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U.S. Citizenship  
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FILE: LIN 03 269 51635

Office: NEBRASKA SERVICE CENTER

Date: NOV 16 2005

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, Director  
Administrative Appeals Office

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

The petitioner is a restaurant specializing in Chinese cuisine. It seeks to employ the beneficiary permanently in the United States as a cook. 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 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 June 21, 2002. The proffered wage as stated on the Form ETA 750 is \$9.80 per hour, which amounts to \$20,384 annually. On the Form ETA 750B, signed by the beneficiary on April 26, 2002, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on September 17, 2003. On the petition, the petitioner claimed to have been established on 1990, to currently have eight employees, to have a gross annual income of \$476,558, and to have a net annual income of \$273,597.

In support of the petition, the petitioner submitted:

- Counsel's G-28;
- The original ETA 750;
- The petitioner's 2003 bank statements; and,
- The petitioner's Form 1120 return for a fiscal year ending June 30, 2002.

In a request for evidence (RFE) dated March 1, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner on May 20, 2004, submitted:

- The petitioner's Form 1120 return for fiscal year ending June 30, 2003; and

- The petitioner's 2004 bank statements.

In a decision dated June 18, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that [REDACTED] (Mr. [REDACTED]) the owner of the petitioner corporation, has a personal net worth of \$714,000, which he asserts shows the petitioner has the ability to pay the \$20,384 annual proffered wage. Counsel further suggests that if Mr. [REDACTED] were to reduce his own officer's compensation,<sup>1</sup> the petitioner could pay the proffered wage. He further asserts the petitioner is a viable, 14-year-old business and paid salaries of \$93,181 for its fiscal year ending June 30, 2003, and that it has a bank balanced of \$10,056.

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). Where a petitioner fails to submit to the director a document that has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, the director had specifically requested none of the documents submitted on appeal. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

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). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered 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 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 the full proffered wage in 2001 or thereafter.

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 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*

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<sup>1</sup> The tax returns show that Mr. [REDACTED] and his wife own 100 percent of the petitioner's stock shares.

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. 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 show the amounts for taxable income on line 28 as shown in the table below.

| Fiscal Year | Net Income | Income Increase Needed*<br>To Pay Proffered Wage | Surplus or<br>(Deficit) |
|-------------|------------|--|-------------------------|
| 2002        | \$0        | \$20,384   | (\$20,384)              |
| 2003        | \$1,188    | \$19,196   | (\$19,196)              |

\* The full proffered wage, since no wage payments were made to the beneficiary in 2001 or 2002.

Since each of the above figures is negative and fails to demonstrate the ability of the petitioner to pay the proffered wage.

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 those the owner might expect 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 net current assets as shown in the following table.

| Fiscal Year | Net Current Assets | Surplus/(Deficit) After Wage Paid* |
|-------------|--------------------|------------------------------------|
| 2001        | \$8,681            | (\$11,703)                         |
| 2002        | \$4,936            | (\$15,448)                         |

\* The full proffered wage, since no wage payments were made to the beneficiary in 2001 and 2002.

Since each of those figures is negative, they also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts that would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

In any event, in the instant petition, no bank statements for 2002 were submitted. Therefore, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2002.

Counsel suggests that Mr. [REDACTED] and his wife could improve the petitioner's ability to pay the proffered wage by reducing their own officer compensation. Nothing in the record indicates that Mr. [REDACTED] and his wife have volunteered to give up approximately 40 percent of their annual compensation as officers. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Similarly, counsel's assertion that Mr. [REDACTED] \$714,000 net worth is available for the proffered wage is not supported by competent evidence in the record of proceeding. Further, the petitioner is a corporation. 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, the stockholders, or anyone else.<sup>2</sup> As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

CIS records show that during the pendency of the instant petition, the petitioner has won approval of three other I-140 petitions with priority dates November 30, 2000<sup>3</sup> or September 10, 2001. Accordingly, the petitioner must show it has the ability to pay at least four times the proffered wage, or \$81,536 during each of the pertinent years, before this office would deem the petitioner able to pay the proffered wage in the instant case. Because the petitioner had not shown its ability to pay the proffered wage, this office can only conclude the petitioner has not shown its ability to pay four times the amount of the proffered wage.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.

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<sup>2</sup> Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

<sup>3</sup> Two petitioners share this priority date.

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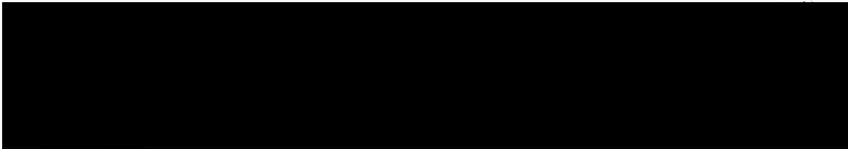
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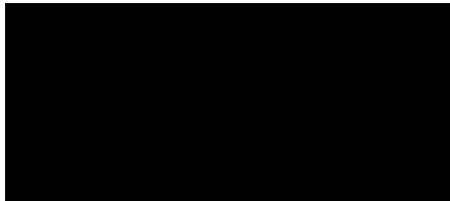
FILE: WAC 04 214 52845 Office: CALIFORNIA SERVICE CENTER Date: NOV 16 2005

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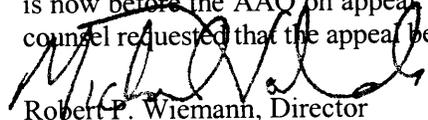
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INSTRUCTIONS:

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DISCUSSION: The Director, California Service Center, on June 24, 2005, denied the visa petition. The matter is now before the AAO on appeal. On October 21, 2005, before any decision on appeal, the petitioner through counsel requested that the appeal be withdrawn. The withdrawal may not be retracted. 8 C.F.R. § 103.2(b)(6).

  
Robert P. Wiemann, Director  
Administrative Appeals Office