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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

File: EAC 01 254 52870 Office: VERMONT SERVICE CENTER Date: JAN 14 2004

IN RE: Petitioner:
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: SELF-REPRESENTED

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner appears to have retained representation. The representative, however, does not appear to have participated in this appeal. Further, because the petitioner did not sign the Form G-28, Notice of Entry of Appearance, in the file, whether the petitioner consented to be represented is unclear. Finally, that Form G-28 does not indicate that the putative representative is an attorney and does not indicate that he is an accredited representative. All representations will be considered, but this decision will be furnished only to the petitioner.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification approved by the 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.

On appeal, the petitioner submits a statement and additional evidence.

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.

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 eligibility beginning on the priority date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158

(Act. Reg. Comm. 1977). The petitioner must, therefore, 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. Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is $425.60 per week, which equals $22,131.20 per year. That amount is based on a 35-hour week.

With the petition, the petitioner submitted no evidence of its ability to pay the proffered wage. Therefore, the Vermont Service Center, on October 23, 2001, requested evidence pertinent to the continuing ability of the petitioner to pay the proffered wage beginning on the priority date. The Service Center specifically requested the petitioner's 1998 federal income tax return. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 1998, that it submit a copy of the 1998 Form W-2, Wage and Tax Statement issued by the petitioner to the beneficiary.

In response, the petitioner submitted a copy of the 1998 Form 1120 U.S. Corporation Income Tax Return of the petitioner. That return shows that the petitioner declared a loss of $2,344 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. In a letter submitted with that return, the petitioner's putative counsel stated that the amount of the petitioner's gross receipts shows that it was able to pay the proffered wage.

The petitioner also submitted a copy of the 1998 Form 1120 U.S. Corporation Income Tax Return of El Bandido Restaurant Inc Spring Valley, New Jersey. The petitioner provided no evidence pertinent to the relationship of that the Spring Valley restaurant to the petitioner. It would seem, however, that the petitioner is alleging that the petitioner's owner also owns that other restaurant, and implying that the other restaurant's profits and assets should be included in the determination of the petitioner's ability to pay the proffered wage. That the Spring Valley Restaurant submits a Form 1120 tax return separate from the petitioner's, however, indicates that it is a separate corporation.

The petitioner did not submit the requested W-2 form and did not submit evidence pertinent to any other year. The petitioner provided no explanation of those omissions.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on July 24, 2002, denied the petition.

The appeal was submitted August 28, 2002. On appeal, the petitioner provided pay statements purporting to show amounts paid to the beneficiary. The petitioner stated that those statements show the petitioner's ability to pay the proffered wage.

The pay statements submitted are for weekly pay periods with end dates from March 14, 1999 to July 22, 2001. Each of those statements shows a year-to-date total of the wages paid by the petitioner to the beneficiary. The last statement for 1999 is for the week ending December 19, 1999. That statement indicates that, as of that date, the petitioner had paid $16,202 to the beneficiary during 1999.

The last statement for 2000 is for the week ending December 14, 2000 and indicates a year-to-date total of $22,627.60. The last statement for 2001 is for the week ending July 22, 2001 and indicates a year to date total of $14,070.

The reliance of the petitioner, through putative counsel, on the petitioner's gross receipts is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net income[2], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special deductions.

A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders, including other corporations, and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter. Whether or not the petitioner and the Spring Valley El Bandido are owned by the same person, the income and assets of that other restaurant play no part in the determination of the petitioner's ability to pay the proffered wage and shall not be

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[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

further considered.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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 both CIS and 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). In *K.C.P. Food Co., Inc. v. Sava*, 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 the INS, now 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 proffered wage is $22,131.20 per year. The priority date is January 14, 1998. The petitioner is obliged to show the continuing ability to pay the proffered wage beginning on that date.

The petitioner's 1998 tax return shows a loss and negative end-of-year net current assets. Other than that tax return, the petitioner has submitted no evidence of its ability to pay the proffered wage during 1998. The petitioner did not state why no pay statements for 1998 were provided. The petitioner did not state why the requested 1998 W-2 Form was not provided. The petitioner has not, therefore, submitted sufficient evidence of its ability to pay the proffered wage during 1998.

The petitioner submitted some pay statements for 1999. The last of those statements indicates that the beneficiary was paid $16,202 during that year, which is less than the proffered wage. The petitioner submitted no other evidence of its ability to pay the proffered wage during 1999. The petitioner has not demonstrated that it was able to pay the proffered wage during 1999.

The petitioner submitted some pay statements for 2000. The last of those statements indicates that the petitioner was paid $22,627.60 during that year. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

The petitioner submitted some pay statements for 2001. The last of those statements is for the week ending July 22, 2001. That statement indicates a year to date total of $14,070. The petitioner submitted no additional evidence of its ability to pay the proffered wage during 2001. The petitioner did not state why no later pay statements were submitted. Because $14,070 is less than the proffered wage, the petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1998, 1999, and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.