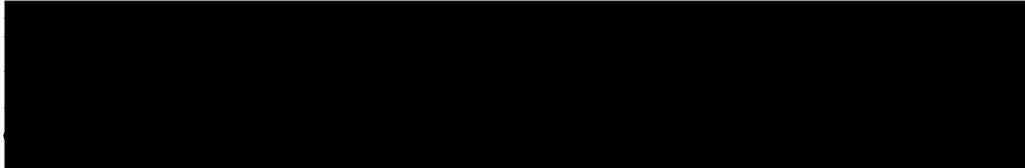




U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: **AUG 21 2007**

SRC-03-152-52964

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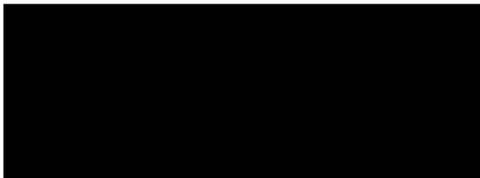
Petitioner:

Beneficiary:



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 preference visa petition and a subsequent motion to reopen were denied by the Director, Texas Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook (cook for Chinese food). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification or Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition because it did not establish that Empress at [REDACTED] is the successor-in-interest to the petitioner. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 27, 2006 denial, the single issue in this case is whether or not the successor-in-interest relationship between [REDACTED] and the petitioner has been established and thus the petitioner demonstrated that it and its successor-in-interest had demonstrated the 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 nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(l)(3)(i) states in pertinent part:

... Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program ...

The instant case is not an application for Schedule A designation, nor an application that the alien qualifies for one of the shortage occupations in the DOL's Labor Market Information Pilot Program. Therefore, the petitioner must submit an individual labor certification from DOL for the proffered position.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The record shows that the petitioner, [REDACTED] dba [REDACTED] filed a Form ETA 750 on behalf of the instant beneficiary on April 20, 2001 and the Form ETA 750 was certified on March 19, 2002 to the petitioner. The proffered wage as stated on the Form ETA 750 is \$2,400 per month (\$28,800 per year). On May 2, 2003, the petitioner filed the instant petition. On the petition, the petitioner claimed to have been established in 1985, to have a gross annual income of \$352,000, to have a net annual income of \$75,000, and to currently employ 12 workers. In response to the director's notice of intent to deny (NOID) dated January 25, 2006, counsel claimed that the petitioner closed its business in December 2004 and requested substituting the petitioner with [REDACTED].

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal counsel submits Unanimous Written Consent of the Shareholders of [REDACTED] dba Empress of China Restaurant on December 5, 2004, Unanimous Written Consent of the Board of Directors of Princess of China, Inc. dba [REDACTED] on December 5, 2004, Unanimous Written Consent of the Shareholders of [REDACTED] on December 6, 2004, Unanimous Written Consent of the Board of Directors of [REDACTED] on December 6, 2004, and Stock Certificates issued by [REDACTED]. Other relevant evidence in the record includes the petitioner's unaudited financial statements for 2002, a letter dated March 23, 2006 from [REDACTED], President of [REDACTED] and [REDACTED]'s Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 through 2004, W-3 forms for 2001 through 2004, W-2 forms for 2003 for all its employees, Form 941 Employer's Quarterly Tax Returns for 2001 through 2004, Texas Workforce commission Quarterly Tax Returns for 2001 through 2004, Certificate of Incorporation, Articles of Incorporation, phone directory pages and the lease agreement. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that submitted evidence established the successor-in-interest relationship between the two companies and the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

However, the record contains no evidence that [REDACTED] qualifies as a successor-in-interest to the petitioner. The record shows that both the petitioner and [REDACTED] are structured as a Texas corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the

¹ 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).

financial resources of individuals or entities who have no legal obligation to pay the wage.” Counsel’s assertion that the two corporations are sister corporations owned by the same people does not establish that Grapevine Vinyard is the successor-in-interest to the petitioner.

This status requires documentary evidence that the successor company has assumed all of the rights, duties, and obligations of the petitioner. On appeal, counsel submits unanimous written consents of the shareholders and the board of directors of both corporations and stock certificates of [REDACTED]. According to the four unanimous written consents, the shareholders and the board of directors of both corporations agreed on December 5, 2004 and December 6, 2004 respectively that the petitioner would be dissolved and [REDACTED] would merge and acquire the petitioner’s assets and property, rights and interests, as well as any and all of the duties, obligations and liabilities. However, counsel does not submit any legal documents for the merger and acquisition, such as bill of sale, or sale and purchase agreement between the two corporations to support the contents of the consents. [REDACTED] 2004 tax return does not indicate this acquisition. State of Texas’ official record does not contain any documents filed for dissolution, merger or acquisition for the two corporations.² In addition, the four consents provide inconsistent information with the petition and Texas state official records. The consents state that the petitioner dissolved in December 2004 and its all rights and obligations were assumed of [REDACTED] however, the state record shows that the corporation is not in good standing as it has not satisfied all state tax requirements. [REDACTED] was described in the consents and signed the consents as the president of the petitioner in December 2004, while he signed the labor certification application on December 8, 2000, and the I-140 petition on October 8, 2002 as the secretary of the petitioner, and in the Texas state records [REDACTED] is recorded as the secretary and [REDACTED] recorded as the president of the petitioning corporation. “It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.” *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The record does not contain any independent objective evidence to resolve these inconsistencies. The inconsistencies also raise a doubt as to whether or not these consents were created on December 5, 2004 and December 6, 2004 respectively. They appear to be documents drafted in order to support the appeal from the director’s April 27, 2006 denial. “Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.” *Id.*

The stock certificates issued by [REDACTED] on December 6, 2004 show that [REDACTED] own four hundred, four hundred and two hundred shares of the company’s stocks. However, the record does not contain any documentary evidence about how many shares [REDACTED] has totally issued and what percent of the petitioner’s shares each of the three people owned at the time the petitioner dissolved on December 5, 2004. Instead, the tax returns filed by [REDACTED] indicate that [REDACTED] own 40 percent, 40 percent and 20 percent of shares of the company and that ownership did not change in 2004. Therefore, without further evidence, [REDACTED] stock certificates of 400 shares to [REDACTED] 400 shares to [REDACTED] and 200 shares to [REDACTED] themselves cannot establish that the assets and properties, and the rights and obligations of the petitioner were assumed to [REDACTED], and thus the petitioner failed to establish that Grapevine Vinyard is the successor-in-interest to the petitioner.

The AAO finds that the petitioner has not submitted persuasive evidence that indicates that [REDACTED] the successor-in-interest to the petitioner. This portion of the director’s decision is affirmed.

² See <http://ecpa.cpa.state.tx.us/coa/Index.html> (accessed on August 3, 2007)

In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Even if the petitioner had established that Empress at [REDACTED] were the successor-in-interest to the petitioner, the petitioner would have to establish its ability to pay the proffered wage from the priority date in 2001 to December 2004 when the petitioner was allegedly dissolved. In the instant petition, the petitioner did not submit its annual reports, tax returns, or audited financial statements for 2001, the year of the priority date, through 2004. The only document showing the petitioner's ability to pay the proffered wage from the priority date of April 20, 2001 in the record is the unaudited financial statements for 2002. However, these financial statements were not audited. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the petitioner failed to establish its ability to pay the proffered wage beginning on the priority date.

The successor-in-interest must establish its ability to pay the proffered wage from the time it becomes a successor-in-interest to the predecessor enterprises to the present. In the instant case, even though Empress at [REDACTED] had established its successor-in-interest relationship to the petitioner from December 2004, it must have demonstrated its ability to pay the proffered wage from 2004 to the present. In determining the petitioner's ability to pay the proffered wage during a given period, 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. However, in the instant case, [REDACTED] did not submit any documentary evidence, such as W-2 forms, 1099 forms, payroll records, paystubs or cancelled paychecks, to show [REDACTED] paid the beneficiary in 2004 and onwards. Submitted [REDACTED] Forms 941, Forms W-3 and Forms W-2 for its employees do not include the beneficiary. In general, wages already paid to others including the owners of the company are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. [REDACTED] failed to establish its ability to pay the proffered wage in 2004 and onwards through the examination of wages paid to the beneficiary.

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 contrary to the petitioner's assertions. 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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's

depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 record contains copies of [REDACTED] Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2004. As previously discussed, even if the successor-in-interest relationship between the petitioner and [REDACTED] had been established, [REDACTED] would have to demonstrate that it had the ability to pay the proffered wage from the time when it had become the successor-in-interest to the petitioner, in this case that would be December 2004. Therefore, [REDACTED]'s tax returns for 2001 through 2003 would not be necessarily dispositive. The AAO will review the 2004 tax return only.

- In 2004, the Form 1120S stated a net income³ of \$29,246.

[REDACTED] 2004 tax return appears that it had sufficient net income to pay the beneficiary the proffered wage of \$28,800 that year. However, CIS records show that [REDACTED] filed two I-140 immigrant petitions in 2002 with the priority dates of December 29, 2000 and April 30, 2001, and that one of the beneficiaries obtained his lawful permanent residence in 2004 and the other's adjustment of status application is pending.⁴ The regulation 8 C.F.R. § 204.5(g)(2) strictly requires the petitioner to demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Therefore, [REDACTED] must demonstrate that it had the ability to pay the two approved proffered wages in 2004, however, the 2004 tax return shows that its net

³ 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, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See 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>.

⁴ One petition (SRC-02-151-52287) was filed by [REDACTED] on April 17, 2002 with the priority date of December 29, 2000 and approved by the Texas Service Center on October 10, 2002. The beneficiary filed a Form I-485 (SRC-03-235-50443) on August 19, 2003 and the Form I-485 is still pending with the Texas Service Center. The other petition (SRC-02-237-53053) was filed on August 2, 2002 with the priority date of April 30, 2001 and approved on March 17, 2003. The beneficiary's Form I-485 adjustment of status (SRC-04-031-52439) was approved on December 8, 2004

income was sufficient to pay only one proffered wage. Therefore, [REDACTED] failed to demonstrate that it had sufficient net income to pay the instant beneficiary the proffered wage after it paid the two approved beneficiaries the proffered wages in 2004. Furthermore, [REDACTED] even failed to establish its ability to pay the proffered wages to the two approved beneficiaries with its 2004 net income. CIS records also show that [REDACTED] filed four more immigrant petitions in 2007.⁵ Therefore, it is most unlikely that [REDACTED] has sufficient net income to pay the instant beneficiary at the present.

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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.⁶ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- [REDACTED] net current assets during 2004 were \$12,638.

Therefore, for the year 2004, [REDACTED] had insufficient net current assets to pay the instant beneficiary the proffered wage, even without taking into account into the approved two beneficiaries. Similarly, it is also unlikely that [REDACTED] could establish its ability to pay all the proffered wages to the pending multiple beneficiaries, including the instant beneficiary, at the present.

Therefore, the petitioner failed to submit persuasive evidence to establish that [REDACTED] is the successor-in-interest to the petitioner. Even if the successor-in-interest relationship had been established, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date in 2001 to 2004 through an examination of wages paid to the beneficiary, its net income or its net current assets and [REDACTED] failed to demonstrate that it had sufficient net income or net current assets to pay the proffered wage in 2004 and onwards.

Counsel's assertions on appeal cannot be overcome the director's grounds of denial. The evidence submitted does not establish that [REDACTED] is the successor-in-interest to the petitioner and that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

⁵ LIN-07-069-53358 filed on January 8, 2007, LIN-07-082-53205 filed on January 25, 2007, SRC-07-219-52008 filed on July 10, 2007, and SRC-07-219-54068 filed on July 12, 2007.

⁶According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. **Here, that burden has not been met.**

ORDER: The appeal is dismissed.