

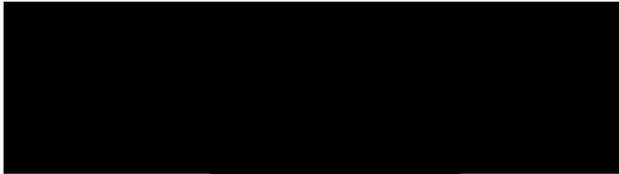
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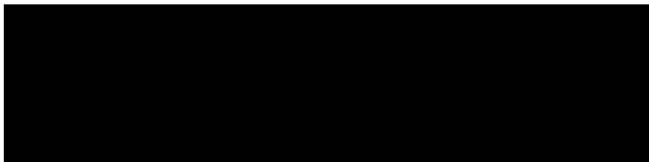
Office: CALIFORNIA SERVICE CENTER

Date: **AUG 28 2007**

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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a licensed facility for developmentally disabled adults. It seeks to employ the beneficiary¹ permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. 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. 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 denial dated January 16, 2006, the single issue in this case is whether or not the petitioner has 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 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, 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 the U.S. Department of Labor. *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

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 5, 1997.² The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience as an assistant cook.

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 appeal.³

Evidence in the record includes the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor with amendment for the substitute beneficiary; an employment certification for the beneficiary from Quality Health Maintenance Services Inc. of West Covina, California; an employment certification for the beneficiary from [REDACTED] Administrator, Fourth & Dexter Home, Covina, California; an employment certification for the beneficiary from Obdulia Legaspi Catering & Services, Manila, the Republic of the Philippines; a support letter from the petitioner dated January 24, 2005; California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for the petitioner's employees that were accepted by the State of California for 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004; the petitioner's U.S. Internal Revenue Service tax returns Form 1120 for 1998, 1999, 2000, 2001, 2002, 2003 and 2004; the beneficiary's Wage and Tax Statement (W-2) from the petitioner for year 2004 in the amount of \$9,732.27; and three pay statements from the petitioner to the beneficiary stating year-to-date wages to November 30, 2005, of \$8,840.19.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1989 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on June 6, 2005, the beneficiary claimed to have worked for the petitioner since February 2004.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes the following documents: the director's decision dated January 16, 2006; the beneficiary's Wage and Tax Statements (W-2) from the petitioner for years 1997 to 2005; statements from the owners of the petitioner dated March 9, 2006 and March 10, 2006; approximately 72 statements from the owners' of the petitioner savings and investments; and a payment statement from the petitioner to the beneficiary dated February 28, 2006, stating year-to-date wages of \$4,081.60.

² It has been approximately ten years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

³ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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, Citizenship and Immigration Services (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 (BIA 1967).

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. Based upon the W-2 statements submitted by counsel, the petitioner paid the beneficiary wages in years 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004 and 2005 of \$24,936.84, \$25,265.16, \$13,579.23, \$10,494.13, \$14,420.64, \$17,442.65, \$1,616.02, \$9,732.27 and \$10,872.99 respectively. In the instant case, the petitioner has established that it employed and paid the beneficiary the full proffered wage of \$24,024.00 per year from the priority date in years 1997 and 1998, but not from 1999 through 2005.

The difference between the wages paid by the petitioner to the beneficiary and the proffered wage of \$24,024.00 per year from 1999 through 1995 is as follows: 1999 - \$10,444.77; 2000 - \$13,529.87; 2001 - \$9,603.36; 2002 -\$6,581.35; 2003 -\$22,407.98; 2004 - \$14,291.73; and 2005 - \$13,151.01.

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 sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that its depreciation expenses should be "added back" is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. 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 that 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 1998, the Form 1120 stated a loss⁴ of <\$20,918.00>⁵.
- In 1999, the Form 1120 stated net income of \$16,505.00.
- In 2000, the Form 1120 stated net income of \$13,475.00.
- In 2001, the Form 1120 stated net income of \$16,812.00.
- In 2002, the Form 1120 stated a loss of <\$9,280.00>.
- In 2003, the Form 1120 stated a loss of <\$5,551.00>.
- In 2004, the Form 1120-A stated net income of \$9,678.00.

Since the proffered wage is \$24,024.00 per year, the petitioner did not have the ability to pay the difference between the wages paid by the petitioner and the proffered wage from an examination of its net income for years 2000, 2002, 2003 and 2004.

From the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had established that it had the continuing ability to pay the beneficiary the proffered wage in 1997, 1998, 1999, and 2001 through an examination of wages paid to the beneficiary and its net income.⁶

If the net income the petitioner demonstrates it had available during the 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.

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.⁷ A

⁴ IRS Form 1120, Line 28 that states the petitioner's taxable income before net operating loss deduction and special deductions, which will be referred to as net income in these proceedings.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁶ This Office notes that in 2000 the total of petitioner's net income and wages paid to the beneficiary is only \$54.81 short of the proffered wage.

⁷ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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.

The petitioner's net current assets⁸ during 1998, 1999, 2000, 2001, 2002 and 2003 were <\$27,204.00>, <\$37,772.00>, <\$13,257.00>, <\$25,250.00>, <\$25,180.00> and <\$4,865.00>.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for 1997, 1998, 1999 and 2001.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁹ copies of annual reports, federal tax returns, or audited financial statements are the means by which a petitioner's ability to pay is determined.

Counsel has submitted statements of the petitioner's owner's personal assets that counsel asserts are evidence of petitioner's ability to pay the proffered wage. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is 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 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 financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel has submitted a statement from the petitioner's owner that because of an injury and personal reasons, the beneficiary could not work full time for the petitioner for a time but has since returned to work in November 2005. However, the record of proceeding demonstrates that the beneficiary worked full-time for another employer from January 2003 through February 2004 and that the beneficiary has worked part-time for Pizza Hut since 1999. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Also, counsel's contention that the wages paid to beneficiary in years 2002, 2003, 2004 and 2005 unfairly reflect the petitioner's ability to pay the proffered wage when only the beneficiary's wages are considered for those years is not supported by the record. Commencing in 2002, the petitioner had insufficient net income or net current assets even in combination with wages paid to the beneficiary in years 2002, 2003 and 2004 to pay the proffered wage (no tax return was submitted for 2005).

⁸ The petitioner's Schedule L from tax return Form 1120-A for 2004 is blank.

⁹ 8 C.F.R. § 204.5(g)(2).

The evidence submitted has not established that the petitioner has the continuing ability to pay the proffered wage from year 2002 and continuing to the present.

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.