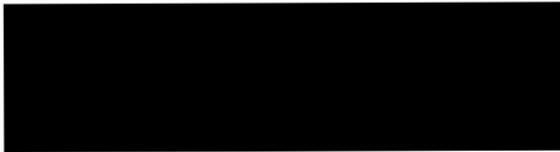




U.S. Citizenship  
and Immigration  
Services

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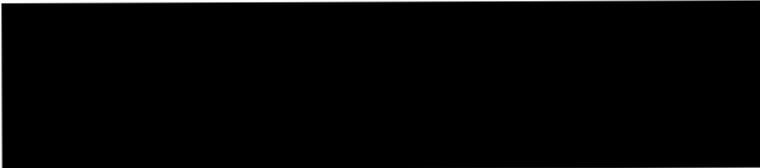
FILE: LIN 07 046 54401 Office: NEBRASKA SERVICE CENTER Date: JUL 16 2008

IN RE: Petitioner:  
Beneficiary:



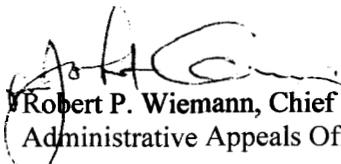
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a restaurant.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the beneficiary cannot be found qualified for classification as a skilled worker. 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 December 8, 2006 denial, the single issue in this case is whether or not the petitioner has the 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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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.<sup>2</sup>

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<sup>1</sup> The petitioner indicates that it operates under an assumed name, Aladdin Indian Restaurant, and that its actual corporate name is Sweets of Bengal, Inc. A search of the State of Michigan's website indicates that Sweets of Bengal, Inc. was automatically dissolved on July 15, 2003, prior to the filing of the ETA Form 750 and Form I-140 in the instant matter. See [http://www.cis.state.mi.us/bcs\\_corp/dt\\_corp.asp?id\\_nbr=24295A&name\\_entity=SWEETS%20OF%20BENGAL%20INC](http://www.cis.state.mi.us/bcs_corp/dt_corp.asp?id_nbr=24295A&name_entity=SWEETS%20OF%20BENGAL%20INC). (accessed July 2, 2008). If the petitioner pursues this matter further, it must demonstrate its active corporate entity status and provide evidence of the petitioner's fictitious name filings in the State of Michigan.

<sup>2</sup> The regulation at 8 C.F.R. § 204.5(l)(4) states in pertinent part as follows:

*Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

The Form ETA 750 submitted with the instant petition states that the proffered position requires four years of grade school and five years of high school education. The Form ETA 750 fails to support a classification of the beneficiary as a skilled worker under section 203(b)(3)(i) of the Act, as it does not require at least two years of training or experience. Since the Form ETA 750 does not support a skilled worker classification, the petition must be denied.

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 either 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 DOL. *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 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 January 14, 2005. The proffered wage as stated on the Form ETA 750 is \$8.00 per hour (\$16,640.00 per year).<sup>3</sup>

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>4</sup> On appeal, counsel submits a brief, three letters dated January 5, 2007, January 23, 2007 and February 6, 2007, respectively, from A [REDACTED] of Kamal Accounting in Detroit, Michigan regarding the petitioner's ability to pay the proffered wage; a letter dated January 29, 2007 from the shareholders of Sweets of Bengal, Inc.; the first page of three commercial leases for property between [REDACTED] and various landlords; a closing statement dated April 25, 2005 for property located at [REDACTED] Hamtramck, Michigan; an income statement for Sweets of Bengal dba Aladdin Sweets & Café for the year ending December 31, 2006;<sup>5</sup> and an

<sup>3</sup> As noted by the director, the petitioner listed the wages to be paid to the beneficiary per hour as \$7.20 on Form I-140 at Part 6, #9. The petitioner has not addressed this inconsistency on appeal.

<sup>4</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).

<sup>5</sup> This office notes that the income statement introduces another purported fictitious name, Aladdin Sweets & Café, for Sweets of Bengal. If the petitioner pursues this matter further, it must provide evidence of the petitioner's fictitious name filings in the State of Michigan. Further, 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

income statement for Showdesh Restaurant for the year ending December 31, 2006. Other relevant evidence in the record includes the 2005 IRS Form 1120S, U.S. Income Tax Return for Sweets of Bengal.<sup>6</sup> 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 an S corporation. On the petition, the petitioner claimed to have been established on July 13, 2000 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 30, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erroneously failed to request additional evidence from the petitioner prior to denying the petition;<sup>7</sup> that the petitioner's owners have agreed to personally guarantee payment of the proffered wage using their personal resources; and that the petitioner's sales are increasing due to introduction of new catering services.

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).

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 has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2005 or subsequently.

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

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ability to pay the proffered wage.

<sup>6</sup> The record contains a copy of IRS Form 1120S for Sweets of Bengal for 2003. Evidence preceding the priority date in 2005 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

<sup>7</sup> The regulation at 8 C.F.R. § 103.2(b)(8) provides that a petition may be denied if there is clear evidence of ineligibility, notwithstanding the lack of initial evidence. In the instant case, the director determined that the initial evidence submitted by the petitioner supported a decision of denial, based on the petitioner's inability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2) and the beneficiary's ineligibility for classification as a skilled worker. Therefore, the director's denial was proper without the issuance of a request for evidence.

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 gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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. The court specifically rejected the argument that CIS 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.

As previously noted, the petitioner, Aladdin Indian Restaurant, has not established that its corporate name is Sweets of Bengal, Inc. However, even if we assume that the federal income tax returns for Sweets of Bengal, Inc. are those of the petitioner, the petitioner has not established its continuing ability to pay the proffered wage as of the priority date. In 2005, the petitioner's IRS Form 1120S stated net income<sup>8</sup> of \$5,362.00. Therefore, for the year 2005, the petitioner did not have sufficient net income to pay the proffered wage of \$16,640.00.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>9</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. In 2005, the petitioner's IRS Form 1120S stated net current assets of \$12,023.00. Therefore, for the year 2005, the petitioner did not have sufficient net current assets to pay the proffered wage of \$16,640.00.

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<sup>8</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>9</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.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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, or its net income or net current assets.

On appeal, counsel asserts that the petitioner's owners have agreed to personally guarantee payment of the proffered wage using their personal resources. He supports this assertion with a letter dated January 29, 2007 from the shareholders of Sweets of Bengal, Inc. stating "that in case of any financial difficulty experienced by the Aladdin Sweets & Café, we will cover the expenses from our personal funds."<sup>10</sup> The petitioner's accountant also asserts in a February 6, 2007 letter that the petitioner's owners own another restaurant, Showdesh Restaurant, that the owners often combine revenues to cover expenses for both restaurants, and that the shareholders have sizeable equities in rental properties.<sup>11</sup> However, contrary to the assertions of counsel and the petitioner's accountant, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owners 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. Further, the petitioner has provided no evidence to establish that it operates under the assumed name of Aladdin Sweets & Café as referenced in the shareholders' January 29, 2007 letter.

Further, on appeal, counsel states that the petitioner's sales are increasing due to introduction of new catering services. However, he provides no support for this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 DOL. Further, the Form ETA 750 fails to support a classification of the beneficiary as a skilled worker under section 203(b)(3)(i) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>10</sup> This office notes that the guaranty does not specifically identify payment of the proffered wage to the beneficiary as an expense to be guaranteed.

<sup>11</sup> In an earlier letter dated January 5, 2007, the petitioner's accountant indicates that the petitioner's shareholders have "two additional businesses from which they are able to offset the differences at the Aladdin." The other two businesses are not named in that letter.