

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

FILE: [REDACTED]
EAC-05-199-52301

Office: VERMONT SERVICE CENTER

Date: JAN 31 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[REDACTED]

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a not-for-profit organization promoting international cultural exchanges. It seeks to employ the beneficiary permanently in the United States as a recording engineer. 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 May 1, 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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 DOL 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 August 20, 2001. The proffered wage as stated on the Form ETA 750 is \$52,603 per year. The Form ETA 750 states that the position requires six months of experience in the job offered or related occupation as a sound mixer. On the petition, the petitioner claimed to have been established in 1975, to have a gross annual income of \$512,700, to have a net annual income of \$212, and to currently employ five workers.

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.¹ On appeal counsel submits a letter dated May 30, 2006 from [REDACTED], the director of the petitioner, a letter dated May 25, 2006 from [REDACTED], the president of the petitioner and Heian Bunka Center, printout of the petitioner's accounting program, brochure, Heian Bunka Center, Inc.'s financial statements for 2002 through 2004 and printout of Heian Bunka Center, Inc.'s accounting program. Other relevant evidence in the record includes the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for 2001 through 2004, the petitioner's Form 1120 U.S. Corporate Income Tax Returns for 2001 through 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the 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 Sonegawa*, 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 the beneficiary's W-2 forms for the relevant years. The petitioner submitted its Form 941 for 2001 through 2004. Although these forms show how much total wages and tips, plus other compensation the petitioner paid to its employees in each quarter, they do not name each employee. Thus, it is not clear whether or not the petitioner paid any compensation to the beneficiary in the relevant years. 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 \$52,603 per year from 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).

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).

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 Chang* at 537.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001 through 2004. According to the tax returns, the petitioner is structured as a C corporation² and its fiscal year runs from June 1 to May 31. The petitioner's tax return for its fiscal year 2001 covers the priority date of August 20, 2001, and therefore, it is the tax return for the year of the priority date. The petitioner's tax returns for 2001 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$52,603 per year from the year of the priority date:

- In the fiscal year 2001 (6/1/01-5/31/02), the Form 1120 stated a net income³ of \$(175,111).
- In the fiscal year 2002 (6/1/02-5/31/03), the Form 1120 stated a net income of \$(16,734).
- In the fiscal year 2003 (6/1/03-5/31/04), the Form 1120 stated a net income of \$(89,080).
- In the fiscal year 2004 (6/1/04-5/31/05), the Form 1120 stated a net income of \$(240,160).

Therefore, for the years 2001 through 2004, 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. 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

² Although the petitioner claimed to be a not-for-profit organization on the petition and the Form ETA 750, the petitioner's tax returns submitted in the record do not support the petitioner's assertion.

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

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.⁴ 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 2001 were \$(445,177).
The petitioner's net current assets during its fiscal year 2002 were \$(604,395).
- The petitioner's net current assets during its fiscal year 2003 were \$(798,757).
- The petitioner's net current assets during its fiscal year 2004 were \$(948,896).

Therefore, for the years 2001 through 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

The record contains copies of the petitioner's statements of check register for 2001 through 2005. Counsel's reliance on the petitioner's expenses is misplaced. First, check register statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. Second, check register statements show the amount the petitioner spent in the relevant years, but cannot show the petitioner's net income or net current assets. Showing that the petitioner's wage and other expenses are in excess of the proffered wage is insufficient to establish its ability to pay a proffered wage. Third, although check register statements show some checks issued to the beneficiary that appear to be compensation, wages actually paid to the beneficiary should be established with W-2 forms, 1099 forms or other documentary evidence. Check register statements are not sufficient to demonstrate that the petitioner paid the beneficiary the proffered wage.

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.

On appeal, counsel asserts that the petitioner's Japanese parent company Heian Bunka Center Inc. has the financial strength to guarantee the beneficiary's proffered wage and submits a letter dated May 25, 2006 from [REDACTED] the president of the petitioner and Heian Bunka Center, Heian Bunka Center, Inc.'s financial statements for 2002 through 2004 and printout of Heian Bunka Center, Inc.'s accounting program to support its assertions.

However, the record does not contain any evidence showing that Heian Bunka Center is the parent company of the petitioner and responsible for the petitioner's obligations. The New York State Department of State Division of Corporation official corporation database website shows that Kampo Cultural Center, Inc. was

⁴According 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 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.

established on June 9, 1975 and is a New York active domestic business corporation, and Heian Bunka Center Incorporated was registered as a foreign business corporation on November 9, 1998, but is currently inactive.⁵ Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." In the instant case, the petitioner is a separate independent legal entity from its owner, [REDACTED] and from another enterprise, Heian Bunka Center, Inc. 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 [REDACTED] or Heian Bunka Center cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In addition, the petitioner did not submit any evidence to establish that Heian Bunka Center is the parent company of the petitioner and will be responsible for paying salaries and all other expenses of the petitioner.

Counsel'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 with regulatory-prescribed evidence. 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of recording engineer. The position requires six (6) months of experience in the job offered or six (6) months in the related occupation as sound mixer. The duties are delineated at Item 13 of the Form ETA 750A as

⁵ See http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_SEARCH_ENTRY (accessed on January 18, 2008).

“operate disk or tape recording machine to record music of phonograph recording sessions.” Item 15 of Form ETA 750A reflect “fluency in Japanese” as special requirements. Item 17 indicates that the beneficiary will supervise three (3) employees.

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) or 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.

The only evidence the petitioner submitted in the record to demonstrate the beneficiary’s qualifying experience is the experience letter dated June 16, 2005 from [REDACTED] of Drum Music Production, Inc.(DMP). This letter is on DMP’s letterhead and was signed by [REDACTED] as the president of DMP. This is a letter from the beneficiary’s former employer. However, this letter states that the beneficiary worked as a recording engineer “from June 2000 to December 1999.” While we can assume what the employer tried to state is that the beneficiary worked for them from December 1999 to June 2000, the AAO cannot determine whether the beneficiary possessed the requisite experience prior to the priority date and thus, qualifies for the proffered position in the instant case based on such an impossible statement. Furthermore, the letter does not verify the beneficiary’s full-time employment. Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary’s qualifying experience as a recording engineer or sound mixer, and further failed to establish that the beneficiary is qualified for the proffered position.

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.