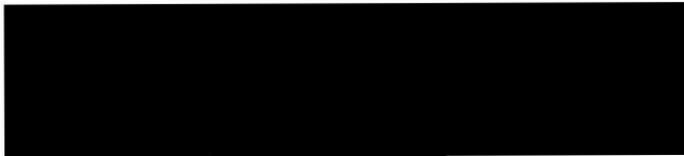




U.S. Citizenship
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Office: VERMONT SERVICE CENTER

Date: MAY 02 2006

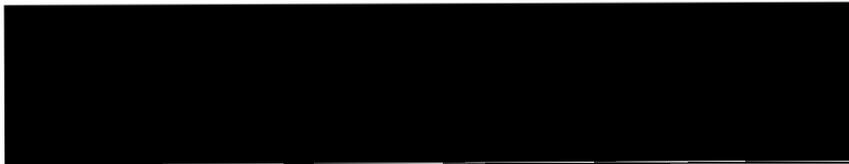
IN RE:

Petitioner:

Beneficiary:

PETITION: Petition for Alien Worker as an Other Worker 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 motel. It seeks to employ the beneficiary permanently in the United States as a bilingual secretary. 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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 February 22, 2001. The proffered wage as stated on the Form ETA 750 is \$16.14 per hour, which amounts to \$33,571.20 annually. On the Form ETA 750B, signed by the beneficiary on January 27, 2001, the beneficiary claimed to have worked for the petitioner beginning in July 1999 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on June 27, 2003.

The I-140 petition was submitted on December 23, 2003. On the petition, the petitioner claimed to have been established on September 18, 1985 and to currently have one employee. In the items for the petitioner's gross annual income and net annual income the petitioner wrote "GIF - [REDACTED]" (I-140 petition, Part 5). With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated February 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 May 7, 2004.

In a decision dated August 11, 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 Schedule L balance sheets of the petitioner's corporate income tax returns in the record show that the petitioner has had sufficient resources available to pay the proffered wage during the relevant period.

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 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 January 27, 2001, the beneficiary claimed to have worked for the petitioner beginning in July 1999 and continuing through the date of the ETA 750B. In the RFE, the director stated, "If the beneficiary was employed by you in 2001 – 2003, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business." (RFE, February 13, 2004). Nonetheless, no copies of any Form W-2's of the beneficiary were submitted in evidence, nor does the record contain any other evidence corroborating the beneficiary's claim of employment with the petitioner or indicating the amount of any compensation received by the beneficiary from 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 (9th 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 (7th 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 2000, 2001, 2002 and 2003. The record before the director closed on May 7, 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 was the most recent return available.

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. *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>.

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Line 23 of the Schedule K, for income.

In the instant petition, the petitioner’s tax returns indicate no income from activities other than from a trade or business and no additional relevant deductions. Therefore the figures for ordinary income on line 21 of page one of the petitioner’s Form 1120S tax returns will be considered as the petitioner’s net income. The petitioner’s tax returns state amounts for ordinary income on line 21 as shown in the table below.

Tax year	Ordinary income	Wage increase needed to pay the proffered wage	Surplus or deficit
2000	-\$3,789.00	not applicable	not applicable
2001	-\$13,607.00	\$33,571.20*	-\$47,178.20
2002	-\$4,848.00	\$33,571.20*	-\$38,419.20
2003	-\$348.00	\$33,571.20*	-\$33,919.20

* The full proffered wage, since the record contains no 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	
2000	-\$4,907.00	-\$4,916.00	not applicable
2001	-\$4,916.00	-\$4,755.00	\$33,571.20*
2002	-\$4,755.00	-\$1,750.00	\$33,571.20*
2003	-\$1,750.00	-\$1,903.00	\$33,571.20*

* The full proffered wage, since the record contains no 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.

Counsel states in his brief that the Schedule L balance sheets of the petitioner's corporate income tax returns in the record show that the petitioner has had sufficient resources available to pay the proffered wage during the relevant period. Counsel states that sufficient funds have been available to the petitioner in the form of loans from shareholders. The record contains a letter dated October 12, 2004 from a certified public accountant. In the letter, the accountant states that he has been the petitioner's accountant since 1993 and that in that capacity he is responsible for preparing quarterly and annual reports for the petitioner. The accountant states, "I hereby certify that despite the fact that the company in 2000, 2001, 2002 and 2003 did not enjoy significant profit, the company still had between \$138,379.00 to \$162,655.00 made available to it in the form of loans from shareholders" The accountant also states : "Loans from the shareholder were loaned to the company as a long-term loan. Meanwhile 2000, 2001, 2002 and 2003 has had sufficient income and sufficient assets available to it, to have and to remain financially capable of paying the salary of \$16.14 per hour." (Letter from CPA, October 12, 2004 (grammatical errors in the original)).

Opinion letters from certified public accountants are not among the types of evidence listed in the regulation at 8 C.F.R. § 204.5(g)(2). Moreover, the shareholder loans referred to by counsel and by the accountant are not assets of the petitioner, but rather are liabilities. To the extent that any proceeds from such loans were held in the form of cash or other current assets, such proceeds are fully considered above in the analysis of the petitioner's net current assets for each of the years at issue in the instant petition.

The record also contains copies of Form 1040 U.S. Individual Income Tax Returns for 2001, 2002 and 2003 of the two persons who each own 50% of the shares of the petitioners. The Form 1040's are joint returns, and they show that the two shareholders are a married couple. The record also contains a copy of a savings account quarterly statement dated February 1, 2004 for an account of the petitioner's two shareholders at the National Bank of Jeffersonville, Jeffersonville, New York; a bank reference letter dated March 10, 2004 from an executive vice president of that bank; and a bank reference letter dated March 5, 2004 from a branch manager, Manufacturers and Traders Trust Company, Liberty, New York. Each of the two bank reference

letters states that [REDACTED] is a customer in good standing with that bank. [REDACTED] is one of the petitioner's two shareholders.

CIS may not "pierce the corporate veil" and look to the assets of the corporation's owners 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 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.

The record contains no other evidence relevant to the financial condition of the petitioner. For the reasons discussed above, the evidence therefore 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 2001, 2002 and 2003 and correctly evaluated the petitioner's year-end net current assets for each of those years. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted 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.