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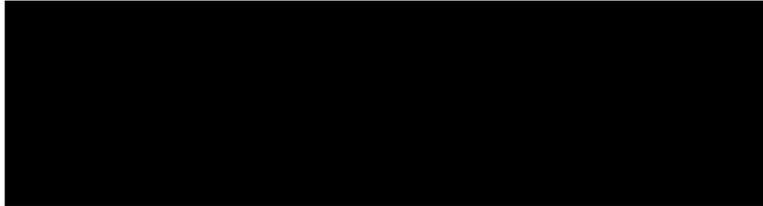
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
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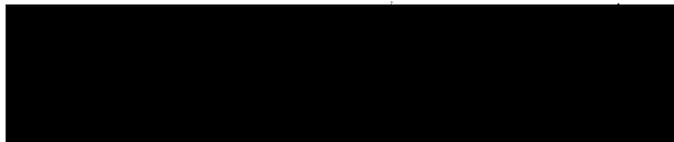


FILE: EAC 04 063 54213

Office: VERMONT SERVICE CENTER

Date: JUL 26 2006

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, Chief
Administrative Appeals Office

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

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and contends that the petitioner's evidence established its continuing financial ability to pay the proffered salary.

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 nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

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. 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 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 February 22, 2001. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour, which amounts to \$29,120 per annum. On the Form ETA 750B, signed by the beneficiary on January 22, 2001, the beneficiary does not claim to have worked for the petitioning employer.

Part 5 of the visa petition, filed on January 2, 2004, indicates that the petitioner was established in March 2000 and employs three workers. In support of its ability to pay the beneficiary's proposed wage offer of \$29,120 per

year, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001. It also supplied a copy of its 2002 corporate return. As noted by the director, the balance sheet contains all zeros and apparently was not completed. Collectively, the tax returns reflect that the petitioner files its federal tax returns using a fiscal year running from March 1st to February 28th of the following year. Thus, the 2000 return reflects financial information covering the period from March 1st, 2000 to February 28th, 2001. Relevant to the petitioner's taxable income before the net operating loss (NOL) deduction¹ and current assets and liabilities, the returns contain the following:

	2000	2001	2002
Taxable Income before NOL deduction	\$ 3,576	-\$19,971	-\$8,128
Current Assets (Sched. L)	\$ 5,740	\$ 9,448	-0-
Current Liabilities (Sched. L)	\$ 2,321	\$ 3,405	-0-
Net current assets	\$ 3,419	\$ 6,043	-0-

It is noted that net current assets, as shown above, are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of the corporate tax return. Current assets are found on line(s) 1 through 6 and current liabilities are specified on line(s) 16 through 18. If a corporation's year-end 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 included a December 24th, 2003, statement in which the petitioner's owner states that he had approximately \$64,000 in his bank account on February 22, 2001 available to use for the business, as well as equity in two family residences. Included with this statement are a copy of the owner's personal savings account from November 4, 2003 and a copy of a real estate tax bill.

The director reviewed the petitioner's financial data submitted to the record and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of February 22, 2001. The director found that personal assets of the owner could not be attributed to the petitioner as it is a separate corporate entity and concluded that the corporate tax returns failed to demonstrate sufficient net income of net current assets to pay the \$29,120 certified wage.

On appeal, counsel contends that the owner's individual assets should have been recognized in supporting the petitioner's ability to pay the proffered wage. Counsel provides a letter from the petitioner's accountant, William J. Kearns Jr., who relies on the owner's hope in stating that the beneficiary's skill as a cook and the ability to

¹ For the purpose of this review, taxable income before the NOL deduction will be treated as net income.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

prepare "dim sum" will increase revenues. [REDACTED] also offers an unaudited balance sheet as of February 28, 2001, which purports to represent the corporate petitioner's status but which also includes the monies held individually by the owner as current assets.

In this case, these contentions are not convincing. Generalized assertions as to the future prospects of the business and the beneficiary's abilities are not specifically probative to the petitioner's ability to pay the proffered wage beginning as of the priority date of February 22, 2001, as required to be shown in this proceeding. 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 may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. Here, the record indicates that the petitioner has not employed the beneficiary.

It is noted that here, the individual assets of the petitioner's owner will not be considered in reviewing the petitioner's financial ability to pay the proposed salary. The petitioner is the named corporate employer on the preference petition. 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 no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). 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."

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 next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). 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.

Regarding the documentation consisting of an unaudited balance sheet, it is noted that such financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. According to the plain language of the 1991 regulation found at 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. As such documents are not audited as required by the 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during the period represented.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, as noted above, CIS will review a petitioner's net current assets.

As noted above on the 2000 tax return, the petitioner's net taxable income of \$3,576 was less than the certified wage of \$29,120. Its net current assets of \$3,419 were also \$25,701 less than the proffered salary. The petitioner did not demonstrate its ability to pay the wage offer for the period covered by this fiscal year.

Similarly, in 2001, neither the petitioner's net taxable income of -\$19,791, nor its net current assets of \$6,043 were sufficient establish the petitioner's ability to pay the certified wage for the period covered by this fiscal year.

Finally, as shown on information set forth on the 2002 return, the net taxable income of -\$8,128 was not enough to demonstrate the petitioner's ability to pay the proposed wage offer of \$29,120 per year.

Based on the evidence contained in the record and after consideration of the argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered salary 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 not met that burden.

Beyond the director's decision, it is noted that the petitioner's owner and beneficiary bear the same family name. While this may not be uncommon, it is noted that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Although not part of the consideration in this case, this issue may also merit further investigation, including consultation with the DOL if further petitions are filed involving the same parties.

ORDER: The appeal is dismissed.