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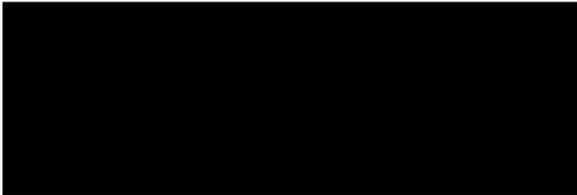


FILE: WAC 05 017 52448 Office: CALIFORNIA SERVICE CENTER Date: MAR 30 2007

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a motel manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (D)L), accompanied the petition. The director determined that the petitioner had not established that the beneficiary, [REDACTED] had acquired the necessary qualifying employment experience as of the priority date of the visa petition. The director also determined that the petitioner had not demonstrated its financial ability to pay the proffered wage beginning as of the priority date.

On appeal, the petitioner, Lincoln Motel, through counsel, submits additional evidence and asserts that the beneficiary obtained the qualifying work experience and that the petitioner has had the continuing ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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(l)(3) further provides:

(ii) *Other documentation—*

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate that it has had the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 13, 2001. The proffered wage is set forth as \$24.00 per hour, which amounts to \$49,920. The ETA 750B, signed by the beneficiary on April 5, 2001, indicates one period of past employment. The beneficiary states that he worked as a motel manager for the Comfort Inn at [REDACTED] Los [REDACTED] from April 1997 to February 2001.

Item 14 and item 15 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that two years of work experience is required in the job offered of motel manager. Item 15, lists other special requirements as "verifiable references."

The preference petition was filed on October 25, 2004. On part 5 of the petition, the petitioner claims that it was established in 1999, has two employees, a gross annual income of \$162,242, and a net annual income of \$35,737.

In support of the beneficiary's qualifying past work experience, the petitioner provided a letter, dated February 25, 2001, from "[REDACTED]". It describes the beneficiary's period of employment at the Comfort Inn from April 1997 to February 2001 and the nature of his duties. [REDACTED] does not identify himself or how he has such knowledge of the beneficiary's employment.

In support of the petitioner's ability to pay the proffered wage of \$49,920 per year, the petitioner provided copies of the petitioner's Form 1065, U.S. Partnership Return of Income for 2001, 2002 and 2003. The tax documents indicate that the petitioner, [REDACTED] is a general partnership. The partners identified on the partnership returns are [REDACTED]. The tax returns indicate that the petitioner files its taxes using a standard calendar year. The returns contain the following information:

	2001	2002	2003
Ordinary Income ¹	-\$ 6,656	\$5,830	\$35,737
Current Assets (Sched.L)	\$44,886	\$2,299	\$ 8,822
Current Liabilities (Sched.L)	\$ 676	\$ 465	\$ 465
Net Current Assets	\$44,210	\$1,834	\$ 8,357

Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² It represents a

¹ For the purpose of this review only, ordinary income will be treated as net income.

² 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

measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s)15 through 17 of Schedule L of its federal partnership return. If the petitioner'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 out of those net current assets.

The petitioner further provided copies of the partners' individual income tax returns (Form 1040). During the 2001-2003 period, the partners individually reported adjusted gross income(s) as follows:

██████████	██████████	████████████████████
2001-\$38,901	2001-\$26,414	2001-\$214,453
2002-\$45,218	2002-\$50,654	2002-\$141,579
2003-\$11,671	2003-\$50,012	2003-\$97,165
██████████		
2001-\$36,157		
2002-\$22,760		
2003-\$45,360		

Copies of two bank statements belonging to ██████████ were also provided to the record. A checking account statement indicates that on September 14, 2004, \$12,557.18 was on deposit in this account. A savings account statement indicates that on the same date \$24,571.03 was on deposit.

The director issued two separate requests for evidence. The first, dated May 16, 2005, requested copies of the petitioner's state quarterly wage reports and a copy of its business license. The director also advised the petitioner that the employment verification letter from the Comfort Inn was insufficient. He requested additional letters, contracts, and pay statements to verify that the beneficiary worked for that employer for the time and duration claimed. The director advised that the letter that had been submitted to the record was too vague and was not accompanied by contracts or pay statements.

In response, the petitioner, through former counsel, submitted another letter from the Comfort Inn signed by ██████████. This letter is dated June 6, 2005 and states that the beneficiary worked as a full-time manager during the years claimed. Former counsel's transmittal letter states that there were no employment contracts between the beneficiary and the Comfort Inn.

The director requested additional evidence again on June 16, 2005, instructing the petitioner to submit its 2004 federal tax return, requesting clarification of the relationship between ██████████ and the beneficiary, and again requesting additional documentation of the beneficiary's past employment at the Comfort Inn such as contracts and pay statements in corroboration of his employment. The director also requested that the petitioner provide ██████████'s job title.

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 response, the petitioner submitted its 2004 federal tax return consisting of a Form 1120S, U.S. Income Tax Return for an S Corporation. The tax return was filed as the [REDACTED] dba [REDACTED]" indicating that it was incorporated on March 14, 2003, and that the former partners are now each 25% shareholders in the corporation. The tax return contains the following information:

	2004
Ordinary Income	\$ 27,214
Current Assets (Sched.L)	\$ 7,439
Current Liabilities (Sched.L)	\$ 585
Net Current Assets	\$ 6,854

No documentation was provided relating to the beneficiary's past employment. Former counsel's transmittal letter asserts that [REDACTED] was the general manager and no longer works for the former employer. She states that the first shift manager, [REDACTED] can provide additional information. She also states that the partner of the petitioning employer is not related to the beneficiary and that Ahir is a common name in India. It is herein noted that the assertions of counsel do not constitute evidence in this regard. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).³

The director denied the petition on August 11, 2005. Determining that he could not consider the figures indicated on the partners' individual income tax returns, the director concluded that the petitioner's net current assets or ordinary income for 2001, 2002, and 2003 were not sufficient to cover the proposed wage offer of \$49,920. The director also found that in 2004, neither the \$27,214 reported in ordinary income nor the petitioner's net current assets of \$6,854 were sufficient to pay the proffered salary.

The director also noted that the petitioner failed to adequately respond to the director's request for additional corroborating documentation from the past employer. He concluded that that the beneficiary had not met the

³ In *Matter of Silver Dragon Chinese Restaurant*, the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful, job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification. In future proceedings, further corroboration of any blood or marital relationship between the beneficiary and the petitioner may be merited.

minimum requirements of two years of qualifying work experience as required by the terms of the labor certification.

On appeal, counsel asserts that the director erroneously concluded that he could not consider the incomes and assets of the petitioner's individual partners where the entity is a domestic general partnership. We concur. A general partnership is created by an agreement between two or more persons who contribute capital and/or their services to the organization. It carries with it unlimited joint and several liability for all debts incurred by the partnership. See *Barron's Accounting Handbook* 604 (3rd ed. 2000). For this reason, when determining a petitioner's financial ability to pay the proffered wage, the incomes and other readily available cash assets of the individual partners may be examined. In this case, that would apply to the 2001 and 2002 and part of 2003. For those periods, it would appear that sufficient resources would be available to the partnership, particularly from [REDACTED]'s income figures, to supplement the funds already shown on the partnership's federal returns. In March 2003, the record indicates that the petitioner incorporated. On appeal, counsel provides copies of selected 2005 bank statements held by the individual shareholders. For the purpose of determining a corporate petitioner's continuing ability to pay the proffered wage, the personal assets of the shareholders will not be included for consideration. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, the court 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." A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, 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. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period. In this case, the record does not indicate that the petitioner has employed the beneficiary.

It is further noted that CIS jurisdiction includes a determination of whether the petitioner is making a realistic job offer and an evaluation of the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305,1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will also 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*, supra. 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 taxable 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. It is also noted that the depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, 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. (Original emphasis.) *Chi-Feng* at 536.

On appeal, counsel also erroneously refers to the petitioner's "net current assets" on Schedule L of its tax returns as its "total assets." Counsel cites the *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004) as authority for this assertion. We reject counsel's argument in this regard as his calculation of the petitioner's net current assets would include buildings and other depreciable assets that would not be considered as readily available cash or cash equivalent resources to pay a proffered wage. With regard to the 2005 Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.⁴ This similarly applies to the selected AAO cases and the American Immigration Lawyers Association (AILA) 1994 minutes from a teleconference with the Vermont Service Center, cited by counsel on appeal. Moreover, the calculation of current assets, current liabilities and net current assets explained above is consistent with the guidelines set forth in the Yates memo.

Ranchito Coletero, 2002-INA-104 (2004 BALCA) is cited on appeal for the proposition that the overall circumstances of a sole proprietorship should be considered. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, the analysis applied to a sole proprietorship, which is an entity that is indistinguishable from the assets and liabilities of its individual owner, is only applicable to the petitioner when it was a general partnership and not as a corporation.

In this case, as noted above, the petitioner became a corporation in March 2003. However, only the 2004 corporate income tax return was provided, which covered the calendar year of 2004. No corporate income tax return was provided that would cover the period from March 2003 to December 31, 2003. Although the record suggests that the partners' income and/or assets would be appropriate to consider during 2001 and 2002 and would appear to establish the petitioner's ability to pay the \$49,920 proffered wage during that period, the information is incomplete as to 2003. The 2004 corporate tax return indicates that neither the petitioner's net income of \$27,214, nor its net current assets of \$6,854 was sufficient to pay the certified wage. We do not find that the petitioner has established its continuing ability to pay the proffered wage as of the visa priority date.

The petitioner must demonstrate that the beneficiary's qualifying work experience was acquired as of the April 13, 2001, priority date set forth on the labor certification. The director requested corroboration in the form of employment contracts and payroll records to verify the employment. On appeal counsel provides a

⁴See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

copy of another letter, dated October 3, 2005, signed by [REDACTED] on the letterhead of the Comfort Inn. He states that he is general manager of the motel and confirmed that the beneficiary was employed between 1997 and 2001, but that he was paid in cash and instructed to handle his own withholding. [REDACTED] states that the company retained no pay stubs or contracts because the beneficiary had no social security number. What has not been explained is how the company filed its taxes, state quarterly wage reports, Form 1099s, etc., and other required documentation without mentioning the beneficiary who was alleged to have been in the position of a manager during this four year period. We do not find that the director erred in determining that there was insufficient evidence to confirm that the beneficiary acquired the requisite qualifying work experience as of the priority date and has not met the minimum requirements set forth on the labor certification.

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.