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**U.S. Citizenship  
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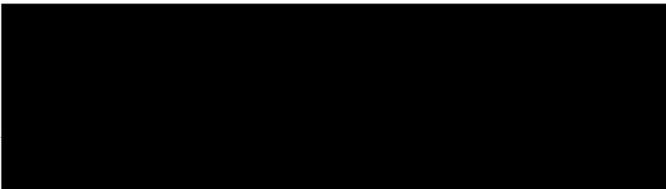
FILE: EAC-04-263-50219 Office: VERMONT SERVICE CENTER Date: **JUL 25 2006**

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, Chief  
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 bakery. It seeks to employ the beneficiary permanently in the United States as a bakery supervisor. 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 record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 15, 2004 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour, which amounts to \$31,200.00 annually.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and additional evidence.

Relevant evidence submitted on appeal includes an affidavit from the petitioner's two shareholders, a letter from a certified public accountant, unaudited financial statements pertaining to the petitioner's two shareholders, an appraisal report for the business premises of the petitioner, copies of two payroll statements of the petitioner, copies of newspaper articles about the petitioner, and photographs of the petitioner's place of business. Other relevant evidence in the record includes copies of the petitioner's Form 1120 federal corporate income tax returns for its 2001 and 2002 tax years.

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).

On appeal, counsel states that the petitioner's shares are owned by two individuals, Emanuel and Angelina Melo, who are husband and wife. Counsel states that in 2001 the shareholders purchased the business premises of the petitioner, which the petitioner had previously been leasing. Counsel states that the shareholders have a net worth of \$445,000.00, including the value of the petitioner's business premises. Counsel also states that the petitioner intends to hire the beneficiary to perform duties previously performed by two former employees of the petitioner, duties which have been performed by Mr. Melo, pending the hiring of the beneficiary. Counsel also states that the evidence establishes the petitioner's ability to pay the proffered wage under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 27, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

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 a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002. The petitioner's Form 1120 for 2001 covers the period from August 1, 2001 until July 31, 2002 and the petitioner's Form 1120 for 2002 covers the period from August 1, 2002 until July 31, 2003. As noted above, the priority date is April 30, 2001. Therefore, the tax returns in the record do not include a return for the petitioner's tax year which includes the April 30, 2001 priority date.

The I-140 petition was submitted on September 22, 2004. The petitioner's federal tax return for its 2003 tax year presumably covered the period from August 1, 2003 to July 31, 2004. If so, the petitioner's Form 1120 for its 2003 tax would not have yet been due as of September 22, 2004.

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

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2000	not submitted	\$31,200.00*	no information
2001	\$31.00	\$31,200.00*	\$(31,169.00)
2002	\$(2,044.00)	\$31,200.00*	\$(33,244.00)

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information fails 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 year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2000	not submitted	\$31,200.00*	no information
2001	\$(557.00)	\$31,200.00*	\$(31,757.00)
2002	\$1,035.00	\$31,200.00*	\$(30,165.00)

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

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

The record contains an affidavit dated December 14, 2004 jointly signed by [REDACTED] and [REDACTED]. In their affidavit, [REDACTED] state that they purchased the business in 1994 and that they subsequently purchased the building where the bakery is located, which includes three residential units, in June of 2001. They state that the bakery is located in a predominantly Portuguese-American community and that the bakery specializes in pastries, breads and other products which are part of the Portuguese culture. They state that when they purchased the bakery its gross revenues were approximately \$90,000.00 per year and that gross receipts in recent years have been approximately \$300,000.00 per year. [REDACTED] also state that they learned about the beneficiary in 2001 and that after discussing with him his bakery experience in Brazil, they decided that he would be a valuable addition to their business. They state that [REDACTED] has been serving as bakery supervisor and that hiring the beneficiary would allow [REDACTED] to devote more time to marketing the bakery's products. In addition, they state that two experienced employees of the petitioner left the employ of the petitioner in 2004 and that the petitioner has not replaced them, in anticipation of being able to hire the beneficiary. They state that in the interim, [REDACTED] has been working in excess of 70 hours per week. [REDACTED] state that one payroll statement in the record for the week of October 18, 2003 shows the petitioner's payroll before the departures of those employees, and that a second payroll statement in the record for the week of October 30, 2004 shows the petitioner's payroll after the departures of those two employees. Finally, [REDACTED] state that they also had sufficient personal assets to easily obtain a line of credit or other short term financing which might have been necessary to bring the beneficiary into the business as an employee during previous years.

The record contains a copy of a payroll statement of the petitioner for the pay period ending October 18, 2003, which shows gross payroll for the period of \$2,193.07 paid to the petitioner's two shareholders and to four other employees, of which \$340.00 was paid to one of the employees who later left the petitioner, and of which \$400.00 was paid to the other employee. The record contains a copy of a second payroll statement of the petitioner for the pay period ending October 30, 2004 which shows gross payroll for the period of \$1,350.00 to the petitioner's two shareholders and one other employee, who is not one of the employees who left the petitioner's employ in 2004. The payroll statements do not explicitly state the length of each pay period, but a comparison of figures on each payroll statement with figures on the petitioner's tax returns suggests that each pay period was two weeks long. The difference between the two payroll statements is \$2,193.07 minus \$1,350.00, which equals \$1,563.07 biweekly, or \$40,639.07 on an annual basis.

The record contains an appraisal report for the building housing the petitioner's business, which shows the estimated value of the property as of December 12, 2004 to be \$409,000.00. The appraisal report includes color photographs of the premises, which is a three story wood frame building with a concrete one-story addition on the rear, with the petitioning business occupying the ground floor. The appraisal report states that

the second floor consists of a three-bedroom apartment occupied by the owners and that the third floor consists of two one-bedroom rental apartments.

The record contains a copy of a quitclaim deed for the premises showing that [REDACTED] obtained the property on June 9, 2001 for a price of \$180,000.00.

The record contains copies of newspaper articles on the petitioning business dated in 1975, 1982 and 1994.

The record also contains a letter dated December 14, 2004 from a certified public accountant which summarizes the petitioner's total revenue from 1995 through 2004. The accountant states that total revenues for the fiscal years ending on July 31 of each year were as follows:

1995	\$98,762.00	2000	\$279,696.00
1996	\$157,791.00	2001	\$296,102.00
1997	\$178,012.00	2002	\$302,683.00
1998	\$201,590.00	2003	\$303,802.00
1999	\$244,289.00	2004	\$282,147.00

Attached to the accountant's letter is an unaudited personal financial statement of [REDACTED] dated November 30, 2004. The statement shows total assets of \$587,000.00, total liabilities of \$142,000.00, and net worth of \$445,000.00.

On appeal, counsel states that the evidence establishes the petitioner's ability to pay the proffered wage under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 basic rule of law concerning corporations 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 shareholders of a corporation have 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 1120 U.S. Corporation Income Tax Return.

In the instant case, the petitioner's tax returns show expenses for compensation of officers of \$50,000.00 in the 2001 tax year and \$44,800.00 in the 2002 tax year. Presumably those amounts were paid to the petitioner's two shareholders. The petitioner's total receipts in each of those years was not greater than \$500,000.00, therefore, pursuant to the instructions on the Schedule E's attached to those returns, no itemization was made by the petitioner of its expenses for compensation of officers.

The amounts of \$50,000.00 in the 2001 tax year and \$44,800.00 in the 2002 tax year would have been more than sufficient to pay the entire proffered wage in those tax years. Nonetheless, as noted above, the record lacks a copy of the petitioner's federal tax return for its tax year which includes the April 30, 2001 priority date. Moreover, the record does not demonstrate that the petitioner's two owners could have foregone those amounts.

In his December 14, 2004 letter, the petitioner's accountant states that the petitioner's total revenues for the fiscal year ended July 31, 2001 were \$296,102.00. However, the accountant provides no information on the petitioner's expenses during that year. Therefore the evidence does not establish that the petitioner had discretionary funds available during that tax year to pay the proffered wage as of the priority date.

The evidence submitted on appeal shows that two employees of the petitioner left the petitioners' employ during 2004. Counsel asserts that funds previously paid to those two employees were then available to pay the proffered wage to the beneficiary. But the evidence does not establish that as of the April 30, 2001 priority date, the petitioner had sufficient financial resources to pay an additional \$31,200.00 to the beneficiary, which is the amount of the proffered wage.

The record contains some evidence about the financial resources of the petitioner's shareholders, Mr. and Mrs. [REDACTED]. But resources held in the names of the petitioner's shareholders are distinct from financial resources held in the name of the petitioner. CIS may not "pierce the corporate veil" and look to the assets of a corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is a basic rule of law concerning corporations that a corporation is a separate and distinct legal entity from its officers 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 officers, its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

For the foregoing reasons, the evidence fails to establish the petitioner's ability to pay the proffered wage under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Based on the foregoing analysis, the evidence in the record fails 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.

In her decision, the director correctly stated the petitioner's net income in its 2001 and 2002 tax years and correctly calculated the petitioner's year-end net current assets for each of those years. The director failed to note that the petitioner's tax years do not correspond to calendar years. The director therefore failed to observe that the petitioner's tax return for its 2001 tax year does not include the April 30, 2001 priority date. Although the analysis of the director was incomplete, the decision of the director to deny the petition was correct, based on the evidence in the record before the director.

The record before the director did not contain evidence pertaining to the personal financial resources of the petitioner's shareholders, which was submitted for the first time on appeal. Nonetheless, for the reasons discussed above, the assertions of counsel on appeal and the evidence submitted for the first time on appeal fail to overcome the decision of the director.

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.