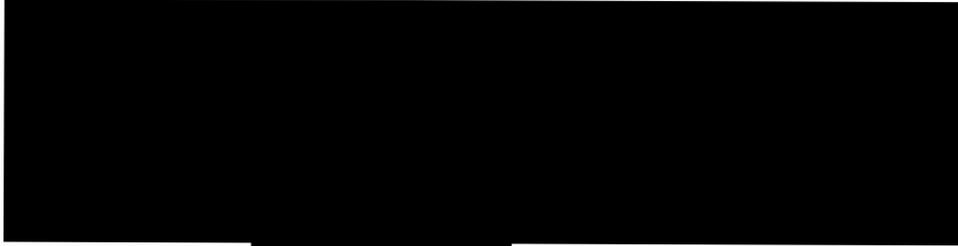




U.S. Citizenship  
and Immigration  
Services

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invasion of personal privacy**



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FILE: [Redacted]  
EAC-05-137-51016

Office: VERMONT SERVICE CENTER

Date: **MAY 24 2007**

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:



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 Acting Director (Director), Vermont 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. The petition is accompanied by a copy of Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL).<sup>1</sup> As set forth in the director's November 1, 2005 denial, 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. 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.

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

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<sup>1</sup> The record lacks an original Form ETA 750. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of Section 203(b)(3) of the Act be accompanied by a labor certification.

The regulation at 8 C.F.R. § 103.2(b) provides:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petitioner, *such as labor certifications*, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with [CIS].

(emphasis added).

The regulation at 8 C.F.R. § 204.5(g) provides: "In general, ordinary legible photocopies of such documents (*except for labor certifications from the Department of labor*) will be acceptable for initial filing and approval." (emphasis added). Counsel has not provided any authority permitting CIS to accept a photocopy of the ETA 750. The regulation at 20 C.F.R. § 656.30(e) provides for the issuance of duplicate labor certifications by the DOL only upon the written request of a consular or immigration officer. The record contains no evidence that the petitioner has obtained an official duplicate labor certification or requested the director to do so. Therefore, the evidence would not support an approval of the Form I-140 petition unless a duplicate original of the Form ETA 750 labor certification had first been obtained.

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 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 September 10, 2001. The proffered wage as stated on the Form ETA 750 is \$18.50 per hour (\$38,480 per year<sup>2</sup>). The Form ETA 750 states that the position requires two years of experience in the job offered.

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>3</sup>. On appeal, counsel submits statements of personal bank accounts for the owner of the petitioner. Relevant evidence in the record includes the petitioner's federal tax returns for 2000 and 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year runs from April 1 to March 31, 2002. On the petition, the petitioner claimed to have been established in 1982, to have a gross annual income of \$72,000, to have a net annual income of \$600, and to currently employ 4 workers. On the Form ETA 750B, signed by the beneficiary on August 15, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel submits copies of personal bank accounts of the owner of the petitioner and requests that the AAO take these documents into account to establish the petitioner's financial ability to pay the proffered wage to the beneficiary.

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

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<sup>2</sup> It is noted that there is a typo pertinent to the annual proffered salary in the director's decision.

<sup>3</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).

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 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. In the instant case, the petitioner did not submit any evidence for the beneficiary's compensation for 2001 onwards. Therefore, the petitioner failed to establish its ability to pay the proffered wage from the priority date in 2001 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. 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 Form 1120, U.S. Corporation Income Tax Return filed by [REDACTED] for 2000 and 2001.<sup>4</sup> Since the priority date in the instant case is September 10, 2001, the

<sup>4</sup> The AAO considers the tax returns of [REDACTED], as the petitioner's in the instant case since the petitioner's federal employer identification number on the Form I-140 is the same as the one on the tax returns for [REDACTED] although the record does not contain any evidence of the relationship between [REDACTED] and the petitioner.

petitioner's 2000 tax return is not necessarily dispositive. The petitioner's tax return for its fiscal year of 2001 (from April 1, 2001 to March 31, 2002) demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$38,480 per year from the priority date:

- In 2001, the Form 1120 stated a net income<sup>5</sup> of \$(4,884).

Therefore, for the fiscal year of 2001, the petitioner did not have sufficient net income to pay the proffered wage of \$38,480.

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.<sup>6</sup> 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.

- The petitioner's net current assets during its fiscal year of 2001 were \$4,537.

Therefore, for the fiscal year of 2001, the petitioner did not have sufficient net current assets to pay the proffered wage of \$38,480.

The record before the director closed on September 26, 2005 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE). As of that date the petitioner's federal tax returns for its fiscal year of 2002 and 2003 should have been available. However, the petitioner did not submit the petitioner's tax returns for 2002 and 2003. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. CIS cannot determine whether or not the petitioner had the ability to pay the proffered wage for the relevant years without the petitioner's tax returns or other regulatory-prescribed evidence for those years. The

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<sup>5</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

<sup>6</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.

petitioner failed to establish its ability to pay the proffered wage for 2002 and 2003 because it failed to submit its tax returns or other regulatory-prescribed evidence.

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, its net income or its net current assets.

Counsel asserts on appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel submits "copies of personal bank accounts of [redacted] the owner of [the petitioner]" and states that: "Please take these documents into account as they serve to document the owner's financial ability to pay the prevailing wage to [the beneficiary]." Counsel's reliance on personal assets of the petitioner's owner to establish the petitioner's ability to pay the proffered wage is misplaced. 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. The instant petitioner is structured as a C corporation, which is a separate and distinct legal entity from its owner, [redacted].

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has demonstrated that the beneficiary possessed the qualifying experience prior to the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The Form ETA 750 in the instant case states that the position of cook requires two (2) years of experience in the job offered. The beneficiary set forth his credentials on Form ETA-750B and signed his name on August 15, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been working as a full time cook (chef) for La France, [redacted] since April 1996. Prior to that, he represented that [redacted] in Poland employed him as a full time chef from March 1970 to December 1984, and that he worked as a casual domestic cook from February 1995 to April 1996. He does not provide any additional information concerning his employment background on that form.

The petitioner must 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains no experience letter from the beneficiary's former or current employer(s) verifying that the beneficiary possessed the qualifications as required by the Form ETA 750. The petitioner failed to demonstrate that the beneficiary possessed the required two years of experience prior to the priority date with regulatory-prescribed evidence.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.