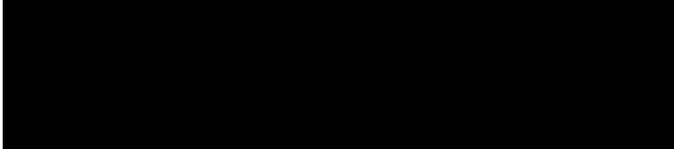




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



B6

JAN 22 2007

FILE: WAC 04 015 52864 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: 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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 restaurant. It seeks to employ the beneficiary 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 Department of Labor. The director noted discrepancies in the petitioner's address and the address listed on the federal income tax returns submitted to the record and stated that no clear evidence was submitted to the record as to the business relationship between the petitioner and the employer who had submitted tax returns to the record. The director then determined that the petitioner had not submitted sufficient evidence to establish its continuing ability to pay the proffered wage. 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 25, 2005 denial, the single issue in this case is whether or not the petitioner has provided sufficient evidence as to its corporate identity and thus has established its 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(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 CFR § 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).

Here, the Form ETA 750 was accepted on April 5, 2001. The address for the petitioner on the Form ETA 750 is listed as [REDACTED]. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024 per year). The Form ETA 750 states that the position requires two years of relevant work experience.

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, the petitioner² submits a letter from [REDACTED] President, [REDACTED] Inc., [REDACTED] Glendora, California. Other relevant evidence in the record includes the 2001, 2002, and 2003 federal tax returns for [REDACTED] Inc., as well as W-2 forms for the beneficiary for the years 2001 through 2003.

On the petition, the petitioner claimed to have been established in June 1997, to have 22 employees, a gross annual income of \$1,500,000 and a net annual income of \$150,000. On the Form ETA 750B, signed by the beneficiary on March 15, 2001, the beneficiary claimed to have worked for the petitioner since February 1992. With the petition, the petitioner submitted Forms 1120S, U. S Income Tax Return for an S Corporation for tax years 2001, and 2002. The business identified on these tax returns is [REDACTED] Inc., [REDACTED]

In a request for further evidence, the director asked the petitioner to submit evidence to establish that it has a qualifying relationship with [REDACTED] Inc. The director requested the petitioner submit its annual report that lists all affiliates, subsidiaries, branch offices and percentage of ownership, and the petitioner's current state business license. The director also requested evidence of the ability of the petitioner, identified as [REDACTED] Family Restaurant, to pay the proffered wage, and stated that such evidence could be copies of annual reports, federal tax returns or audited financial statements. The director stated that all schedules and tables for any tax returns should also be submitted. The director also noted the beneficiary's claimed work experience and requested the beneficiary's federal tax returns from 1989 to 1992 and from 1999 to the present. The director also requested copies of the beneficiary's W-2 forms. The director also stated that if the petitioner was a sole proprietor, it should submit a statement of monthly expenses for the petitioner's family.

In response, the petitioner resubmitted the federal tax returns for [REDACTED] Inc. and submitted for the first time the 2003 federal tax return for the same corporation. The petitioner also submitted state of California tax documentation. Two notices, dated October 24, 2002, and May 5, 2004 respectively, identified the recipient of the state's correspondence as [REDACTED] Inc. [REDACTED] Family Restaurant, [REDACTED]. A third document from the City of Monrovia, dated May 31, 2003 is a business license renewal notice addressed to [REDACTED] Family Restaurant, [REDACTED] California. The federal income tax return for [REDACTED] for tax year 2003 also contains a Form 8824, Like-Kind Exchanges, that indicated an exchange of like-kind property effected in tax year 2003. According to this document, the equipment and goodwill of "[REDACTED] Restaurant" was given up on November 1, 2003 for the build-out of the "[REDACTED] restaurant". Supplements to the 2003 IRS Form 1120S show ordinary deductions for accounting, advertising, purchase, gross receipts or sales for entities identified as [REDACTED] and [REDACTED].

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).

² It is noted that the petitioner has utilized the services of [REDACTED] International Legal Services, Santa Monica, California throughout these proceedings to submit the I-140 petition and to respond to the director's request for further evidence. However, there is no G-28 found in the record for Mr. [REDACTED] to establish that he is an attorney or an accredited representative. Thus, the petitioner is considered self-represented.

██████████ The federal income tax return for 2002 only mentions the ██████████ entity under Statement 5, Other Assets, ██████████ will. In the 2001 federal income tax return submitted to the record, the federal supplemental information shows ordinary income; gross receipts or sales; cost of goods sold; purchases; ending inventory and ordinary deductions; real property; salaries and utilities for both entities identified as ██████████ and ██████████. With regard to the beneficiary's W-2 forms, these documents indicate that ██████████ ██████████, Glendora, California was the beneficiary's employer. The federal employer's identification number on the W-2 forms is the same as noted on the federal income tax returns submitted to the record.

As stated previously, the director denied the petition because the record contained discrepancies which called into question the petitioner's ability to establish its eligibility for the I-140 petition. The director stated that the federal income tax returns were for a business located in Glendora, California. The director noted that although the state of California notice showed both ██████████ Inc and the name ██████████ Family Restaurant, the address on the state notice differed from the petitioner's address noted on the I-140 petition, namely ██████████. The director also noted that the beneficiary's W-2 forms indicated that he worked for ██████████ in Glendora, California from 2001 to 2003 and that the W-2 information was not consistent with the information claimed on the Form ETA 750, namely that the beneficiary had worked at ██████████.

The director then stated that the discrepancies in the documentation had not been explained sufficiently, and that no clear evidence of the business relationship between the ██████████ Family Restaurant and the ██████████ Corporation had been submitted. The director then stated that without such evidence, Citizenship and Immigration Services (CIS) could not determine whether the petitioner is an affiliate or subsidiary of J & M ██████████ Inc., and thus could not determine whether the petitioner had established its ability to pay the beneficiary's proffered wage.

On appeal, Mr. ██████████ submits a letter on blank piece of paper. In his letter, dated May 17, 2005, Mr. ██████████ states the following:

[The beneficiary] has been a loyal employee for ██████████ Inc. for many years. The corporation includes ██████████ in Glendora, ██████████ Family Restaurant in Monrovia till [sic] October of 2003, when the sold at that time.

Mr. ██████████ does not submit any further documentation of the former or current corporate structure of ██████████ Inc., or of the claimed sale of ██████████ family Restaurant.

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 (Reg. Comm. 1967).

In the instant petition, the identity of the actual petitioner appears critical to establishing the regulatory criteria outlined in 8 C.F.R. § 204.5(g)(2). The letter provided by Mr. [REDACTED] on appeal is given limited evidentiary weight, for two reasons. First, Mr. [REDACTED] submits no documentation to further substantiate his assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Mr. [REDACTED] did not submit any specific evidence that his corporation ever owned [REDACTED] Family Restaurant as of its claimed 1997 establishment date and/or as of the 2001 priority date.

Second, the letter submitted to the record on appeal does not clarify the previous relationship between [REDACTED] Inc. and [REDACTED] Family Restaurant, but rather further confuses the record. Mr. [REDACTED] claims that [REDACTED] Family Restaurant was part of the petitioner's businesses until 2003. It is noted that the [REDACTED] Inc. federal income tax returns for tax year 2001 and 2003 do include assets, salaries and other items for [REDACTED] Family Restaurant in various supplements and explanations of deductions. Furthermore, it is noted that Form 8824, Like-Kind Exchanges, in [REDACTED] Inc.'s 2003 tax return indicated an exchange of like-kind property was effected in tax year 2003. According to this document, the equipment and goodwill of [REDACTED] Restaurant was given up on November 1, 2003 for the build-out for the [REDACTED] restaurant". Thus, by inference, some evidence is in the record that suggests [REDACTED], Inc., did own and operate the [REDACTED] Family Restaurant.

Nevertheless, the record is not clear that an S Corporation, such as [REDACTED], Inc. can operate distinct business entities under its corporate umbrella, or whether each of these businesses would have its own separate federal income tax return. Furthermore, as the director correctly noted, the beneficiary's wages for tax years 2001 to 2003 were paid by the [REDACTED], Inc. [REDACTED] business entity. The record contains no explanation for why the beneficiary would be paid by the [REDACTED] business, rather than by [REDACTED] Family Restaurant. As also correctly noted by the director, the W-2 documentation also conflicts with the information contained in the ETA 750, Part B, as to the beneficiary's claimed employment. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." Thus, the director's comment that the petitioner has not provided sufficient evidence to establish the relationship between [REDACTED] Family Restaurant and [REDACTED] Inc. is well founded.

In addition, Mr. [REDACTED] statement on appeal that the [REDACTED] Family Restaurant was sold in 2003 raises a question whether another petitioner, namely the current owner of [REDACTED] Family Restaurant, now exists that qualifies as a successor in interest to [REDACTED] Inc. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. 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. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). This status also requires that the successor in interest file an original I-140 petition, along with documentation establishing that it is the successor in interest to the original petitioner. In the instant petition, the record does not reflect whether the [REDACTED] Family Restaurant still exists, and under what ownership.

In sum, the record is confused, first, with regard to the relationship between [REDACTED] Family Restaurant and [REDACTED], Inc. as of the 2001 priority date. In addition, the record is confused as to whether

following the claimed sale of the ██████████ Family Restaurant in 2003, a new petitioner, as successor in interest, should have filed another I-140 petition.

For further clarification of the record, the AAO will discuss briefly how the petitioner's ability to pay the proffered wage during a given period is determined.

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. In the instant case, while ██████████ Inc. ██████████ established it had employed the beneficiary, ██████████ Family Restaurant, the petitioner identified on the I-140 petition and the Form ETA 750, did not submit any pertinent documentation as to the beneficiary's wages. It is noted that if ██████████ Inc. can establish that it was the actual petitioner of the beneficiary as of the 2001 priority date, the wages reported in the record would not establish that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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). 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 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 the proffered wage of \$24,024 per year from the priority date:

- In 2001, the Form 1120S stated net income³ of \$96,520.
In 2002, the Form 1120S stated net income of \$111,272.
- In 2001, the Form 1120S stated net income of \$103,796.

Therefore, for the years 2001 to 2003 [REDACTED] inc., if established as the actual petitioner, did have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage and of the 2001 priority date and onward. However, as noted previously, the actual petitioner as of the 2001 priority year date is not clearly established, and the actual petitioner, following the sale of [REDACTED] Family Restaurant in 2003, is not clearly established in the record.

Mr. [REDACTED] assertion on appeal cannot be concluded to outweigh the presently confused record that the actual petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

³ The AAO considers an S corporation's net income to be ordinary income (loss) from trade or business activities as reported on Line 21, unless the corporation reports income from other activities on lines one to six of Schedule K.