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**U.S. Citizenship
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Services**

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: APR 04 2006
SRC 03 222 51166

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Armenian fast food restaurant. It seeks to employ the beneficiary permanently in the United States as a chef, Middle Eastern and Iranian food. 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 as of the priority date and denied the petition accordingly.

On appeal, counsel states that the petitioner does have the ability to pay the proffered wage as of the priority date and to the present. Counsel submits additional documentation.

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, 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is an annual salary of \$33,909. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1985, to have three employees, and a gross annual income of \$111,257. In support of the petition, the petitioner submitted a cover letter that stated the petitioner operated a chain of ten fast food restaurants that specialize in Middle Eastern food. The letter also listed the beneficiary's job duties. The petitioner also submitted a letter of employment verification from the [REDACTED] Iranian restaurant, Doha, Qatar, that stated the beneficiary worked as chief cook from 1997 to 2000. The petitioner also submitted an unaudited statement of financial position for the years ending in December 31, 2001 and 2002.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 6, 2004, the director requested

additional evidence pertinent to that ability. The director stated that the petitioner's unaudited financial report was not sufficient to establish the petitioner's ability to pay the proffered wage. The director specifically 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 as of April 30, 2001, the date of filing the instant petition, and continuing to the present. The director also requested that if the petitioner paid the beneficiary a wage or salary during 2001 to 2003, the petitioner should submit copies of the petitioner's W-2 Forms or copies of payroll records. The director also stated that letters from previous employers must include the name of the person writing the letter, and that the letter from [REDACTED] restaurant, in Qatar lacked a legible name of the author. Finally the director noted that the beneficiary was subject to a regulation published in the Federal Register, dated November 6, 2002 that requires nonimmigrant males born on or before November 15, 1986 who are nationals or citizens of Iran, Iraq, Libya, Sudan or Syria to register in the National Security Entry-Exit Registration System (NSEERS) by December 16, 2002 or at the time of entry thereafter.

In response, counsel submitted the first page of the petitioner's IRS Form 1120S, for the years 2001, 2002, and 2003. These documents indicated that the petitioner has ordinary income of -\$80,834 in 2001, -\$17,639 in 2002 and \$14,257 in 2003. Counsel also submitted an undated document entitled "Independent Auditor's Report." The document is written by [REDACTED] Certified Public Accountant, and is addressed to the board of directors, [REDACTED]. The letter writer states: "We have audited the balance sheet of [REDACTED] as of December 31, 2002 and 2001 and the related statements of income, retained earnings, and cash flows for the year then ended." The letter writer then explained how the audit was conducted. The financial statement attached to this letter is the same document submitted with the initial petition.

Counsel then submitted the first pages of bank statements dated August 2004 for businesses identified as La [REDACTED], Habib, Inc., [REDACTED] and [REDACTED] or [REDACTED]. Counsel also submitted a letter from [REDACTED] (Mr. [REDACTED] - President [REDACTED] Corporation, Atlanta, Georgia. Mr. [REDACTED] stated that the company [REDACTED] or [REDACTED] issued the beneficiary's W-2 Forms, Mr. [REDACTED] stated that this company was a corporation affiliated with [REDACTED] Corporation. Mr. [REDACTED] also stated he owned 100 percent of the stock of [REDACTED].

Counsel also submitted copies of the beneficiary's 2001, 2002 and 2003 W-2 Forms, issued by [REDACTED], Atlanta, Georgia. These documents indicated that the beneficiary earned \$10,350 in 2001, \$32,070 in 2002, and \$29,290 in 2003. Counsel stated that the W-2 Form for 2001 did not reflect a full year of employment, and that Mr. [REDACTED], through [REDACTED], paid the beneficiary a salary just below the proffered of \$33,909. Counsel then stated that the audited financial statements submitted to the record in response to the director's request for evidence indicate that the petitioner had assets of \$348,312 in 2002 and assets of \$408,276 in 2001. Counsel also submitted a new letter of employment verification from [REDACTED] Iranian restaurant that identifies [REDACTED] as General Manager. With regard to the NSEERS registration, counsel stated that he represented the beneficiary during his NSEERS interview on February 7, 2003. Counsel stated that the beneficiary was placed into proceedings after his NSEERS interview and that his passport was confiscated, which counsel stated contained the Fingerprint Identification

[REDACTED]

Number (FIN). Counsel states that the petitioner is unable to comply with the director's request for evidence of the beneficiary's NSEERS status.

On November 30, 2004, the director denied the petition. In his denial of the petition, the director examined the gross receipts and net income identified on the petitioner's federal income tax returns, and stated that none of the net income figures was sufficient to pay the proffered wage. The director noted that the petitioner had not provided any of the tax returns' accompanying schedules and attachments. The director also noted that the petitioner had submitted an audited financial statement for the years ending December 31, 2001 and 2002 and examined the financial statement. For tax year 2001, the director stated that the petitioner had total current assets in the amount of \$55,121 and total current liabilities of \$15,540. By subtracting the petitioner's total current liabilities from its total current assets identified on the petitioner's financial statement, the director stated that \$39,581 was sufficient to pay the proffered wage in 2001. With regard to tax year 2002, the director stated that subtracting the petitioner's total current liabilities identified on the financial statement from its total current assets yielded \$11,276. The director stated that this was not sufficient to pay the proffered wage in 2002. With regard to the petitioner's ability to pay the proffered wage in 2003, the director stated that the petitioner's corporate federal income tax indicated reflected a net income below the proffered wage, and the petitioner had not established its ability to pay the proffered wage in 2003.

With regard to the W-2 Forms submitted by counsel to the record, the director stated that the relationship between the beneficiary's employer, [REDACTED] and the petitioner was ambiguous. The director stated that without supporting evidence, Citizenship and Immigration Services (CIS) could not assume that Mr. [REDACTED] wholly owned both the petitioner and [REDACTED]. The director stated that counsel's statements with regard to the relationship between the petitioner and [REDACTED] did not constitute evidence. The director then determined that the documentation of the beneficiary's wages in 2001 to 2003 could not be considered in determining the petitioner's ability to pay the proffered wage.

On appeal, counsel notes that the director in his decision concluded that the petitioner had the ability to pay the proffered wage in 2001. Counsel states that the petitioner actually employed and compensated the beneficiary at another corporation wholly owned and operated by the petitioner. With regard to the relationship between [REDACTED], and [REDACTED], counsel submits the following documents:

A copy of the Articles of Incorporation of [REDACTED] that indicates [REDACTED] the incorporator;

A copy of the Articles of Incorporation of [REDACTED] that indicates [REDACTED] is the incorporator;

A copy of the webpage of the state of Georgia Secretary of State Corporations Division that shows [REDACTED] is the Chief Economic Officer and Chief Financial Officer of [REDACTED]; and

A copy of the webpage of the state of Florida Department of State, Division of Corporation that indicates [REDACTED] is the principal officer/ director of [REDACTED]

Counsel then adds the wages that the petitioner's affiliated company paid to the beneficiary with the petitioner's net income and/or net assets for the years 2002 and 2003 to examine the petitioner's ability to pay the proffered wage. For the year 2002, counsel combines the petitioner's negative net income of \$17,639 with net assets in the amount of \$35,337. Counsel asserts that combining the petitioner's 2002 net income with the petitioner's net assets equals \$17,698, which is available to pay the proffered wage. Counsel then states that the beneficiary's actual wages of \$32,070, paid by the petitioner's affiliated corporation, combined with the petitioner's \$17,698 equals \$49,768 which is greater than the proffered wage of \$33,909.

Counsel then examines the petitioner's net income in 2003. Counsel asserts that the petitioner's 2003 net income of \$14,257, combined with the beneficiary's actual wages of \$29,290, equals \$43,547, which is greater than the proffered wage of \$33,909. Counsel asserts that the petitioner has established its ability to pay the proffered wage in tax year 2002 and 2003.

On appeal, counsel asserts that the beneficiary's wages paid by a company owned by the petitioner's owner can be utilized to establish the petitioner's ability to pay the proffered wage. 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. Thus, the wages paid to the beneficiary by a company owned by the petitioner's owner cannot be considered in examining the petitioner's ability to pay the proffered wage.

In addition, on appeal, counsel in his analysis of the petitioner's ability to pay the proffered wage, combines net income and net assets, as identified on the audited financial statement submitted by the petitioner. Net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is, for example; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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.

Although the petitioner submitted W-2 salary statements for the beneficiary for the years 2001, 2002, and 2003, as stated previously, the beneficiary was paid by a company incorporated by the petitioner's owner, and thus not by the petitioner, per se. Thus, the petitioner has not provided any documentation as to wages paid to the beneficiary by the petitioner. Thus, the petitioner has to establish that it paid the beneficiary a salary equal to or greater than the proffered wage of \$33,909. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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). 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 argument that the Service should have considered income before expenses were paid rather than net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001, 2002, and 2003 shows the following amount of ordinary income: -\$80,834, -\$17,639, and \$14,257. These figures fail to establish the ability of the petitioner to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its 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

¹ 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.

greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

As stated previously, the petitioner did not submit its Schedules L for its income tax returns. Therefore the AAO cannot determine the petitioner's net current assets, by examining the petitioner's federal tax returns. With regard to the audited financial statement submitted by the petitioner in response to the director's request for further evidence, this document indicates that the petitioner's total current assets for 2001 were \$55,121 and its total current liabilities are \$15,540, which indicates net current assets of \$39,581. This figure indicates that the petitioner had sufficient net current assets to pay the proffered wage of \$33,909 in 2001. Thus, the petitioner has established the ability to pay the proffered wage as of the 2001 priority date.

With regard to tax year 2002, the petitioner's audited financial statement indicates total current assets of \$35,237 and total current liabilities of \$23,961. The petitioner's net current assets for 2002, thus, would total \$11,276. This figure is not sufficient to pay the proffered wage of \$33,909. Furthermore, on appeal, the petitioner submits its 2002 IRS Form 1120S with the accompanying Schedule L. Schedule L indicates that the petitioner's current assets are \$35,337, while the petitioner's current liabilities are zero. The petitioner's net current assets, based on its 2002 federal income tax return, are \$35,337. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." In the instant petition, the record reflects two disparate figures, \$11,276 and \$35,337, as the petitioner's net current assets for tax year 2002. The petitioner provides no clarification or explanation for these conflicting figures. Thus, the petitioner also did not establish its ability to pay the proffered wage in tax year 2002.

With regard to tax year 2003, as previously stated, the petitioner did not submit its complete federal income tax return with accompanying schedules and attachments. The petitioner only submitted the first page of its 2003 federal tax return. It is noted that the second page of the petitioner's financial statement, which is dated September 3, 2004, examines the petitioner's 2003 compensation of officers and ordinary income to arrive at the petitioner's net income from operations. The petitioner's compensation of officers is identified as \$38,950, while the petitioner's ordinary income is identified as \$14,257.² The resulting ordinary income figure is \$55,210. However, the AAO will not normally include officers' compensation into the calculation of the petitioner's ability to pay the proffered wage when the record does not show the officers' willingness and ability to forego these funds. In addition, as previously stated, the 2003 W-2 Form provided by the petitioner to document the beneficiary's wages from another corporation is not dispositive in these proceedings. Therefore, the petitioner has not established its ability to pay the proffered wage in tax year 2003.

As noted previously, the assets of the petitioner's owner are not viewed as corporate assets. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has, therefore, shown the ability to pay the proffered wage during the salient portion of 2001. However, the petitioner has not established that it has the continuing ability to pay the proffered wage in tax year 2002 or

² This figure is the same ordinary income figure noted on the first page of the petitioner's 2003 IRS Form 1120S submitted to the record.

2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date to the present.

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.