

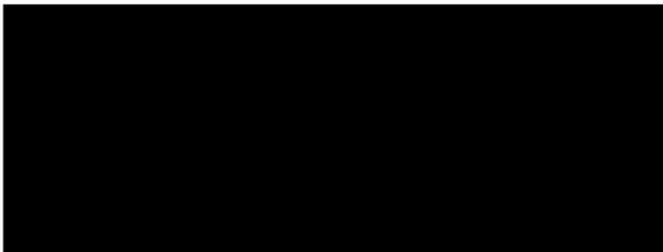
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**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **SEP 08 2006**
EAC-04-133-50169

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Specialty Cook - Greek. 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 October 5, 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 \$18.50 per hour, which amounts to \$38,480.00 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 no additional evidence. The petitioner also submits duplicate copies of tax returns of the petitioner which were submitted previously.

Relevant evidence in the record includes copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002 and a copy of a letter from a former employer of the beneficiary in Greece.

On appeal, counsel states that the petitioner's figures for gross profits, compensation of officers and year-end cash on hand are sufficient to establish the petitioner's ability to pay the proffered wage during each of the years at issue. Counsel also states that the director's decision fails to explain the calculations which support the director's finding that the petitioner's current liabilities exceeded its current assets at the end of 2001.

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 26, 2001, the beneficiary did not claim to have worked for the petitioner. The record contains a copy of a letter dated February 24, 2004 from an accountant of the petitioner which states that the beneficiary has been employed by the petitioner since August of 2002. However, no evidence in the record indicates the amount of any compensation paid 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 (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 a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002. In his brief, counsel states that the petitioner's tax return for 2003 has also been submitted in evidence on appeal. However, no copy of the petitioner's tax return for 2003 is found in the record.

The I-140 petition was submitted on March 27, 2004. As of that date, the petitioner's tax return for 2003 was not yet due. No request for additional evidence was issued by the director. For the foregoing reasons, the petitioner's tax return for 2002 is considered to be the most recent return relevant to the instant petition.

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)
2001	\$14,483.00	\$38,480.00*	\$(23,997.00)
2002	\$33,639.00	\$38,480.00*	\$(4,841.00)

* 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 either 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)
2001	\$(21,706.00)	\$38,480.00*	\$(60,186.00)
2002	\$35,349.00	\$38,480.00*	\$(3,131.00)

* 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 either of the years at issue in the instant petition.

Counsel asserts that the petitioner's tax returns show cash on hand at the end of the year in the amount of \$110,088.00 in 2001 and \$141,555.00 in 2002. Counsel's figures are not consistent with the year-end cash as shown on the Schedule L's attached to the petitioner's tax returns, which show year-end cash of \$32,104.00 in

2001 and \$33,639.00 in 2002. However, counsel does not rely on the figures on the Schedule L's, but rather refers to figures on Schedule M-2, line 8 as the source for his year-end cash figures.

Despite counsel's assertions, the information on the Schedule M-2's does not show the petitioner's cash on hand. Schedule M-2 is titled "Analysis of Unappropriated Retained Earnings per Books (Line 25, Schedule L)." That schedule records the change in unappropriated retained earnings during the year. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. In general, the current year's retained earnings are the previous year's retained earnings plus the current year's net income. Retained earnings are one element of the total value of the company to the shareholders. The figure for year-end unappropriated retained earnings is recorded as a liability on the Schedule L, on line 25. Year-end unappropriated retained earnings do not correspond to the figure for year-end cash on hand, which appears on the Schedule L on line 1. For the foregoing reasons, the evidence does not support counsel's assertions concerning the amounts of year-end cash on hand of the petitioner in 2001 and 2002.

Counsel also relies on the petitioner's expenses for compensation of officers as additional evidence of the petitioner's ability to pay the proffered wage.

The petitioner's Form 1120 U.S. Corporation Income Tax Returns show that two officers of the corporation received compensation from the petitioner, and that those two persons own 100% of the shares of the petitioner. Counsel states in his brief that the two officers are husband and wife. The tax returns in the record show the names of the two officers to be [REDACTED] and [REDACTED]. The fact that both officers have the same last name indicates a family relationship, through the record contains no evidence that they are a married couple.

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 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 petition, the Form 1120 U.S. Corporation Income Tax Returns of the petitioner show the following amounts for officer compensation to the petitioner's two shareholders: \$155,600.00 in 2001 and \$156,000.00 in 2002.

The Form 1120, Schedule E provides for itemizing the amount of compensation for each officer, along with each officer's social security number, percent of time devoted to the business, percent of corporation stock owned, and amount of compensation. The Schedule E's attached to the petitioner's tax returns show the following information regarding compensation of officers.

	Name of officer	Percent of time devoted to business	Percent of corporation stock owned		Amount of compensation
			Common	Preferred	
2001	[REDACTED]	100%	50%		\$119,600.00
		75%	50%		\$36,000.00
	Total compensation of officers				
2002	[REDACTED]	100%	50%		\$119,600.00
		75%	50%		\$36,400.00
	Total compensation of officers				

Since the two officers receiving compensation own 100% of the shares of the petitioner, the amounts paid to them in officer compensation may be considered as additional financial resources of the petitioner. The results of adding those amounts to the petitioner's net income are shown in the table below.

Tax year	Compensation of officers	Net Income	Total available income	Proffered wage	Surplus or deficit
2001	\$155,600.00	\$14,483.00	\$170,083.00	\$38,480.00	\$131,603.00
2002	\$156,000.00	\$33,639.00	\$189,639.00	\$38,480.00	\$151,159.00

The foregoing information shows that if the petitioner had paid the beneficiary the proffered wage in 2001 and 2002, the amounts remaining would still allow for the payment of substantial amounts of officer compensation to the petitioner's sole shareholders in those years.

The record indicates that the petitioner is financially stable. The tax returns in the record show that gross receipts or sales were \$843,185.00 in 2001 and \$937,936.00 in 2002. The petitioner's total income figures on its tax returns were \$591,381.00 in 2001 and \$609,220.00 in 2002. Those figures indicate that the petitioner has had gross receipts or sales and total income which are many multiples of the proffered wage.

The foregoing evidence concerning the petitioner's net income, its officer compensation to its sole shareholders, its gross receipts or sales and its total income is sufficient 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, under the principles described in *Matter of Sonogawa*, 12 I&N Dec. 612.

In her decision, the director correctly analyzed the petitioner's tax returns and correctly concluded that the petitioner's net income and its net current assets failed to establish the petitioner's ability to pay the proffered wage during the relevant period. The director did not conduct any further analysis based on the principles in *Matter of Sonogawa*. But in certain circumstances, it is appropriate to do so. As shown above, under those principles, the petitioner's evidence is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

For the reasons discussed above, the assertions of counsel on appeal are sufficient 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.