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U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED]
EAC 05 160 51215

Office: VERMONT SERVICE CENTER

Date: JUL 02 2008

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty foreign food cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.¹ The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage from the priority date. 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 31, 2006 denial, the issue in this case is whether or not the petitioner has established that it has the continuing ability to pay the proffered wage from the priority date of April 30, 2001.

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 or seasonal nature, for which qualified workers are not available in the United States.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12 per hour or \$24,960 annually.

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.*,

¹ The petitioner seeks to substitute the current beneficiary for the original beneficiary of the approved labor certification.

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 appeal². Relevant evidence submitted on appeal includes counsel's brief, a letter, dated March 1, 2006, from United Bank stating that the petitioner has two business accounts since 2000 and 2002, a letter, dated March 1, 2006, from Union Bank stating that one of the petitioner's owners has a personal account with Union Bank since 1999, and a letter, dated March 1, 2006, from [REDACTED] CPA of Balagan, Inc. Other relevant evidence includes a copy of the petitioner's Certificate of Occupancy as of March 18, 2002, copies of the petitioner's 2002 and 2003 ABC licenses for the time periods July 12, 2002 through June 30, 2004, copies of the petitioner's 2001 through 2004 Forms 1120, U.S. Corporation Income Tax Returns, copies of the petitioner's 2001 and 2002 Forms 1120X, Amended U.S. Corporation Income Tax Returns, copies of restaurant reviews for Café Taj in McLean, Virginia, a copy of an income statement for the ten months ending October 31, 2005, a list of the petitioner's employees, 2001 personal bank statements for one of the petitioner's owners, copies of ETA 750s for additional employment-based immigrant petitions the petitioner filed on behalf of two other beneficiaries, and a request to withdraw one of the previously filed petitions. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The letter, dated March 1, 2006, from Union Bank states that the average balance for one of the petitioner's business accounts was \$34,412.55 for last year (2005) and is \$48,769.75 for this year (2006). The letter also states that the second account had an average balance of \$4,415.72 last year (2005) and a year-to-date (March 1, 2006) balance of \$8,878.84.

The second letter, dated March 1, 2006, from Union Bank states that one of the petitioner's owners has had an account with Union Bank since 1999 and that the average balance for last year (2005) was \$88,810.96 and is \$66,501.41 for this year (2006).

The letter, dated March 1, 2006, from the CPA states:

We are retained as Accountant by [the petitioner] for the past three years. As such, we have not completed the company tax return for the year 2005.

However, from the company records available in our system, we state the following facts:

1. Estimated gross revenue for 2005	\$668,143
2. Number of employees as of 12/31/2005	8
3. Total pay-roll reported in 2005	\$113,022
4. Total FICA taxes paid in 2005	\$ 17,293
5. The estimated reportable net income for 2005	\$ 26,633

We further certify that the company had paid all the pay-roll taxes fully in time.

The petitioner's 2001 through 2004 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$25,303, \$25,741, \$44,992, and \$16,089, respectively. The petitioner's 2001 through 2004 Forms 1120 also reflect net current assets of \$4,229, \$4,739, \$7,834, and \$24,385, respectively.

² 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 petitioner's 2001 and 2002 Forms 1120X reflect changes in total income and taxable income for those two years from the previously filed 2001 and 2002 tax returns.³

The copy of the petitioner's income statement for the ten months ending October 31, 2005 reflects total revenues of \$542,617, gross profit of \$316,527, and net income of \$46,557.⁴ It should be noted that counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the AAO will not consider the petitioner's income statement for the ten months ending October 31, 2005 when determining the petitioner's ability to pay the proffered wage of \$24,960 from the priority date of April 30, 2001 and continuing until the beneficiary obtains lawful permanent residence.

The petitioner's list of employees shows that on December 2, 2005, the petitioner employed the beneficiary and two other employees that were petitioned for by the petitioner with priority dates of 2001 or later. However, that list does not reflect any wages paid to those employees.

The 2001 personal bank statements for one of the petitioner's owners reflect balances ranging from a low of \$50,400 to a high of \$64,400.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage of \$24,960 based on its bank accounts and one of the owner's personal bank accounts. Counsel also states that the other two workers who are the beneficiaries of immigrant petitions filed by the petitioner are working for the corporation, that they are being paid the proffered wage, and, therefore, they are not paid from the petitioner's net profit.

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, 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).

³ The amended 2001 and 2002 tax returns are dated May 20, 2004. The petitioner did not submit the 2001 and 2002 tax returns that were originally submitted to the Internal Revenue Service.

⁴ The income statement for the ten months ending October 31, 2005 indicates that the petitioner is doing business as Super Polo. However, the petitioner has not submitted any evidence of the petitioner using this trade name. In fact, the petitioner's Certificate of Occupancy and ABC License list the name Tandoori Kabob House as its trade name.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750, signed by the beneficiary on May 3, 2005, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary to show that the petitioner employed the beneficiary in the pertinent years, 2001 through 2004. While the petitioner did submit a list of employees with the beneficiary's name on it, there was no mention of wages paid to the beneficiary. Therefore, the petitioner must establish that it had sufficient funds to pay the entire proffered wage from the priority date of April 30, 2001 and continuing to the present. Furthermore, the petitioner has submitted additional immigrant petitions for other employees. Thus, the petitioner must establish that it had sufficient funds to pay all the salaries of the beneficiaries with priority dates of 2001 and later.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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.

In 2001 through 2004, the petitioner was organized as a "C" corporation. For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A. The petitioner's tax returns demonstrate that its net incomes in 2001 through 2004 were \$25,303, \$25,741, \$44,992, and \$16,089, respectively. The petitioner could not have paid the proffered wage of the beneficiary and the proffered wages of its two additional sponsored beneficiaries. The petitioner would need a total of \$74,880 to pay the proffered wages of its the three employees from its net incomes in 2001 through 2004.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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 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.⁵ 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 a corporation'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's net current assets in 2001 through 2004 were \$4,229, \$4,739, \$7,834, and \$24,385, respectively. The petitioner could not have paid the proffered wage of \$24,960 to the beneficiary and the additional employees petitioned for from its net current assets in 2001 through 2004.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage from its bank accounts and the bank accounts of one of its owners.

Counsel is mistaken. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank 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. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that is considered when determining the petitioner's net current assets. Further, 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. 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."

⁵ 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 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.

On appeal, counsel also states that the other two aliens are working for the corporation; that they are being paid the proffered wage, and, therefore, they are not paid from the petitioner's net profit. Counsel has not, however, submitted any evidence in support of his assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was incorporated in 2001. The petitioner has provided tax returns for the years 2001 through 2004. However, none of the tax returns establish the petitioner's ability to pay the proffered wage of \$24,960 to the beneficiary and the proffered wages to the two additional employees petitioned for with priority dates in 2001 and later. In addition, there is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth or reputation within the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date of April 30, 2001.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

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.