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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
WAC 05 048 54274

Office: CALIFORNIA SERVICE CENTER

Date: **JUL 25 2000**

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

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:

[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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a corporation that operates an Indian restaurant/catering business. It seeks to employ the beneficiary¹ permanently in the United States as a banquet manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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 denied the petition accordingly.

According to the petition, the business was established in 2000, and, at the time of preparation of the petition, employed five individuals.

The record demonstrated that the appeal was properly filed, timely and made 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.

The regulation at 8 C.F.R. § 103.5(A)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

Counsel has submitted additional evidence.

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.

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.²

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from ██████████, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3.

² The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

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 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.

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 DOL. See 8C.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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$866.02 per week (\$45,033.04 per year).

The director denied the petition on June 1, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and the subsequent appeal was dismissed by the AAO on December 5, 2006.

In support of the motion, counsel submits a legal brief and the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2004 and 2005.

Counsel asserts that "the original location" for the petitioner has been sold "although the corporation still exists." Counsel has not provided a new business address, details concerning the present state of the business nor has counsel indicated that the business is still operated as an Indian restaurant/catering business. Since the prevailing wage determination in the labor certification is dependent on geographic location, we cannot determine if the labor certification is still valid for the petitioner in its new business location. Counsel's assertion that a new facility has been purchased in the "same metropolitan statistical area" without independent, objective evidence to support the assertion is not evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel has made the following contention:

Employer's expansion plans for a banquet facility and actual photos of the facility were included in the application. The [AAO] decision does not discuss employer's business plan, his selection of the [the beneficiary] as the most capable and trustworthy candidate for this position [i.e. banquet manager], or her relocation in order to commence work with the employer.

A review of the record of proceeding indicates that no "employer's expansion plans for a banquet facility" were submitted into evidence. Six photocopies of photos of an un-named business location that presumably was the petitioner's former restaurant were provided as exhibits with the petition. No business plan was submitted into evidence. Counsel has provided no elaboration why the photos are relevant to the petitioner's ability to pay the proffered wage.

Counsel's characterization of the beneficiary as the most capable and trustworthy candidate for banquet manager would appear to relate to the beneficiary's qualifications rather than to the petitioner's ability to pay the proffered wage. Counsel has provided no elaboration why the beneficiary's relocation to the United States is relevant to the petitioner's ability to pay the proffered wage.

Counsel has made the following additional contention:

The business plan was heavily dependent on this position. As with any start-up business, there is always a "worst case" business plan in order to support the business in periods of lower case flow. The petitioner was not granted an opportunity to provide evidence of his long-term plan to invest in this key position in order to guarantee long-term profitability. The petitioner was dependent on this position since he himself is involved in several different businesses.

Since no business plan was submitted into evidence we have insufficient independent, objective evidence to understand or evaluate counsel's assertions. 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)). Counsel contends that the petitioner should have been granted an opportunity to provide further evidence of his long-term plan. There is no business plan³ in evidence or evidence that the petitioner was denied the right to submit evidence.⁴ Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

³ The petitioner has not submitted a business plan and audited cash flow statements, to demonstrate its overall financial position.

⁴ Both the AAO and CIS will always accept and review any evidence submitted by a petitioner although its probative value will be determined within the particular factual circumstances of the case. The AAO reviews appeals on a de novo basis. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). It is worth emphasizing that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The AAO notes that the petitioner did not submit its 2004 tax return on appeal.

Counsel asserts that “the decision takes the employer’s payment of wages out of context [i.e. a pay stub was introduced for the period May 13, 2005 to May 26, 2005, evidencing wages paid of \$10,875.00 year to date] and does not take into account the fact that the beneficiary was in India during the first few years that the labor certification was on file.” Counsel has not in her brief elaborated on this statement. It is not clear why the fact that the beneficiary had not entered the United States as counsel stated “during the first few years” is relevant to the petitioner’s ability to pay the proffered wage.

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 from the priority date. The petitioner has had ample time to submit additional wage evidence since according to the record the beneficiary has been in the employ of the petitioner since 2005.

Counsel asserts that the assets of the owner of the petitioner may be evidence of the petitioner’s ability to pay the proffered wage “in the case of a start-up operation in which it is axiomatic that a business owner may be required to invest additional personal capital in order to comply with the terms of a business plan.” Counsel has not submitted a business plan nor has the owner of petitioner contributed additional paid-in capital according to the tax returns submitted. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

According to counsel on motion, the ability of the corporation’s owner to invest his “personal assets to cover business overhead should have been permitted in this particular fact situation.” Counsel cites no case precedent or regulation to support her assertions. This issue was addressed in the previous AAO decision of December 5, 2006 at 7.

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. No evidence was introduced that the petitioner paid the beneficiary the proffered wage. A pay stub was introduced for the period May 13, 2005 to May 26, 2005, evidencing wages paid of \$10,875.00 year to date. Although the petitioner has had ample time to submit additional wage evidence, it has not done so. There is no regulation-prescribed evidence available to analyze whether the petitioner is able to pay the difference between the wages actually paid to the beneficiary and the proffered wage in that year. In 2005 the difference between wages paid the beneficiary in 2005 and the proffered wage is \$18,148.04.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng* at 537.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$45,033.04 per year from the priority date of April 26, 2001:

- In 2001, the Form 1120 stated net income⁵ of \$6,152.00.
- In 2002, the Form 1120 stated net income of \$31,404.00.
- In 2003, the Form 1120 stated net income of \$13,706.00.
- In 2004, the Form 1120 stated net income of <\$23,016.00>⁶.
- In 2005, the Form 1120 stated net income of \$26,885.00.

In no year for which tax returns have been submitted did the petitioner have sufficient funds to pay the proffered wage from net income or the difference between the wage paid for 2005 and the proffered wage for 2005.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has net income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage at any time between the years 2001 through 2005 for which the petitioner's tax returns are offered for evidence.

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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- The petitioner's net current assets during 2001, 2002, 2003, 2004 and 2005 were \$15,414.00, \$17,391.00, \$6,092.00, \$5,312.00 and \$8,412.00.

⁵ IRS Form 1120, Line 28 that states the petitioner's taxable income before net operating loss deduction and special deductions, which will be referred to as net income in these proceedings.

⁶ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁷ 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.

Therefore, for the period 2001 through 2005 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets, net income or the difference between the proffered wage and wage paid for 2005.

Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a banquet manager will significantly increase the petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel contends that the owner of the petitioner should have been granted an opportunity to provide further evidence of a long-term business plan or additional paid-in capital.. Although counsel has not further elaborated upon this statement, by implication, counsel is requesting that the petitioner's owner's personal assets or the assets of other commonly controlled organizations be considered as evidence to pay the proffered wage. 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. 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." No business plan was submitted by the petitioner although ample time has passed during these proceedings for counsel to submit a detailed business plan supported by audited financial statements.

Counsel's contention cannot be concluded to outweigh the evidence presented in the five corporate tax returns submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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 motion to reopen is granted and the decision of the AAO dated December 5, 2006 is affirmed. The petition is denied.