

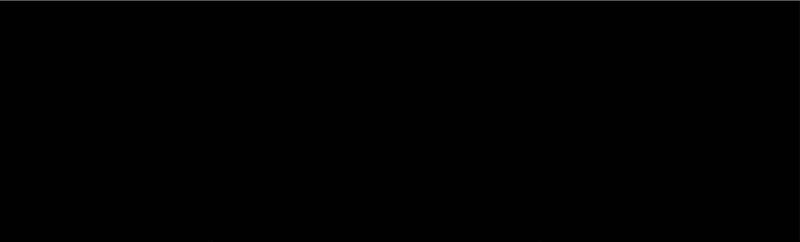
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U.S. Citizenship  
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FILE:



Office: TEXAS SERVICE CENTER

Date: NOV 26 2007

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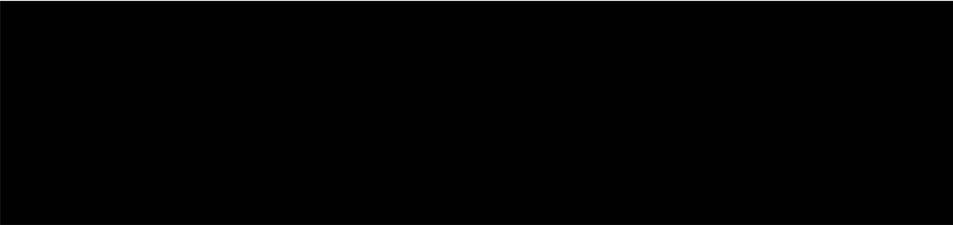
Petitioner:



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 Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty 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 (DOL). The director determined that the petitioner failed to establish 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.

As set forth in the director's July 28, 2006 denial, the single issue in this case is whether or not the petitioner 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 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).

The instant petition is for a substituted beneficiary.<sup>1</sup> The original Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$8.81 per hour (\$18,324.80 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. The I-140 petition was submitted on October 17, 2005. On the petition, the petitioner claimed to have been established in 1994, and to currently employ 15 workers. However, the petitioner did not provide information about its gross annual income and net annual income on the petition. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on August 4, 2005, the beneficiary did not claim to have worked for the petitioner.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>2</sup>. On appeal counsel submits the petitioner's Form SW-2 Department of Revenue and Taxation Employer Quarterly State Wage Report for the first and second quarters of 2006, Form GRT Department of Revenue and Taxation Government of Guam Monthly Gross Receipts, Use, Occupancy, Liquid Fuel, Automotive Surcharges, Tobacco and Alcoholic Beverages Tax Returns for the first six months of 2006, individual income tax returns and an affidavit from two shareholders of the petitioner, and copies of documents previously submitted. Other relevant evidence in the record includes the petitioner's corporate tax returns for 2001 through 2005, Form 941-SS Employer's Quarterly Federal Tax Return for the last two quarters of 2004 and the first two quarters of 2005, Form SW-2 for the last two quarters of 2004 and the first two quarters of 2005, and Form GRT for the first six months of 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner has submitted overwhelming evidence supporting its petition and that it is clear from the totality of the circumstances that the petitioner has the ability to pay the proffered wage.

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).

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<sup>1</sup> 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.*, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

<sup>2</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 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 beneficiary did not claim to have worked for the petitioner and the petitioner did not submit W-2 forms, 1099 forms or other documents showing the petitioner paid the beneficiary during the relevant years. The petitioner's Form 941-SS for the last two quarters of 2004 and the first two quarters of 2005, Form SW-2 for the last two quarters of 2004, the first two quarters of 2005 and the first two quarters of 2006, and Form GRT for the first six months of 2005 and 2006 do not show that petitioner paid the beneficiary any compensation during the relevant years. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner failed to establish its ability to pay through the examination of wages actually paid to the beneficiary. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$18,324.80 per year from 2001, the year of the priority date, to the present with its net income or its net current assets.

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). On appeal counsel asserts that the petitioner had a gross annual income of \$1.1 million for five straight years from 2001 to 2005 and that it paid payroll of \$118,994 in the second quarter of 2006. Counsel's reliance on the petitioner's gross annual 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 Chang* at 537

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001 through 2005. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year is based on a calendar year. The tax returns for 2001 through 2005 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$18,324.80 per year from the year of the priority date in 2001:

- In 2001, the Form 1120 stated a net income<sup>3</sup> of \$5,319.
- In 2002, the Form 1120 stated a net income of \$(47,997).
- In 2003, the Form 1120 stated a net income of \$(252,534).
- In 2004, the Form 1120 stated a net income of \$(40,423).
- In 2005, the Form 1120 stated a net income of \$(98,260).

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net income to pay the proffered wage.

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. We reject, however, counsel's idea on appeal that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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>4</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 2001 were \$12,160.
- The petitioner's net current assets during 2002 were \$131,629.
- The petitioner's net current assets during 2003 were \$10,062.
- The petitioner's net current assets during 2004 were \$23,165.
- The petitioner's net current assets during 2005 were \$(8,405).

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<sup>3</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

<sup>4</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the years 2002 and 2004, the petitioner had sufficient net current assets to pay the beneficiary the proffered wage of \$18,324.80, however, the petitioner failed to establish its ability to pay for 2001, 2003 and 2005 with its net current assets.

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 except for 2002 and 23004.

Counsel asserts on appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel submits 2005 individual tax returns for [REDACTED] and asserts that these two sisters owns 73 percent of the petitioner's shares and therefore, the petitioner should be considered as sole-proprietorship in determining the petitioner's ability to pay the proffered wage. However, the evidence in the record shows that the petitioner is structured as a corporation. 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.

Counsel refers to two decisions issued by the AAO concerning the consideration of the individual owner's assets in determining a petitioning sole proprietorship's ability to pay the proffered wage, but does not provide their published citations. Counsel is also citing [REDACTED] 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. 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, unpublished 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, [REDACTED] and the two AAO decisions referred by counsel deal with a sole proprietorship and are not directly applicable to the instant petition, which deals with a corporation.

Counsel's argument concerning the petitioner's size, longevity, and number of employees, however, cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1994 and employs approximately 15 employees. Counsel claims that the petitioner's gross annual income averaged over \$1.1 million during the five years from 2001 to 2005, and that the petitioner had the total assets of \$357,833 and paid payroll of \$118,894 during the second quarter of 2006. However, the tax returns for 2001 through 2005 in the record shows that the petitioner's gross receipts decreased from \$1,265,160 in 2001 to \$1,001,189 in 2005; the net current assets also decreased from \$131,629 in 2002 to \$(8,405) in 2005; during the five relevant years, the petitioner's net income was negative. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the relevant years were uncharacteristically unprofitable years for the petitioner. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and does not have the continuing ability to pay the proffered wage.

The majority shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for net income.

The documentation presented here indicates that [REDACTED] hold 50.1 and 40.9 percent of the company's stock respectively. According to the petitioner's 2001 through 2005 IRS Form 1120 Schedule Es (Compensation of Officers), the shareholders elected to pay themselves \$28,468 and \$28,000, respectively in 2001, and paid each of themselves \$35,500 in 2002, \$10,500 in 2003, \$15,600 in 2004 and \$33,000 in 2005. We note here that the compensation received by the company's owners during these five years was not a fixed salary.

CIS (legacy INS) has long held that it 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 the present case, however, counsel is not suggesting that CIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their restaurant business. On appeal, counsel submits an affidavit from [REDACTED] and [REDACTED] pledging that they are willing to forgo the amount of their compensation of officers each year to pay the beneficiary the proffered wage in 2001 through 2005. Counsel also submits [REDACTED] and [REDACTED]'s 2005 individual tax returns on appeal to support their affidavit.

[REDACTED]'s 2005 individual tax return shows that she had adjusted gross income of \$132,968 in 2005 and thus it appears possible for her to forgo all of her officer compensation from the petitioner that year since the officer's compensation of \$33,000 was only a small percentage of her gross income (less than 25%) and the rest of her gross income should be sufficient to support herself. The 2005 individual tax return for [REDACTED] shows that she had adjusted gross income of \$133,331 in 2005 and thus it appears possible for her to forgo all of her officer compensation from the petitioner that year since the officer's compensation of \$33,000 was only a small percentage of her gross income (less than 25%) and the rest of her gross income should be sufficient to support herself.

As previously discussed, the petitioner's net current assets for 2002 and 2004 were sufficient to pay the beneficiary the proffered wage. The record also shows that the petitioner paid officer's compensation of \$56,468 in 2001, \$21,000 in 2003 and \$66,000 in 2005. Therefore, the officers' compensation was sufficient to pay the beneficiary the proffered wage for 2001, 2003 and 2005, and thus the petitioner establish its continuing ability to pay the proffered wage with the officer's compensation for the years 2001 through 2005.

A review of the petitioner's amount of compensation paid out to the majority shareholders confirms that the proffered wage of \$18,324.80 can be paid by the petitioner. The AAO concurs with the arguments presented by counsel on appeal.

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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.