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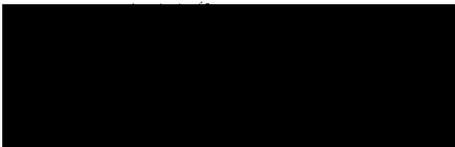
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6



FILE: [REDACTED]  
EAC-03-012-51623

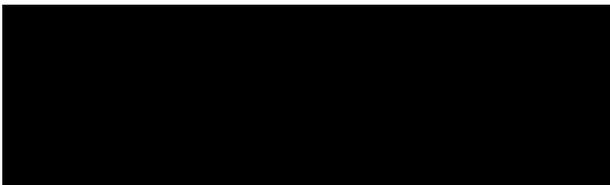
Office: VERMONT SERVICE CENTER

Date: DEC 14 2005

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 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a Middle East Kosher style 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 (DOL). 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 a brief statement and a letter regarding the beneficiary's replacement of employees of the petitioner.

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 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 DOL. See 8 CFR § 204.5(d). 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 DOL 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 February 20, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour or \$39,291.20 per year<sup>1</sup>. The Form ETA 750 states that the position requires 2 years experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner did not provide information on the petitioner's IRS Tax #, Date Established, Current # of employees, Gross Annual Income and Net Annual Income. According to the tax returns in the record, the

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<sup>1</sup> It is based on 40 hours per week according to Item 10 Total Hours Per Week of the Form ETA 750A.

petitioner's fiscal year is based on a calendar year. The beneficiary did not claim to have worked for the petitioner.<sup>2</sup>

On November 6, 2001, the petitioner filed a Form I-140 petition<sup>3</sup> on behalf of the beneficiary based on the labor certification approved by the DOL on September 25, 2001. On April 22, 2002, the director denied the petitioner because the petitioner did not establish that it had the ability to pay the offered wage at the time of filing. On October 15, 2002, the petitioner filed this instant petition for the same beneficiary. With the petition, the petitioner submitted the following supporting documents pertinent to the ability to pay: bank statements for the petitioner's business checking account, Form 1040 US Individual Income Tax Return filed by [REDACTED] for 2000 and 2001, Form 1120-A, U.S. Corporation Short-Form Income Tax Return filed by the petitioner for 2001.

The director denied the petition on August 9, 2004, finding that the evidence submitted with the petition did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage or salary to the beneficiary and that the beneficiary will replace [REDACTED] as a cook.

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 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary in 2001 and subsequent years.

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 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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<sup>2</sup> On Form ETA 750B signed by the beneficiary on October 21, 2000, he claimed to have worked as self-employed in various jobs for [REDACTED] from March 1996 to present; Form G-325 signed by the beneficiary on September 3, 2002 indicates that he worked as self-employed in various job since April 1999.

<sup>3</sup> With receipt number EAC-02-031-50512.

argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax return submitted demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$39,291.20 per year from the priority date.

In 2001, the Form 1120-A stated net income<sup>4</sup> of \$12,181.85.

Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the proffered wage. It is not clear whether the petitioner had sufficient net income to pay the proffered wage in the years 2002 and 2003 since the record does not contain the 2002 and 2003 tax returns.

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>5</sup> A corporation's year-end current assets are shown on Part III, lines 1 through 6. Its year-end current liabilities are shown on lines 13 through 14. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the year 2001, were \$(15,937.74), a negative. Therefore, for the year 2001, the petitioner did not have sufficient net current assets to pay the proffered wage. Again it is not clear whether the petitioner had sufficient net current assets to pay the proffered wage in 2002 and 2003 since the record does not contain the tax returns for these years.

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<sup>4</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 24 on Form 1120-A.

<sup>5</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.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage.

Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as **the petitioner's taxable income (income minus deductions)** or the cash specified on Part III of Form 1120-A that is considered in determining the petitioner's net current assets.

The record of proceedings contains copies of Form 1040 US Individual Income Tax Return filed by [REDACTED] 2000 and 2001. Contrary to counsel's assertion, 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 advised that the beneficiary will replace [REDACTED] as a cook and submitted a letter stating that he is leaving the position of cook and the beneficiary will replace his position as cook. W-2 forms for [REDACTED] issued in 2000 and 2001 submitted indicate that [REDACTED] was paid \$24,840.00 in 2000 and \$23,920.00 in 2001. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. In the instant case, the proffered wage is \$39,291.20 per year. If the petitioner used the compensation of \$23,920 already paid to the substituted employee in 2001 to pay the partial wage to the beneficiary, the petitioner's net income of \$12,181.85 in that year would not have been sufficient to pay \$15,371.20 of difference between the compensation already paid to the substituted employee and the proffered wage. Nor would its negative net current assets that year. Moreover, the petitioner did not document the compensation paid to the substituted employee and the petitioner's net income and net current assets in 2002 and 2003. Therefore, the petitioner did not establish that it had sufficient fund to pay the beneficiary the full proffered wage from the priority date to present through the replacement of employment method.

It is noted that the replacement letter will be given less weight as evidence. The letter appears to be written by [REDACTED]. It reads that: "I, [REDACTED] brother [REDACTED] [sic] worked as a cook for [REDACTED] [sic]nc. in the restaurant." However, it is signed [REDACTED] the president of the petitioner, but not [REDACTED] himself. The letter is notarized by a public notary, but he did not state what he notarized for.

In addition, the AAO notes that the instant petition is the second petition the petitioner filed for the beneficiary in the same position and based on the same labor certification through the same counsel. The record shows that on December 14, 2001 the director issued a request for addition evidence (RFE) for the previous petition. Some parts of the RFE states as follows:

Will the prospective employee fill a newly created position? \_\_\_\_\_ If your answer is no, how long has this position existed? \_\_\_\_\_. What wage have you been paying the incumbent to this position? \$\_\_\_\_\_/year. Identify the former employee, submit evidence of the salary paid to him or her, and document that the position was vacated. Submit copies of Form 941 for the period in question.

The record of proceedings does not contain any evidence/documents in response to this part of the RFE. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed. In the instant case, although the director did not issue a RFE for the instant petition directly, if the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents with the identical petition re-filing since both the petitioner and counsel knew the requested documents already from the director's RFE issued for previous petition. Therefore, the AAO does not consider the sufficiency of the evidence submitted on appeal.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner 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.