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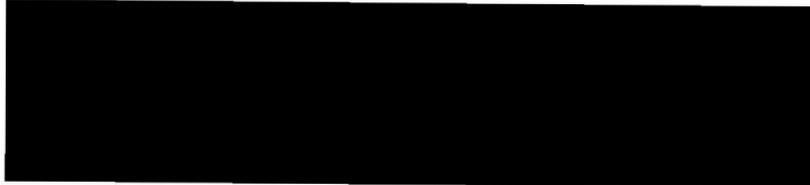
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



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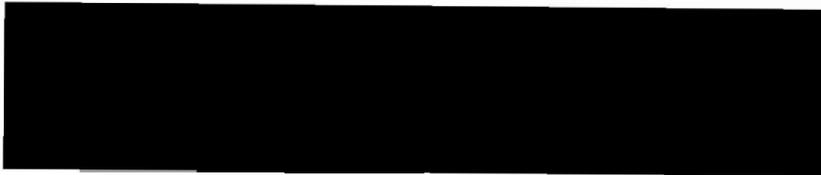


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: OCT 24 2006
EAC 02 200 51705

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

The petitioner is an ethnic Moroccan restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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, new counsel states the petitioner does have the ability to pay the proffered wage. Counsel submits a statement and no further evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$26,000 annually.

On the petition, the petitioner indicated it was established in 1987, has ten employees, a gross annual income of \$468,034, and a net annual income of \$6,568. With the petition, the petitioner submitted IRS Forms 1120, federal corporate income tax return, for the years 2000 to 2001, as well as letters of work verification for the beneficiary. The income tax documentation indicated that the petitioner had taxable income before net operating loss deduction and special deductions taxable income of -\$13,324 in tax year 2000, and of \$6,568 in tax year 2001.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 27, 2003, the director requested additional evidence

pertinent to that ability. The director stated that the petitioner's 2001 federal income tax return did not indicate sufficient net income to pay the proffered wage, and that the petitioner's 2001 Schedule L balance sheet indicated current liabilities in excess of current assets. The director specifically requested that the petitioner provide copies of its 2002 U.S. corporate income tax, with all schedules and attachments. The director also requested that, if the petitioner had employed the beneficiary in the years 2001 or 2002, the petitioner should submit the beneficiary's W-2 forms. The director also requested information as to whether the proffered position was a newly created position, and if not, for how long had the position existed. The director also requested information as to the wage the petitioner is currently paying the employee in the proffered position. If the beneficiary was taking the place of a former employee, the petitioner should identify the former employee, evidence of the salary paid to him or her and document that the position was vacated. Finally the director requested that the petitioner submit copies of its Forms 941 for the last quarter in which the former employee was employed by the petitioner and for all quarters since, and to submit copies of the petitioner's payroll documents listing its employees by name and the wages paid to them for the same period.

In response, counsel stated that the present position was not a newly created one, and that it was created in 2001. With regard to any wages paid to the individual who presently held the position, counsel stated that [REDACTED], the owner and sole shareholder has previously performed the duties of the position. Counsel stated that compensation that was previously available to the petitioner's shareholder for his chef duties would not be available to pay the proffered wage. Counsel stated that the sole shareholder had been overseeing the management of the business part of the restaurant as well as working as a chef.

Counsel stated that with regard to the petitioner's 2001 federal income tax return, although the taxable income was \$6,568, the petitioner held other assets that demonstrated sufficient liquidity to pay the proffered wage. In particular, counsel stated that the petitioner's 2001 tax return indicated the petitioner paid officer compensation of \$10,100 because the owner/shareholder was working at the restaurant as chef due to the shortage of qualified employees. Counsel also noted that the petitioner's tax return indicated capital stock in the amount of \$140,000. Counsel described the capital stock item as monies invested in the petitioner for financial stability and as a liquid variable. Counsel also stated that the capital stock demonstrated the bona fide nature and business viability of the petitioner. Counsel noted additional paid-in capital listed on Schedule L of \$90,493. Counsel then stated that the capital stock is in reserves for such express purposes to be available to the petitioner for needs as they arise and at the time of the 2001 filing, was more than sufficient to supplement the finances of the corporation to pay wages or purchase inventory, among other items. Counsel stated that the officer compensation of \$10,100 and the capital stock of \$140,000 combined totaled \$150,100, and thus it is reasonable to conclude that the beneficiary would have received the proffered wage as of the 2001 filing date under all circumstances.

With regard to tax year 2002, counsel stated that the petitioner had taxable income of \$23,093. Counsel further noted that the sole shareholder/chef received wages of \$44,900 in tax year 2002. Counsel submitted a Form W-2 for [REDACTED]'s 2002 wages. Counsel states that the wages paid to [REDACTED] in tax year 2002 alone were enough to establish the petitioner's ability to pay the proffered wage of \$26,000. Counsel submitted a Form W-2 for tax year 2003 for [REDACTED] that indicated he had earned \$46,000 as of November 7, 2003. Counsel also submitted a 2003 payroll record to confirm wages paid to [REDACTED]. Counsel stated that as the beneficiary would take over chef duties from [REDACTED] the compensation previously available to the petitioner's sole shareholder would now be available to pay the beneficiary's proffered wage.

Counsel submitted Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return for calendar 2001 that indicated the petitioner made total wages payments of \$104,329.75 in 2001, and that the petitioner paid wages to eleven employees during 2001.

Counsel also submitted IRS Form 941, Employer's Quarterly Employee Tax Return for the last quarter of 2002 that indicated the petitioner paid \$40,954.85 in wages, tips and other compensation during that quarter. Counsel also submitted the petitioner's FUTA Tax Return for calendar 2002 that indicated the petitioner paid \$172,861.70 in taxable wages and FUTA taxes. A state of Virginia form, VA-6, indicated the Virginia income tax paid for the petitioner's employees and identified sixteen employees to whom total wages and compensation of \$167,155.45 were paid. Counsel also submitted IRS Form W-3 that indicated total Social Security wages paid of \$166,311.70 in tax year 2002 to seventeen employees whose W-2 forms were also submitted to the record.

Counsel also submitted the petitioner's payroll records dated September 10, 2003 that indicated the petitioner paid ten employees and identified them by name and salary. A second page of the payroll Express Check Register also identified salaries earned as of September 10, 2000. The document indicates that [REDACTED] earned \$38,000 as of the September date.

Counsel then stated that the hiring of the beneficiary as chef would allow the reorganization of the existing staff and their schedules to possibly accommodate requests for fewer or different hours. Counsel asserted that the beneficiary's wages would be paid from the same pool of resources that the current employee and officer wages are drawn from. Counsel also stated that hiring the beneficiary into the permanent position would generate increased revenues for the petitioner. Counsel stated that sometimes a modest net income is not necessarily unfavorable to the petitioner. The beneficiary is an experienced Moroccan chef and will be applying this experience to produce a cost effective work product and reduce the need for other workers on his shift as well as projected increased revenues for the petitioner. Counsel then stated that the development of the petitioner's business depended on the strategy to realign responsibilities so that the owner/shareholder could give his present workload to the beneficiary and do new projects.

Counsel also stated that it had been held by several courts that CIS had to consider other sources of income pledged by the employer to pay the proffered wage. Counsel cited *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, 449 (D.C. 1988). Counsel also submitted a statement dated November 17, 2003 by [REDACTED] the petitioner's owner/sole shareholder. In his letter, [REDACTED] stated that he had read and agreed with the contents of the counsel's memorandum, and that chef position was still open and would reduce the owner's obligations as a chef that would free up his time and allow him to focus on other aspects of the restaurant and other business ventures. [REDACTED] stated that the petitioner would be able to finance this position out of its own cash flow and resources. [REDACTED] concluded by stating that notwithstanding his previous statement he would personally guarantee payment of the beneficiary's wages, even if it meant using personal funds or resources, since the beneficiary's employment brought immediate production value to the business.

On December 13, 2004, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition. The director reviewed the petitioner's tax return for 2001 and determined that the petitioner had neither sufficient net income nor net current assets to pay the proffered wage. With regard to tax year 2002, the director stated that the

petitioner had taxable income of \$23,093, and no net current assets. The director then stated that the petitioner had not established its ability to pay the proffered wage in tax year 2002.

With regard to the beneficiary assuming the chef duties performed by the sole shareholder and thus the sole shareholder's compensation being available to compensate the beneficiary, the director stated that Citizenship and Immigration Services (CIS) did not agree that the officer compensation on the petitioner's return was a source of available funds with which to compensate the beneficiary. The director noted that the compensation of officers represented monies already expended by the corporation. The director determined that the sole shareholder's compensation in tax years 2001 or 2002 was not available to pay the proffered wage.

With regard to the use of the petitioner's capital stock to establish the petitioner's ability to pay the proffered wage, the director stated that capital stock did not represent funds with which to compensate the beneficiary but rather was a part of the shareholder's equity position in the corporation and did not represent liquid assets.

The director also noted that CIS did not consider the sole shareholder's personal income as a source of additional funds, since the petitioner was not a sole proprietorship or unincorporated association, in which the individual owners have a legal responsibility for the debts of the business. The director stated that the petitioner was a corporation, and that the assets of a stockholder cannot be considered in determining the petitioner's ability to pay the proffered wage.

On January 6, 2005, counsel submitted a motion to reopen and reconsider that the director granted. On motion, counsel stated that the petitioner had sufficient financial resources to pay the proffered wage of \$26,000. Counsel submitted documentation with regard to an employee who counsel claimed worked as a cook for the petitioner in 2001, 2002, and 2003. Counsel stated that this employee was no longer working for the petitioner, and submitted a letter from [REDACTED] Vice President, to further substantiate this assertion. In her letter [REDACTED] stated that the petitioner employed an individual in the position similar to the one offered to the beneficiary, and that this individual was employed from 2001 to 2003. [REDACTED] noted that since the employee was no longer employed by the company, based on these past wages, the petitioner had the ability to pay the proffered wage to the beneficiary.

Counsel submitted three W-2 forms for tax years 2001, 2002, and 2003. The W-2 for 2001 contained a Social Security Number but the name and address of the petitioner's employee was blank.¹ The W-2s for tax year 2002 and 2003 indicated neither a social security number nor the name and address of the employee. Based on the W-2s submitted, the petitioner paid the employee in question a salary of \$22,080 in 2001, \$24,960 in 2002, and \$23,040 in 2003. Counsel stated that the remaining wage obligations between the former employee's salaries and the proffered wage of \$26,000 could be made up from either the petitioner's net income or a portion of the corporate officer's compensation from each of the last three years. Counsel noted that in tax year 2003 the officer's compensation was available to pay the difference of \$2,960 between the former employee's salary and

¹ Based on the Social Security number, and the petitioner's state and federal documentation on unemployment tax and salaries previously submitted to the record, the 2001 W-2 is for [REDACTED]. In addition, the petitioner's W-2 forms for tax year 2002 indicate that [REDACTED] received compensation of \$24,960 in the year 2002.

the proffered wage in tax year 2003. Counsel submitted the petitioner's 2002 and 2003 federal corporate income tax return. These two documents indicated the petitioner had net income of \$23,093 in tax year 2002 and -\$17,137 in tax year 2003. They also indicated officer compensation of \$42,900 in 2002 and \$52,400 in 2003.

On April 26, 2005, the director reviewed the petitioner's motion to reopen and reconsider the denial of the I-140 petition. The director determined that the ground of denial had not been overcome and dismissed the motion. The director stated that the petitioner had not identified the former employee referenced by the petitioner's vice president nor was any documentary evidence submitted with regard to the employee's termination. On motion the director determined that the petitioner had not submitted credible evidence of the petitioner's ability to pay the proffered wage to the beneficiary based on the information with regard to the claimed former employee.

The director also noted that the petitioner's assertion that the beneficiary would replace an employee whose wages were included in the wages shown on the petitioner's tax returns contradicted the petitioner's previous claim. The director stated that the petitioner claimed previously that the beneficiary would be assuming duties currently performed by the sole shareholder, and that the funds shown on the tax return for officer compensation would be used to pay the proffered wage. The director noted that it was 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 point to where the truth, in fact, lies, would not suffice. The director cited *Matter of Ho*, 22 I&N Dec. 206 (Comm. 1998).

On appeal, new counsel states that the director's denial for the petitioner was arbitrary, capricious, and an abuse of discretion because CIS failed to consider the totality of the circumstances and the evidence in the record. Counsel states that in its denial CIS refused to consider the compensation paid to the officer as a source of available funds because CIS believes that the compensation of officers represents monies already expended by the corporation. Counsel states that CIS is incorrect in its analysis and that the correct analysis should focus on whether the money was available to pay the beneficiary had the beneficiary been able to perform the duties of the position instead of the owner himself. Counsel states that the response to his analysis should have been yes, the monies would have been available if the beneficiary had been able to replace the owner as chef. Counsel further asserts that CIS is incorrect in its refusal to consider the owner's own source of funds as evidence of the petitioner's ability to pay the proffered wage.

Counsel states that small businesses comprise the largest percentage of businesses in the United States, and most small businesses are "mom and pop" operations whose livelihoods depend on their business success. Counsel states that while these small business operations, like the petitioner, may not be legally liable for petitioners' debts and obligations, this does not mean the owner's financial resources cannot be part of the equation. Counsel contends that although the legal system in the United States creates an incentive for owners by protecting them from liabilities if the businesses fail, the stockholders of a business could easily shift assets to the corporation to demonstrate its ability to pay. Counsel states that CIS insistence that it will not consider financial resources of the petitioner's owner is short sighted and in direct contravention of public policy.

Counsel finally states that the petitioner did not provide contradictory testimony when it stated that the beneficiary would replace the owner to do the work of a chef, rather than the employee who left the petitioner's employment. Counsel states that the evidence with regard to the former employee was provided to show that in

addition to the evidence previously provided, the petitioner could also consider other financial resources that would have been available had the alien been able to work for the petitioner. Counsel states that the beneficiary could have been hired to replace the owner himself or the employee who left the company at the discretion of the petitioner. Counsel states that sufficient evidence exists in the case to warrant a reversal of the decision.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. The petitioner did not claim to have employed the beneficiary as of the priority date. Thus, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward, and has the obligation to establish its ability to pay the entire proffered wage of \$26,000 to the beneficiary as of the priority date 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). 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

The petitioner is structured as a corporation. The petitioner's net income is the taxable income shown on line 28, taxable income before NOL deduction and special deductions on its IRS Form 1120. The petitioner submitted its federal corporate income tax returns for tax years 2000, 2001, 2002 and 2003.² In tax years 2001, 2002, and 2003,

² The petitioner's 2000 federal income tax returns are not dispositive in the present proceedings, as the priority

the petitioner's net income was as follows: \$6,568, \$23,093, and -\$17,137. None of these figures is sufficient to pay the proffered wage of \$26,000.

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. In addition, 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.³ 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 greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The tax returns reflect the following information for the tax years 2001 and 2002:

	2001	2002	2003
Taxable income ⁴	\$ 6,568	\$ 23,093	\$ -17,137
Current Assets	\$ 12,266	\$ -1,923	\$ -32,351
Current Liabilities	\$ 15,938	\$ 0	\$ 0
Net current assets	\$ -3,672	\$ -1,923	\$ -17,151

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$6,568, and negative net current assets of \$3,672, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of \$23,093 and negative net current assets of \$1,923, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2003, the petitioner shows a taxable income of -\$17,137 and negative net current assets of \$17,671, and has not, therefore, demonstrated the ability to pay the proffered wage. Thus, the petitioner cannot establish its ability to pay the proffered wage based on its net income or net current assets as of the 2001 priority date and onward.

date year is 2001. The AAO will not examine the petitioner's 2000 tax return in its consideration of the petitioner's net income or net current assets.

³ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ As previously stated, taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

In its response to the director's request for further evidence, the petitioner submitted evidence with regard to the beneficiary replacing the sole shareholder as chef, and on motion submitted evidence with regard to the beneficiary replacing an employee the petitioner claimed no longer worked for it.

With regard to the beneficiary replacing the sole shareholder as chef and thus allowing the use of officer compensation to pay the proffered wage as of the priority date year, the petitioner provided no evidentiary documentation that the sole shareholder actually worked as the petitioner's chef. The sole shareholder likely performed duties other than simply cooking, such as management duties. Even if the AAO were to accept that the sole shareholder was willing to give up his compensation, the record of proceeding does not show the amount of funds that was for compensation as a cook, which would be the only funds available to show the petitioner's ability to pay the proffered wage. Therefore the replacement theory advocated by counsel is not demonstrated by the record of proceedings. Even if all of the sole shareholder's compensation was considered a source of additional financial resources beyond the petitioner's net income or net current assets, the sole shareholder's compensation in 2001, namely \$10,100, in combination with the petitioner's net income of \$6,568 or the petitioner's net current assets of -\$3,672, is not sufficient to establish the petitioner's ability to pay the proffered wage of \$26,000 as of the priority year 2001.

With regard to the use of the former employee's wages to pay the proffered wage, the evidence submitted to the record is problematic. First, as previously stated, the identity of the employee the petitioner claims worked for him in the years 2001 through 2003 and then terminated his employment can be established for tax year 2001, through the employee's social security number on the petitioner's already submitted W-2 forms and other employment records. However, the petitioner provides no explanation for why it chose not to identify the employee more clearly in either tax year 2001, and the ensuing tax years 2002 and 2003. Second, there is no evidence in the record that the former employee did indeed perform the duties of the proffered position, namely, chef, and that he is presently not working for the petitioner. Although the petitioner and counsel assert that the unidentified employee is not working for the petitioner, they did not establish when the employee resigned or was terminated. Again, the assertions of counsel and the petitioner do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Of more probative weight would be evidence cited by the director in his request for further evidence, namely copies of its Forms 941 for the last quarter in which the former employee was employed by the petitioner and for all quarters after his termination that are available.

It is also noted that while the petitioner can choose to use the officer compensation to establish the petitioner's ability to pay the proffered wage during one year in question, and the wages of a terminated employee to establish the petitioner's ability in another year, the petitioner must provide enough evidentiary documentation to clearly establish these two alternative sources of further funds. To date, the petitioner has not provided sufficient evidence as to the employment of the former employee as a chef and his termination. The AAO will further examine below the use of officer compensation to establish the petitioner's ability to pay the proffered wage.

Counsel on motion and new counsel on appeal state that officer compensation can be considered an additional source of funds with which to pay the proffered wage. In fact, contrary to the director's statement, 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 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.⁵

To determine whether or not an entity's officer compensation would have been available to the proffered wage, CIS examines many issues, including the flexibility that the shareholders have in setting their own compensation; the profitability of the corporation; whether the officer compensation is discretionary as opposed to wages which are not discretionary; and/or whether the officer compensation is substantially more than the amount of the proffered wage. In addition, the CIS would examine whether the amount of officer compensation varies over the course of the pertinent years, and whether the officer receiving the compensation is the sole owner/stockholder or majority owner/stockholder.

In addition, the totality of the circumstances (i.e., other information in the record) should support the fact that the petitioner is a viable, profitable enterprise. Such information would include issues examined in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relating to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. In *Matter of Sonogawa*, the courts looked at such issues as the petitioner's longevity, number of employees, and reputation, in examining the totality of the petitioner's circumstances.

The documentation presented here indicates that _____ 100 percent of the company's stock. According to the petitioner's IRS Forms 1120 Schedule E (Compensation of Officers), _____ elected to pay himself \$14,400 in 2000,⁶ \$10,100 in 2001, \$42,900 in 2002, and \$52,400 in 2003. These figures are supported by the sole shareholder's W-2 Forms for 2001 and 2002, which were submitted for the record. We note here that the compensation received by the company's owners during these four years was not a fixed salary and varied from year to year.

Contrary to counsel's assertion on appeal, CIS (legacy INS) has long held that it 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.

In the instant petition, while the AAO will not examine the personal assets of the petitioner's owner and sole shareholder, it can examine the financial flexibility that the employee-owner has in setting his salary based on the profitability of his business. Upon review of the record, the petitioner provided no Forms 941 with which to

⁵ Even if the replacement theory is not borne out by the record of proceedings, the use of such compensation may be considered whether the sole shareholder/officer is engaged or not engaged in the actual operations of the petitioner simply as a matter of the sole shareholder's discretion.

⁶ While the petitioner's tax return for tax year 2000 is not dispositive, the AAO includes the officer compensation for that tax year in its consideration of officer compensation for illustrative purposes.

establish its actual number of employees and salaries paid in tax year 2001, although the petitioner's 1120 tax return indicated total wages and salaries of \$72,808, with officer compensation of \$10,100.⁷ In examining the petitioner's Quarterly Federal Tax Returns (Form 941) and the FUTA tax documentation for 2002 and 2003, the petitioner has a staff of eleven employees in 2001 and sixteen employees in 2002. It is noted that three employees in both years, including the owner/sole shareholder, earned salaries over \$20,000 while the remaining employees are lower wages employees or working part-time. At the same time, the petitioner's gross receipts and salaries have grown over the tax years 2001 to 2003. In 2001, the petitioner's gross receipts were \$468,034 and wages paid were \$72,808, while in tax year 2002, the petitioner's gross receipts were \$510,338 and wages paid were \$87,017. In tax year 2003, the petitioner's gross receipts were \$555,160 and wages paid were \$121,957. During these three tax years, the officer compensation, listed as a separate item on the petitioner's 1120, rose from \$10,100 to \$52,400.

As stated previously, in tax year 2001, the officer compensation of \$10,100 would not be sufficient to pay the proffered wage to the beneficiary, as it is less than half of the proffered wage. With regard to tax years 2002 and 2003, the officer compensation is substantially more than the proffered wage of \$26,000.

When examining the totality of the petitioner's circumstances, it is noted that in the I-140 petition, the petitioner stated it had been established in 1987. However, the petitioner submitted no further evidence with regard to its longevity, and its reputation as a Moroccan restaurant. See *Sonegawa*. In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we cannot conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

Beyond the decision of the director, it is noted that two employees of the petitioner, including the sole shareholder/owner, have the same last name, and that the beneficiary shares this same last name. Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). The AAO would suggest that if the petitioner pursues the instant petition in further proceedings, that it provide some evidence as to any familial relationship between the beneficiary and the petitioner.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.

⁷ The petitioner's Form 941 for the last quarter of 2001 indicates that \$27,984 in wages and tips, plus other compensation was paid in that quarter alone. In other words, almost half of the petitioner's 2001 wages were paid in the last quarter of the year.



ORDER: The appeal is dismissed.