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**U.S. Citizenship
and Immigration
Services**

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FILE:

EAC 03 101 50381

Office: VERMONT SERVICE CENTER

Date:

MAY 12 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 for

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 nature of the petitioner's business is a Korean/Japanese restaurant. It seeks to employ the beneficiary¹ permanently in the United States as a specialty cook, Korean cuisine. 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. The petition is also accompanied by an ETA 750, Part B, for the substitute beneficiary. 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.

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.

As set forth in the director's denial dated July 11, 2006, 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.

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 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

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 Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

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).

Here, the Form ETA 750 was accepted on April 17, 2001.² The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$39,291.20 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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.³

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1120S tax return for 2001 (two pages only); an explanatory letter from counsel dated January 11, 2006; a statement by [REDACTED] dated December 22, 2005, with four exhibits; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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 in 2000 and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$1,956,060.00 and \$2,982,944.00 respectively. On the Form ETA 750, signed by the substitute beneficiary on February 1, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel makes the following assertions.

Counsel states that "Seoul Manor" (i.e. Seoul Manor Ltd.) does business as "Young Bin Kwan" that is also known as "Evolution Cuisine."

According to the petition, the labor certification application and petitioner's tax record submitted for 2001, Seoul Manor Ltd. was incorporated on April 14, 2000. The petition and labor certification application

² It has been approximately six years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

³ 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).

identify the petitioner as Seoul Manor Ltd. d/b/a Young Bin Kwan Restaurant and the tax return provided a Federal Employer Identification Number (FEIN) which is # [REDACTED]⁴

Counsel has submitted a U.S. Internal Revenue Service Form 1120S tax return for Evolution Cuisine Inc. that states the same address as the petitioner but provides a different FEIN which is # [REDACTED].

Counsel states that "Seoul Manor" has two affiliated companies that are Seoul Plaza Entertainment Inc. and S.K. New York, LLC.

According to tax returns submitted by counsel Seoul Plaza Entertainment Inc.'s FEIN is # [REDACTED] and S.K. New York, LLC's FEIN is # [REDACTED].

Based upon the above information, Seoul Manor Ltd., Evolution Cuisine Inc., Seoul Plaza Entertainment Inc. and S.K. New York, LLC are separate corporations.

According to counsel, Seoul Manor Ltd., Seoul Plaza Entertainment Inc. and S.K. New York, LLC are affiliated companies run by a single family and together the entities "... are the largest Korean restaurant & banquet halls & shopping centers in ... [the] New York City area." Counsel provides on appeal the total combined net current assets and net income figures for all three companies for 2001, 2002, 2003 and 2004.

Counsel also states on appeal that the beneficiary commenced working for the petitioner on September 1, 2003. However, based upon the Wage and Tax Statements (W-2) submitted, the beneficiary was employed by Evolution Cuisine Inc. in 2003 and 2004 and not by the petitioner.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes the following documents: a statement by [REDACTED], C.P.A. dated December 22, 2005 that Evolution Cuisine Inc. has the ability to pay the proffered wage; the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2001 and 2002; the U.S. Internal Revenue Service Form 1120 tax returns for Evolution Cuisine Inc. for 2002, 2003 and 2004; the IRS Form 1120 tax return for S.K. New York, LLC for 2001; the U.S. Internal Revenue Service Form 1120 tax returns for Seoul Plaza Entertainment Inc. for 2002 and 2003; Wage and Tax Statements (W-2) from Evolution Cuisine Inc. for 2003 and 2004 to the beneficiary; and U.S. Internal Revenue Service Forms 1040 and 1040A tax returns for the beneficiary for 2003 and 2004.

Counsel provides on appeal an appraisal report of the "Seoul Plaza Shopping Center" that is owned by S.K. New York, LLC. We reject, however, the idea 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. CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Counsel refers to a "Certificate of Eligibility" issued by the City of New York to the petitioner (but has not provided it) and provides on appeal a list of tax exemption figures for years 2001 to 2006 "which [according to counsel] has the same effect as the net profit for the company." Counsel submits an agreement between the

⁴ The FEIN is obscured for privacy purposes.

City of New York and S.K. New York, LLC made in June 1999 regarding training of laborers, electricians and plumbers.

As a preface to the following discussion, Citizenship and Immigration Services (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. *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.” Therefore, the net income, net current assets or wages paid to the beneficiary by other corporations cannot be utilized to demonstrate the petitioner’s ability to pay the proffered wage from the priority date.

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 (BIA 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 from the priority date.

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); *Ubada 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 sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner’s gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The record closed before the director on January 12, 2006, with receipt of the petitioner’s response to the director’s request for evidence (RFE) dated October 18, 2005. The regulation at 8 C.F.R. § 204.5(g)(2) states

that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its 2003 and 2004 tax returns. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The petitioner's Form 1120S⁵ tax return demonstrates the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120S stated net income (Schedule K, line 23) of \$11,565.00.

Since the proffered wage is \$39,291.20 per year per year, the petitioner did not have sufficient net income to pay the proffered wage for year 2001.⁶

If the net income the petitioner demonstrates it had available during the 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

⁵ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income, credits, deductions or other adjustments from sources other than from a trade or business, net income is found on Schedule K. As is found here, if the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, then in that case net income is found on line 23 of Schedule K for tax years 2001, 2002 and 2003. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

⁶ The petitioner provided its 2002 federal income tax return on appeal. According to regulation, copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined. No tax returns after year 2002, and no wage statements (W-2 or 1099-MISC statements issued by the petitioner to the beneficiary) were provided. In his RFE, the director had requested that the petitioner submit the petitioner's tax returns, annual reports or audited financial statements for 2002, 2003 and 2004. As already stated, a petitioner must provide reasonably obtainable tax returns when requested. See *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*); See also *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), and, *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the tax returns in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the 2002 tax return submitted on appeal.

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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 <\$356,490.00>.

Therefore the petitioner did not have sufficient net current assets to pay the proffered wage in 2001.

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, or its net income or net current assets.

Beyond the decision of the director, CIS electronic records indicate that the petitioner has filed other I-140 petitions which have been pending during the time period relevant to the instant petition.⁸ If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

The record in the instant case as found in the director's RFE dated October 18, 2005, contains information about the proffered wages for the beneficiaries of other petitions submitted by the petitioner stating that their salaries total approximately \$400,000.00. There is no information about the current immigration status of those beneficiaries, whether those beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to those beneficiaries. Furthermore, no information is provided about the current employment status of those beneficiaries, the date of any hiring and any current wages of those beneficiaries.

Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also

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.

⁸ CIS identification numbers LIN 07 165 52660; LIN 06 257 52507; LIN 06 256 52476.

establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certifications.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.