, Miscellaneous Income, provided which establish that the petitioner employed the beneficiary in 2001 and 2002. The 2001 Form 1120S, U.S. Tax Return for an S Corporation, for ██████████ ██████████ reflected an ordinary income or net income of \$87,394 and net current assets of \$606,614.<sup>2</sup> The letter from ██████████ claimed that the owner's interests in other businesses and real estate holdings were available to offset the additional monies needed to pay the proffered wage to the beneficiary. The letter from ██████████ asserts that the owner has the ability to pay the proffered wage from his personal and business assets and that he "would not invest in a business or employee unless he believed that such investment would be financially successful."

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 21, 2004, denied the petition.

On appeal, the petitioner, through counsel, submits previously submitted documentation, a copy of the petitioner's 2003 Form 1120S, an unaudited financial statement for the period January 1, 2004 through September 30, 2004, and copies of payroll journals, showing the beneficiary's earnings, for the period April 2004 through October 2004. The 2003 tax return reflects an ordinary income or net income of \$18,548 and net current assets of \$36,637. The unaudited financial statement for the period January 1, 2004 through September 30, 2004 reflects sales of \$464,309 and net profit of \$55,297. The payroll journals for the period April 2004 through October 2004 reflect wages paid to the beneficiary by the petitioner of \$12,960. Counsel asserts that due to the evidence of depreciation, amortization, and private capital funding the petitioner provided when initially filing the I-140, [Citizenship and Immigration Services (CIS)] should have requested further evidence if there were any question as to the ability of the Petitioner to meet the salary requirement. Counsel also contends that the petition should have been approved as two other petitions that were filed at the same time and for the same location were approved; that CIS should have considered the "paper expenses" of depreciation and amortization; that the petitioner paid the proffered wage to the beneficiary; that the evidence submitted reflects a substantial potential for

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<sup>1</sup> The labor certification in Part B, Statement of Qualifications of Alien, signed by the beneficiary under penalty of perjury, stated that the petitioner employed the beneficiary from February 2000 until the present.

<sup>2</sup> It should be noted that the petitioner is a corporation, and 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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." Therefore, the owner's tax returns and that of ██████████ will not be considered by the AAO in determining the petitioner's ability to pay the proffered wage.

the petitioner's growth; and that the decision to deny the petition was incorrect based on prior case law precedents.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner claims to have employed the beneficiary from February 2000 to the present. However, the only evidence submitted as proof of that employment were copies of payroll journals for the period April 2004 through October 2004. Neither tax returns for 2004 nor payroll journals for 2001 through 2003 nor other evidence that wages were paid to the beneficiary were submitted. Therefore, the petitioner has not established that it employed the beneficiary at a salary equal to or greater than the proffered wage from the priority date of April 25, 2001 through 2003. The petitioner is obligated to show that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage. In 2001, that difference is unknown as no evidence of wages paid to the beneficiary in 2001 was provided.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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>3</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's net current assets during 2001 through 2003 were \$22,998, \$32,270, and \$36,637, respectively. The petitioner could have paid the proffered wage in 2002 and 2003 from its net current assets, but not in 2001. However, the petitioner only needed to show that it could pay the difference between the net current assets of \$22,998 in 2001 and the proffered wage of \$24,960. That difference would have been only \$1,962. Regrettably, the petitioner did not provide any evidence of wages paid to the beneficiary in 2001.

Counsel claims that CIS improperly failed to issue a request for evidence before summarily denying the petitioner's petition. The regulation at 8 C.F.R. § 103.2(b)(8) states in pertinent part:

*Request for evidence.* If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. . . . Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence, including blood tests.

In the instant case, the petitioner submitted copies of its 2001 through 2003 income tax returns, copies of its 2001 and 2002 Forms 941, copies of Forms W-2 for its employees for 2001 and 2002, copies of the petitioner's 2001 and 2002 Forms 1040, an unaudited financial statement for the period January 1, 2004 through September 30, 2004, and copies of payroll journals for the beneficiary for the period of April 2004 through October 2004 as proof of its ability to pay the proffered wage. The record of proceeding was complete in that it contained all the necessary initial evidence; and, therefore, the director was not obligated to issue a request for evidence. In addition, since the record of proceeding included evidence of ineligibility on the petitioner's part, the director was justified in denying the petition on that basis alone.

Counsel maintains that CIS should have considered the "paper expenses" of depreciation when determining the petitioner's ability to pay the proffered wage of \$24,960. Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

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<sup>3</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. In addition, counsel does not offer any alternative allocation of those costs.

Counsel asserts that the petition should have been approved as two other petitions that were filed at the same time and for the same location were approved. The director's decision does not, however, indicate whether he reviewed the prior approvals of the other immigrant petitions. If the previous immigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6<sup>th</sup> Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of [the beneficiary], the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*. 248 F.3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In addition, the petitioner would have had to establish that it had the financial ability to pay all three beneficiaries the proffered wage for each one from the priority date and continuing until they obtained lawful permanent residence. *See* the regulation at 8 C.F.R. § 204.5(g)(2).

Counsel contends that the private capital funding the petitioner provided when initially filing the I-140 petition should be considered when CIS determines the petitioner's ability to pay the proffered wage. However, counsel has not provided a published citation that would allow private capital funding to be considered an asset when determining the ability to pay the proffered wage. While 8 C.F.R. § 103.3(c)

provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In addition, as stated previously, CIS may not “pierce the corporate veil” and look to the assets of the corporation’s owner to satisfy the corporation’s ability to pay the proffered wage. 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.

Counsel argues that the petition should have been approved as the petitioner paid the beneficiary the proffered wage. Counsel has not, however, provided evidence of those wages for the years 2001 through 2003 or for the period January 1, 2004 through April 2004 and for the period November 2004 through December 2004. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the success of [the petitioner’s] other pizzerias, counsel contends that the petitioner had a reasonable expectation of increasing business profits and that it would have had the ability to pay the proffered wage. Counsel cites *O’Connor v. Attorney General of the United States*, Civ. A. No. 87-0434-Z, 1987 WL 18243 (D.Mass. 1987) in support of his contention. However, unlike that case which involved a sole proprietorship, the petitioner in this case is a corporation. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black’s Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor’s adjusted gross income, assets and personal liabilities are also considered as part of the petitioner’s ability to pay. However, as previously mentioned, a corporation is a separate and distinct legal entity from its owners and shareholders; and, therefore, 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “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.”

In addition, no detail or documentation has been provided to explain how, why, or when the petitioner would significantly increase its profits to the point of paying all three beneficiaries proffered salaries. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. The fact that the other pizzerias are successful does not automatically correlate to the success or failure of the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has only provided three tax returns (2001 through 2003), which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

The 2001 tax return reflects an ordinary income or net income of -\$135,197 and net current assets of \$22,998. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2001.

The 2002 tax return reflects an ordinary income or net income of -\$33,997 and net current assets of \$32,270. The petitioner could have paid the proffered wage from its net current assets in 2002.

The 2003 tax return reflects an ordinary income or net income of \$18,549 and net current assets of \$36,637. The petitioner could have paid the proffered wage from its net current assets in 2003.

In summary, the petitioner has established its ability to pay the proffered wage through its net current assets in 2002 and 2003, but not in 2001.

The director must afford the petitioner reasonable time to provide evidence such as payroll journals, Forms W-2, Forms 1099-MISC, etc. pertinent to the issue of the wages paid to the beneficiary in 2001, and any other evidence the director may deem necessary.<sup>4</sup> The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's October 21, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.

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<sup>4</sup> It is noted that the petitioner has submitted multiple petitions. In order to establish its ability to pay the proffered wage, the petitioner must demonstrate that it has sufficient income to pay the proffered wages of all the beneficiaries from the priority date and continuing until the beneficiaries obtain lawful permanent residence. See the regulation at 8 C.F.R. § 204.5(g)(2).