

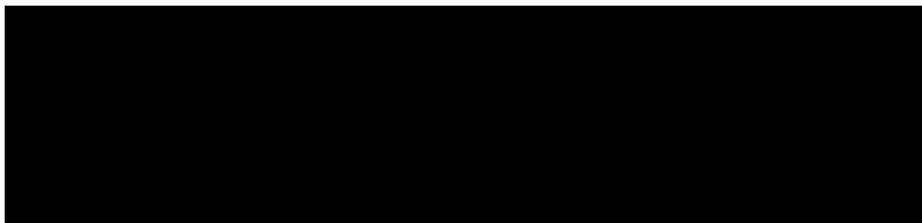


U.S. Citizenship
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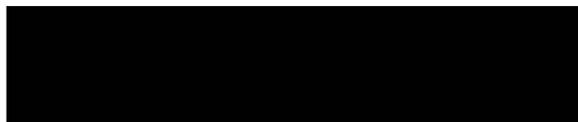


FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 06 2006
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IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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 preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the director's decision. The director dismissed the appeal as untimely filed. The petitioner appealed the denial. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal shall be regarded as a motion to reopen and reconsider. The motion will be granted. The petition will be sustained.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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. The director denied the petition accordingly.

On appeal, counsel submits a brief.

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) 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on October 7, 2002. The proffered wage as stated on the Form ETA 750 is \$10.50 per hour (\$21,840.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 2001 and 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested on October 22, 2003, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested the petitioner's U.S. federal tax return for tax year 2002. The director indicated accredited profit/loss statements, bank account records or personnel records would be additional evidence of the ability to pay the proffered wage. Since the petitioner had filed for one other beneficiary, the director indicated that the evidence submitted should include the ability to pay proffered wages for two beneficiaries.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner withdrew the petition for the second beneficiary. The petitioner's submitted U.S. Internal Revenue Service (IRS) Form 1120S tax returns for year 2002 and a financial statement.

The director denied the petition on March 4, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner filed an appeal of the denial on April 23, 2004.

The director dismissed the appeal on May 20, 2004, finding that the appeal was untimely filed and the appeal did not provide new evidence nor provide precedent decisions to consider.

On appeal filed June 21, 2004, counsel asserts that CIS incorrectly applied the law to the facts of the petition, and, contends that its appeal filed April 23, 2004 of the director's decision issued March 4, 2004 was timely filed.

Counsel has submitted the following document, a U.S. Internal Revenue Service (IRS) Form 1120S tax return for year 2002, to accompany the appeal statement.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine 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).

Counsel states that the petitioner's gross sales are evidence of the ability to pay the proffered wage. In *K.C.P. Food Co., Inc. v. Sava, Supra.*, the court held that the Service 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. *Supra* at 1084. 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 v. Thornburgh*, *Supra* at 537. *See also Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The tax return¹ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$21,840.00 per year from the priority date of October 7, 2002:

- In 2002, the Form 1120S stated a taxable income loss² of <\$32,357.00>³.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time for tax year 2002 for which the petitioner's tax return is offered for evidence.

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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's 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.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in that return indicates the following:

- In 2002, petitioner's Form 1120S return stated current assets of \$42,498.00 and \$1,428.00 in current liabilities. Therefore, the petitioner had \$41,070.00 in net current assets. Since the proffered wage is \$21,840.00 per year, this sum is more than the proffered wage.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁵ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel states that the stated shareholder equity of petitioner is evidence of the ability to pay the proffered wage. Contrary to counsel's primary assertion, CIS may not "pierce the corporate veil" and look to the assets

¹ Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. In tax year 2001 the petitioner stated \$12,886.00 in taxable income.

² IRS Form 1120S, Line 21.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁴ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ 8 C.F.R. § 204.5(g)(2).

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 urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a Chinese specialty chef will significantly increase profits for petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel contends that petitioner has the ability to generate future earnings to return it to profitability. Counsel is in error. *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.

We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.

Counsel has submitted a compiled financial statement dated January 13, 2004 for the business to show the ability to pay the proffered wage. A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. It is the lowest level of financial statements. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in Service deliberations in these matters. The statements presented were not audited.

The unaudited financial statement that petitioner submitted are not persuasive evidence. According to the plain language of 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. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the unaudited financial statements are of little evidentiary value in this matter.

Counsel contends that the owner of petitioner could direct salary paid as officer compensation to pay the proffered wage. There is no agreement in the record of proceeding to do this, nor is it reasonable to assume that an officer would reduce or give up his/her sole compensation since, according to counsel, no officer salaries are paid.

Counsel asserts that as an established business, it has the ability to increase sales, and therefore, profits in the future will increase and that the director was in error to focus just on the petitioner's current finances. There is insufficient financial data, one tax return submitted from the priority date, to determine if the totality of evidence indicated that the petitioner's un-profitability was an isolated instance in years of profitability. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years.

The corporate tax return as submitted by petitioner shows that the petitioner has demonstrated its ability to pay the proffered wage by taxable income from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner had \$41,070.00 in net current assets in tax year 2002. Since the proffered wage is \$21,840.00 per year, this sum is more than the proffered wage by a factor of two. There is sufficient liquidity present for the petitioner to obtain short term financing to pay the proffered wage.

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 motion to reopen or reconsider is granted. The petition is sustained.