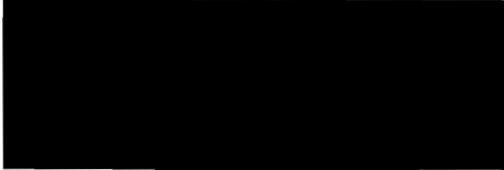


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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **SEP 24 2008**
SRC 06 172 53157

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:



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 "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 December 28, 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 August 28, 2003.

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 August 28, 2003. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour or \$20,800 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., 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 appeal¹. Relevant evidence submitted on appeal includes counsel's brief, a copy of a 2006 personal statement of assets, liabilities and net worth for the petitioner's owner, copies of the 2003 through January 2007 personal bank statements for the petitioner's owner, and copies of the petitioner's 2003 through third quarter 2006 Forms 941, Employer's Quarterly Federal Tax Return. Other relevant evidence includes copies of the petitioner's 2003 through 2005 Forms 1120, U.S. Corporation Income Tax Returns, copies of the petitioner's 2003 through 2005 Forms W-3, Transmittal of Wage and Tax Statements, copies of the 2003 through 2005 Forms W-2, Wage and Tax Statements, for the petitioner's staff (the beneficiary did not work for the petitioner in 2003 through 2005), copies of the petitioner's bank statements for 2003 through July 2006, copies of the 2003 and 2004 Forms 1040, U.S. Individual Income Tax Returns, for the petitioner's owner, and copies of the petitioner's 2003 and 2004 compiled financial statements.² The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2003 through 2005 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions of \$9,311, \$2,927, and \$5,894, respectively. The petitioner's 2003 through 2005 Forms 1120 also reflect net current assets of \$18,503, \$6,458, and -\$3,919, respectively.

The 2003 and 2004 Forms 1040 for the petitioner's owner reflect adjusted gross incomes of \$93,003 and \$157,451, respectively.

The 2003 through 2005 Forms W-2 for the petitioner's staff does not show that the beneficiary was employed by the petitioner in 2003 through 2005.

The petitioner's 2003 through July 2006 bank statements reflect balances from a low of \$565.09 in January 2004 to a high of \$38,698.48 in March 2006.

The 2006 statement of assets, liabilities, and net worth for the petitioner's owner shows that the owner's net worth is \$1,685,956.

On appeal, counsel asserts:

██████████ who signed the labor certification application, the G-28, and the I-140 on behalf of the petitioner (XXX) and who is the sole owner, officer, and shareholder of the corporation that owns [the petitioner], submitted personal income tax returns that showed \$93,003

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

² 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. 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 2003 and 2004 compiled financial statements when determining the petitioner's continuing ability to pay the proffered wage of \$20,800 from the priority date of August 28, 2003.

available in 2003 and \$157,451 in 2004. These amounts would have been more than enough to absorb the cost of all or part of a \$20,800/year salary and still provide comfortably for Mr. [REDACTED] family. The business bank statements also show many times the amount needed to pay the proffered wage. The USCIS argues that it should not consider the 2003-2005 bank statements because the tax returns were available for those years. However, the regulation states only that the petitioner must submit tax returns, annual reports, or audited financial statements to show ability to pay. The regulation does not state that the USCIS is forbidden to consider other evidence. 8 C.F.R. § 204.5(g).

In addition, the petitioner argues that the USCIS should take [REDACTED]'s personal assets into consideration because [REDACTED] as the sole shareholder of the corporation and owner of the restaurant, is in the same situation as a sole proprietor. He is taxed differently, but the business circumstances are the same. If [REDACTED] individual tax returns are taken into consideration, then the tax returns do show that the petitioner has the ability to pay the proffered wage. [REDACTED] 2003-2005 individual tax returns are already included in the record; see the copy of his 2006 statement of personal assets, liabilities, and net worth, now submitted as Exhibit C. The petitioner also submits copies of [REDACTED] personal bank statements for 2003, 2004, 2005, and 2006 as Exhibit D in order to refute the USCIS's allegation that the business bank statements previously submitted included personal assets such as rent payments on other real estate and [REDACTED] salary. The petitioner's business and personal assets over the past three years show consistent prosperity and ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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, 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 August 1, 2003, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2 or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary to establish that the petitioner employed the beneficiary in the pertinent years, 2003 through 2005. Therefore, the petitioner has not established that it employed the beneficiary in 2003 through 2005 and must show that it had sufficient funds to pay the entire proffered wage of \$20,800 from the priority date of August 28, 2003 and continuing to the present.

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 federal case law. See *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*, 719 F. Supp. at 537

In 2003 through 2005, 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 2003 through 2005 were \$9,311, \$2,927, and \$5,894, respectively. The petitioner could not have paid the proffered wage of \$20,800 from its net incomes in 2003 through 2005.

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.³ 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

³ 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.

current assets. The petitioner's net current assets in 2003 through 2005 were \$18,503, \$6,458, and -\$3,919, respectively. The petitioner could not have paid the proffered wage of \$20,800 from its net current assets in 2003 through 2005.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage based on its bank statements, the sole shareholder's individual income tax returns, and the sole shareholder's personal bank statements.

Counsel's reliance on the balances in the petitioner's bank account 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 return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

In addition, the petitioner is organized as a corporation, 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). Therefore, 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. 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 AAO will not consider the owner's personal assets or bank statements when determining the petitioner's ability to pay the proffered wage of \$20,800.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, 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 Sonogawa*, 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 1977.⁴ The petitioner has provided tax returns for the years 2003 through 2005. However, none of the tax returns establish the petitioner's ability to pay the proffered wage of \$20,800. In addition, the petitioner has not provided enough evidence to establish that the business has met all of its obligations in the past or to establish its reputation throughout the industry. The petitioner has also not shown that the years 2003 through 2005 were exceptionally difficult years. Furthermore, while CIS will consider the petitioner's gross income, wages paid to its employees, and longevity where the petitioner has demonstrated by its tax returns that it had the ability to pay the proffered wage in some of the years as represented by those tax returns, in this case, the petitioner has not demonstrated that it had the ability to pay the proffered wage in any of the pertinent years (2003 through 2005). 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.

For the reasons discussed above, the assertions of counsel 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.

⁴ It is noted that on the Form I-140, the petitioner stated that it was established in 1984.