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File: EAC-04-195-50180 Office: VERMONT SERVICE CENTER Date: JAN 04 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 Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant and seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign (“Cook-Mediterranean Style”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s April 25, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

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.<sup>1</sup>

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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.

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<sup>1</sup> 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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on July 10, 2001. The proffered wage as stated on Form ETA 750 for the position of cook is \$19.00 per hour based on a 40 hour work week, which is equivalent to \$39,520 per year. The labor certification was approved on March 25, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on June 18, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: 1996; gross annual income: \$1,027,016; net annual income: \$108,637; and current number of employees: eight.

On October 18, 2004, the Service Center issued a Request for Additional Evidence ("RFE"), requesting that the petitioner submit additional evidence related to the petitioner's ability to pay, including the petitioner's federal tax returns, and bank account records for 2001. The request also sought copies of the beneficiary's W-2 statements if the petitioner employed the beneficiary. Counsel responded to the RFE on the petitioner's behalf. On April 25, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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. In the instant case, on the Form ETA 750B, signed by the beneficiary on June 12, 2001, the beneficiary listed that he has been employed with the petitioner since July 1999. The petitioner submitted a W-2 statement for 2001 exhibiting wage payment in the amount of \$8,800. The evidence of prior wage payment submitted, standing alone, is wholly insufficient to demonstrate the petitioner's ability to pay. The petitioner must demonstrate that it can pay the difference between the wages paid, and the proffered wage.

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. 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).

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 record demonstrates that the petitioner is an S corporation. The 2001 federal tax return that the petitioner submitted was for [REDACTED] with a listed tax identification number of [REDACTED]. The petitioner listed on the I-140 is [REDACTED] with a listed tax identification number of [REDACTED].

While the tax return does list a similar address, and the same tax identification number as listed on the I-140 for the petitioner, the petitioner has not forwarded information to demonstrate that [REDACTED] and [REDACTED] operates on a "d/b/a" basis, or that the two businesses have a successor-in-interest relationship. 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 financial resources of individuals or entities who have no legal obligation to pay the wage." Alternatively, the petitioner would need to show that the new entity is a successor in interest to the original business, which filed the labor certification. The petitioner must show that it has assumed all the rights, duties, and obligations of that business. Present counsel has provided no evidence. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

We will examine the 2001 tax return submitted with the caveat that the petitioner has not demonstrated the relationship between the two companies. The petitioner additionally submitted a 2003 Form 1120S federal tax return for ██████████ Inc., with a tax identification number of: ██████████ This return shows an unrelated tax identification number, and, therefore, will not be considered.

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 1120 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 lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See Internal Revenue Service, Instructions for Form 1120S, 2003*, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, *Instructions for Form 1120S, 2002*, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner lists only income from its business so that we will take the income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2001	-\$50,330 <sup>2</sup>

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in the year 2001.

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 the difference between the petitioner's current assets and current liabilities.<sup>3</sup> 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 on the Forms 1120S. 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

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<sup>2</sup> We note that the petitioner did not submit its 2002 or 2003 federal tax returns, which should have been available at the time of filing the I-140 petitioner. We further note that the RFE requested only the petitioner's 2001 federal tax return.

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2001	\$4,706

Following this analysis, the petitioner's Federal Tax Returns shows that the petitioner would lack the ability to pay the proffered wage under the net current asset test.

On appeal, counsel contends that "the employer had sufficient funds to pay the salary per consolidated tax returns . . . the employer's enterprise must be viewed from the entire group of corporations operated as subchapter S corporations by the employer."

Counsel submitted the petitioning company owner's individual federal tax return Form 1040 for the years 2000, and 2004, as well as an individual 2001 brokerage account statement in the owner's name, but not the petitioning company's name. In the case of a sole proprietorship, CIS may consider the proprietor's personal assets and liabilities. However, in the case of a corporation, CIS may not pierce the corporate veil and look to the assets of the corporation's owner or shareholders. 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. Therefore, while the petitioner's owner may have substantial individual assets or income, those assets or income are not relevant in the case at hand. Further, we similarly cannot consider the "consolidated tax returns" for other companies, only the evidence for the petitioning entity, which fails to demonstrate that the petitioner had the ability to pay the beneficiary the proffered wage.

Based on the evidence submitted, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage from May 2001 to the time that the beneficiary obtains permanent residence. 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.