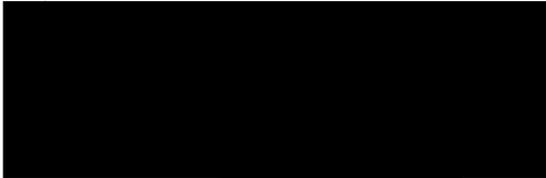


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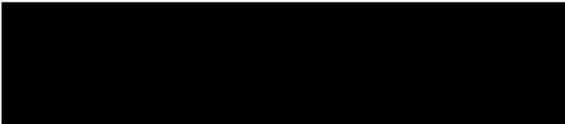
EAC-03-170-50401

Office: VERMONT SERVICE CENTER

Date: **JAN 10 2006**

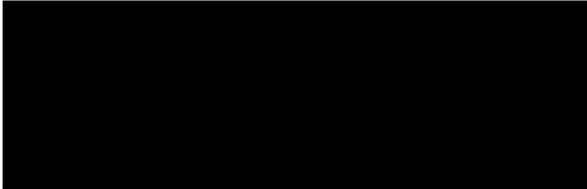
IN RE:

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gas station, service station, and convenience store. It seeks to employ the beneficiary permanently in the United States as an assistant manager. 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.

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 or seasonal 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 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 April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$35,000 per year. On the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on January 21, 2003.

The I-140 petition was submitted on May 4, 2003. On the petition, the petitioner claimed to have been established in 1988, to currently have twelve employees, to have a gross annual income of \$4,272,242.00, and to have a net annual income of \$14,088.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 13, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on July 9, 2004.

In a decision dated August 25, 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 no additional evidence. Counsel also submits additional copies of tax returns of the petitioner which had been submitted previously for the record. Counsel states on appeal that the petitioner's expenses for depreciation are non-cash expenses which represent additional financial resources of the petitioner. Counsel also states that the petitioner's net current assets should be calculated by subtracting from its total assets the petitioner's current liabilities. Counsel states that the evidence therefore establishes the petitioner's ability to pay the proffered wage during the relevant period.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted for the record prior to the decision of the director.

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 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary did not claim to have worked for the petitioner. However, the record contains an affidavit of the beneficiary dated July 6, 2004 in which the beneficiary states that he was employed intermittently as a substitute assistant manager by the petitioner on holidays and long weekends from 1994 to 2001 for a total of about 36 months. The beneficiary states that he was paid a salary of \$300 to \$400 per week for three to four days of work, and that he was paid strictly in cash. The beneficiary states that he was not issued a Form W-2 or a Form 1099 by the petitioner's management and that no formal records of his employment with the petitioner exist.

The beneficiary's affidavit gives no further pertinent details. The affidavit does not state the total amount of the beneficiary's claimed compensation in any of the relevant years. Nor does the record contain any documents corroborating the beneficiary's claim of employment with the petitioner or the amounts of his claimed payments from the petitioner.

The information in the beneficiary's affidavit is inconsistent with the information in the Form ETA 750, Part B, signed by the beneficiary, in which the beneficiary made no claim of having worked for the petitioner.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "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.” The record contains no explanation for the inconsistencies in the evidence noted above.

For the foregoing reasons, the beneficiary’s affidavit cannot be considered as reliable evidence of the beneficiary’s employment by the petitioner or of any payments made by the petitioner to the beneficiary.

As another means of determining the petitioner’s ability to pay the proffered wage, 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 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 an S corporation. The record contains copies of the petitioner’s Form 1120S U.S. Income Tax Returns for an S Corporation for 2001 and 2002. The record before the director closed on July 9, 2004 with the receipt by the director of the petitioner’s submissions in response to the RFE. As of that date the petitioner’s federal tax return for 2003 should have been available. However no copy of the petitioner’s federal tax return for 2003 was submitted for the record.

Where an S corporation’s income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, “Caution: Include only trade or business income and expenses on lines 1a through 21.” Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

Similarly, some deductions appear only on the Schedule K. For, example, the cost of business property elected to be treated an expense deduction under Section 179 of the Internal Revenue Code, rather than as a depreciation deduction, is carried over from line 12 of the Form 4562 to line 8 of the Schedule K. See Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>; Internal Revenue Service, Instructions for Form 1120S (2003), at 22, available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>.

In the instant petition, the petitioner’s tax returns indicate certain charitable deductions which appear only on the Schedule K’s attached to the petitioner’s tax returns for 2001 and 2002. Net income for the petitioner is therefore found on Line 23 of each Schedule K, for income.

The petitioner’s tax returns show the amounts for income on line 23, Schedule K, as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$13,588.00	\$35,000.00*	\$21,412.00
2002	\$32,355.00	\$35,000.00*	\$2,645.00
2003	not submitted	\$35,000.00*	no information

\* The full proffered wage, since the record contains insufficient evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

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 expected to be converted 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.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	-\$28,090.00	-\$21,834.00	\$35,000.00*
2002	-\$21,834.00	-\$37,468.00	\$35,000.00*
2003	not submitted	not submitted	\$35,000.00*

\* The full proffered wage, since the record contains insufficient evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

In his brief, counsel states that the petitioner's net current assets should be calculated by subtracting the petitioner's current liabilities from its total assets. Counsel's statements on this point fail to distinguish between current assets and total assets. Total assets include assets such as property, buildings, equipment, etc. that the petitioner is not expected to be able to turn into cash during the normal course of business. As noted above, a corporation's current assets are shown lines 1 through 6 of the Schedule L. The calculations presented by counsel in his brief do not accurately state the petitioner's net current assets for the years at issue. Therefore counsel's statements on this point are not persuasive.

The petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001 and 2002 show that a single individual is the owner of all of the shares of the petitioner. That individual signed the Form ETA 750 application for labor certification on behalf of the petitioner as its president.

In his brief, counsel asserts that since the petitioner is an S corporation, the income of which is generally passed through to the shareholder for income tax purposes, it is relevant to consider the personal financial resources of the petitioner's owner when evaluating the petitioner's ability to pay the proffered wage.

The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and his wife for 2001 and 2002, and certain schedules from their federal tax return for 2003. The Form 1040's show adjusted gross income of \$382,286.00 for 2001 and \$282,268.00 for 2002. The Form 1040 returns show the income from the petitioner to be a small portion of the total income of the owner and his wife in 2001 and in 2002. The schedules for 2003 submitted in evidence suggest a similar pattern of income for 2003, though a Form 1040 for that year was not submitted in evidence.

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); *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.

Nonetheless, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Income Tax Return for an S Corporation.

In the instant petition, the Form 1120S U.S. Income Tax Returns for an S Corporation of the petitioner show the amounts for officer compensation of \$14,000.00 in 2001 and of \$26,000.00 in 2002. Presumably those payments were made to the individual who is the petitioner's sole shareholder and president. Since that person owns 100% of the shares of the petitioner, the amounts paid to him in officer compensation may be considered as additional financial resources of the petitioner. The results of adding the amounts officer compensation to the petitioner's net income are shown in the table below.

Tax year	Compensation of officers	Net income	Available income	Proffered wage	Surplus or deficit
2001	\$14,000.00	\$13,588.00	\$27,588.00	\$35,000.00*	-\$7,412.00
2002	\$26,000.00	\$32,355.00	\$58,355.00	\$35,000.00*	\$23,355.00
2003	not submitted	not submitted	no information	\$35,000.00*	no information

\* The full proffered wage, since the record contains insufficient evidence of any wage payments made by the petitioner to the beneficiary.

For 2001, adding compensation of officers to the petitioner's net income is insufficient to establish the petitioner's ability to pay the proffered wage in that year. For 2002, adding compensation of officers to the petitioner's net income would produce a figure higher than the proffered wage. As noted above, no tax return of the petitioner

was submitted for the year 2003. The foregoing information fails to establish the petitioner's ability to pay the proffered wage in the year 2001 or in the year 2003.

The record also contains copies of bank statements for a business checking account of the petitioner for the months of January 2001 through December 2001. 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.

On the petitioner's bank statements the ending balances are as follows:

2001:	Ending balances		Ending balances
January	\$13,431.50	July	\$48,222.77
February	\$14,710.34	August	\$14,252.56
March	\$12,599.60	September	\$24,629.25
April	\$2.72	October	\$17,924.65
May	\$196.29	November	\$50,262.05
June	\$93,884.13	December	\$37,801.35

In the instant case, the ending balances do not show monthly increases by amounts which 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 or 2003 were submitted. The record contains no explanation for the absence of any bank statements for those years. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2002 and 2003.

In his brief counsel asserts that the petitioner's depreciation deductions are non-cash expenses which should be considered as additional financial resources of the petitioner. While it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.

Aside from depreciation deductions, some taxpayers may claim deductions on their tax returns for other non-cash items such as amortization of the cost of business start-up expenses, amortization of the cost of good will, and depletion of oil, gas and timber reserves. Such deductions raise similar issues to those discussed above concerning depreciation deductions. See *Id.*, at 2; *Instructions for Form 1120 and 1120A* (2004), at 14-15; *Business Expenses*, IRS Pub. 535 (2004), at 30-42, available at <http://www.irs.gov/pub/irs-pdf/p535.pdf>.

For the foregoing reasons, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the

petitioner's net income. *See Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements.

The record contains no other evidence relevant to the financial situation of the petitioner. For the reasons discussed above, the evidence of the totality of the petitioner's financial circumstances is insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date 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.