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FILE: [REDACTED]
EAC-04-079-51861

Office: VERMONT SERVICE CENTER

Date: **AUG 15 2006**

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, Chief
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 foreign food specialty 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.

On appeal, counsel submits a brief and additional evidence.¹

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:

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 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 October 6, 2003. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour or \$24,960 per year. On the Form ETA 750B, signed by the beneficiary on September 15, 2003, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in May 2003, to have gross income of \$134,150.59 and net income of \$20,451.86 for 5 months period, and to currently employ 3 workers.

¹ 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In support of the petition, the petitioner submitted an unaudited Profit and Loss Statement for June to November 2003, Balance Sheet as of November 30, 2003 and List of the Capital Assets as of November 30, 2003 pertinent to the ability to pay the proffered wage. 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 August 10, 2004, the director requested additional evidence (RFE) pertinent to that ability. 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 and continuing to the present. The director specifically requested the petitioner's 2003 tax return with all schedules and attachments or as an alternative annual reports for 2003 which are accompanied by audited or reviewed financial statements, and the beneficiary's Form W-2 Wage and Tax Statement(s) from the petitioner. In response, counsel submitted a copy of a 2003 U.S. Individual Tax Return filed by the owner of the petitioner with a Schedule C, Profit or Loss from Business statement for Kobe Japanese Steakhouse, bank statements for the petitioner's business accounts in the name of Matsusaka LLC dba Kobe Japanese Steakhouse, an unaudited Profit & Loss Statement/Balance Sheet (January – August 2004) for Kobe Japanese Steakhouse, gross receipt and meal tax reports and fixed assets investments for Kobe Japanese Steakhouse, the owner's personal account balance verification, evidence of the owner's ownership in real property and the beneficiary's paystubs from the petitioner.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage at the time of filing, and on November 30, 2004 the director denied the petition accordingly.

On appeal, counsel asserts that the evidence submitted for the income and assets of the petitioner's owner established the petitioner had the ability to pay the proffered wage as of the priority date.

The petitioner lists its name on the petition and certified Form ETA 750A as Matsusaka LLC dba Kobe Japanese Steakhouse. According to the state of New Hampshire's Business Division's public access website on corporate filings, the petitioner, Matsusaka, LLC, is a limited liability company that filed an annual report in 2004 after its creation in January 2003. See <https://www.sos.nh.gov/corporate/soskb/filings.asp?364682> (accessed August 2, 2006). At the same website, Kobe Japanese Steakhouse is listed as a Trade Name. Thus, Kobe Japanese Steakhouse is the trade name of Matsusaka, LLC and does business as Matsusaka, LLC. Therefore, the petitioner is structured as a limited liability company and will be analyzed as such for ability to pay purposes.

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. In the instant case, counsel claimed that the beneficiary did not start working for the petitioner until June 2004 and submitted the beneficiary's paystubs from the petitioner in 2004. The paystubs show that the petitioner paid the beneficiary \$1,920.00 each month in June, July and August 2004. However, paying in 2004 cannot establish the petitioner's ability to pay the proffered wage in 2003. Further, compensation at the level of \$1,920 per month still cannot meet the proffered wage of \$24,960 per year or \$2,080 per month. Therefore, the petitioner did not establish that it employed and paid the full proffered wage in 2003, the year of priority date.

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 argument that the Service should have considered income before expenses were paid rather than net income. On appeal counsel argues that depreciation of \$16,227 in 2003 should be added back to net income and considered in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on depreciation to establish the petitioner's ability to pay the proffered wage is misplaced. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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.

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.² A LLC's year-end current assets are shown on Schedule L, lines 1 through 6. Its

² 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

year-end current liabilities are shown on lines 15 through 17 of Form 1065. If a LLC'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 out of those net current assets.

The petitioner is a LLC. Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.³ An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds. On appeal, counsel asserts that: "[s]ince the petitioning employer is a LLC, and that [REDACTED] is the sole proprietor, [REDACTED] has provided his personal assets information in order to further warrant his ability to pay the alien/beneficiary wage offered." Counsel's assertion is misplaced. [REDACTED] can be the only LLC member of the petitioner if it is a LLC. The petitioner is not a sole proprietorship. Therefore [REDACTED] personal assets cannot be used to establish the petitioner's ability to pay the proffered wage.

Counsel did not submit the petitioner's tax return for 2003 despite the director's specific request in her RFE. However, the record contains copies of unaudited Profit and Loss, Balance Sheet, and List of the Capital Assets. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel submitted bank statements for the petitioner's business checking accounts and asserted that the balances in the accounts could establish the petitioner's ability to pay the beneficiary the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts 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 Schedule L that would be considered in determining the petitioner's net current assets.

On appeal counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date, i.e. October 6, 2003. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income

expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

³ 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.

towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Finally, counsel claimed that the owner of the petitioner is the sole proprietor, therefore, his personal income and assets can be used to establish the petitioner's ability to pay the proffered wage. Counsel submitted the owner's Form 1040, U.S. Individual Income Tax Return for 2003, personal bank statements and documents of ownership in real property. 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 refers to decisions issued by the AAO, but does not provide published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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 as of 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.