

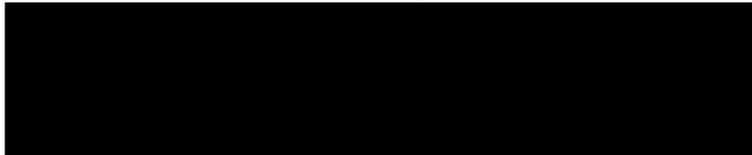


U.S. Citizenship  
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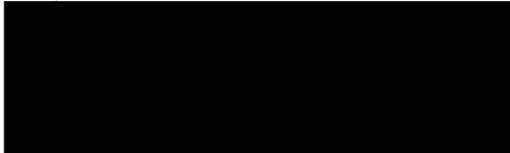
FILE: EAC-04-084-50283 Office: VERMONT SERVICE CENTER Date: JUL 25 2006

IN RE: Petitioner:  
Beneficiary:



PETITION: 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, 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 dismissed.

The petitioner is a catering and gourmet take-out company. It seeks to employ the beneficiary permanently in the United States as a specialty cook – continental/nouvelle cuisine. 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.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 13, 2004 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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) states:

*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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 annually.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits no brief and submits additional evidence.

Relevant evidence submitted on appeal includes a letter from a certified public accountant and copies of Form 1065 U.S. Returns of Partnership Income of the limited liability company which owns the petitioner's business location, for the years 2001 and 2002. Other relevant evidence in the record includes copies of Form 1120 U.S. Corporation Income Tax Returns of the petitioner for 2001 and 2002.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel states that the director's decision fails to account for the petitioner's assets, which are available to pay the offered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 instant case, on the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another 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 for a given year, 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002. The I-140 petition was submitted on January 26, 2004. As of that date, the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 was the most recent return available.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return.

The petitioner's tax returns state amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$9,952.00	\$39,291.20*	\$(29,339.20)
2002	\$1,471.00	\$39,291.20*	\$(37,820.20)

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information fails to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002, which are the two years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$21,788.00	\$39,291.20*	\$(17,503.20)
2002	\$9,020.00	\$39,291.20*	\$(30,271.20)

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information fails to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002, which are the two years at issue in the instant petition.

The Schedule E's attached to the petitioner's tax returns for 2001 and 2002 show that one individual is the owner of 100% of the petitioner's common stock. The name of that person is [REDACTED]. Those Schedule E's show that [REDACTED] received \$55,000.00 in compensation of officers each year in 2001 and 2002. The returns show no other payments as compensation of officers.

The record contains a copy of a letter dated October 11, 2004 from a certified public accountant. The accountant states that the petitioner's total assets and total liabilities each year show excesses of assets over liabilities in amounts more than sufficient to pay the proffered wage. The accountant's letter, however, fails to distinguish between current assets and total assets or between current liabilities and total liabilities. As noted above, in a balance sheet analysis of the petitioner's ability to pay the proffered wage, CIS considers only current assets and current liabilities.

In his letter, the accountant also states the following:

██████████ Business has additional funds available to her. The building housing the business known as La Promenade is owned by Payraudeau 95, LLC, a partnership of Ms. ██████████ and her minor son, Julian. The rent expenses of \$70,000 shown on Line 16, Page 1 of Form 1120 is paid to this partnership. This means that these funds are essentially payments from and to ██████████ herself, and constitute additional funds available to her business. Copies of these corporate tax returns are also attached.

(Letter from certified public accountant, October 11, 2004).

The petitioner's Form 1120 tax returns in the record show rent expenses on line 16 of \$70,000.00 in 2001 and \$70,000.00 in 2002. The petitioner's tax returns therefore provide some corroboration for the accountant's statements.

The record also contains copies of Form 1065 U.S. Returns of Partnership Income of Payraudeau 95, L.L.C. for 2001 and 2002. The name of that company ends with the abbreviation "L.L.C.," indicating that it is a limited liability company. Limited liability companies with a single member are generally "disregarded" for the purpose of filing a federal tax return and are taxed as sole proprietorships where the single member is an individual. Limited liability companies which have more than one member file a partnership return, Form 1065. See Internal Revenue Service, Tax Issues for Limited Liability Companies, Publication 3402 (Rev. 7-2000), at 2, available at <http://www.irs.gov/pub/irs-pdf/p3402.pdf>.

In the instant petition, the Form 1065's in the record show that the income of Payraudeau 95, L.L.C., is divided into two shares, with ██████████ entitled to 99% of profit sharing, loss sharing and ownership of capital and ██████████ entitled to 1% of those items.

Attached to each of the Form 1065 returns in the record is a Form 8825, Rental Real Estate Income and Expenses of a Partnership or an S Corporation. The Form 8825's show a building on Piermont Avenue in Tenafly, New Jersey, as the company's only source of rental income. The address on Piermont Avenue matches the petitioner's address as shown on the ETA 750 and on the I-140 petition.

The Form 8825 for 2001 shows gross rents received of \$70,000.00, with the following expenses: Legal and other professional fees, \$21,484.00; Taxes, \$11,513.00; Depreciation, \$12,247.00; and other (licenses and permits), \$50.00. The total of the expenses is \$45,294.00 and the net income from rental real estate activities is \$24,706.00. Schedule K shows net income from all activities as \$24,745.00. A 99% share of that net income is \$24,497.55.

The Form 8825 for 2002 shows gross rents received of \$70,000.00, with the following expenses: Legal and other professional fees, \$21,726.00; Taxes, \$12,105.00; Depreciation, \$12,101.00 and other (bank charges, insurance, licenses and permits, miscellaneous, and repairs and maintenance), \$855.00. The total of the expenses is \$46,787.00 and the net income from rental real estate activities is \$23,213.00. Schedule K shows net income from all activities as \$23,341.00. A 99% share of that net income is \$23,107.59.

The information on the Form 1065's of Payraudeau 95, L.L.C., is consistent with the statements in the accountant's letter concerning funds under the control of Lori Payraudeau, both through her ownership of 100% the petitioner's shares and her rights to 99% of the profit sharing, loss sharing and ownership of capital of the limited liability company Payraudeau 95, L.L.C.

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 basic rule of law concerning corporations 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); *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.

Nonetheless, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income.

One expense item on the Form 1120 is for rents. The Form 1120's and the Form 1065's show that the petitioner paid \$70,000.00 in rents in 2001 and 2002 to Payraudeau 95, L.L.C. Calculations based on the information in the Form 1065's show that Lori Payraudeau's shares of the rents received by the limited liability company were \$24,497.55 in 2001 and \$23,107.59 in 2002. [REDACTED] could have reallocated those amounts of the petitioner's expenses while still leaving sufficient rent payments to the limited liability company to pay all of its expenses and without affecting the dollar amounts which would be available to her son [REDACTED]. Those amounts are shown in the table below.

Tax year	Excess rent expenses	Net Income	Total available income	Proffered wage	Surplus or (deficit)
2001	\$24,294.55	\$9,952.00	\$34,449.55	\$39,291.20	\$(4,841.65)
2002	\$23,107.59	\$1,471.00	\$24,578.59	\$39,291.20	\$(14,712.61)

The above information fails to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002, which are the two years at issue in the instant petition.

As noted above, the Schedule E's attached to the petitioner's Form 1120 tax returns show that the petitioner paid \$55,000.00 in officer compensation to [REDACTED] in 2001 and in 2002. Although those expenses were also under the control of [REDACTED] who is the petitioner's sole shareholder, no evidence in the record indicates that Ms. Payraudeau would have been willing and able to forego a portion of those payments if needed to pay the proffered wage.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director correctly stated the petitioner's net income in 2001 and 2002 and correctly calculated the petitioner's year-end net current assets for each of those years. The director found that those

amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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 not met that burden.

ORDER:       The appeal is dismissed.