U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: EAC 00 195 50387 Office: VERMONT SERVICE CENTER Date: AUG 11 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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, Director
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 Chinese 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, accompanies the petition. 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.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on December 27, 1999. The proffered salary as stated on the labor certification is $10 per hour or $20,800 per year.

With the petition, counsel submitted a copy of the petitioner's 1998 and 1999 Form 1120, U.S. Corporation Income Tax Return, a copy of the petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the quarter ending March 31, 2000, and copies of the petitioner's bank statements for January, February, and March of 2000. The 1998 tax return reflected a taxable income before net operating loss deduction and special deductions of $1,670 and net current assets of $20,857. The 1999 tax return reflected a taxable income before net operating loss deduction and special deductions of -$440 and net current assets of $8,033. The petitioner's Form 941 for the quarter ended March 31, 2000 indicated that the beneficiary did not work for the petitioner during that quarter. The bank statements for January, February, and March of 2000 reflected ending balances of $3,480.89, $1,895.73, and $5,519.53, respectively.

The director considered this documentation insufficient, and, on September 8, 2000, he requested additional evidence of the petitioner's ability to pay the proffered wage. The director specifically requested evidence of

prior petitions submitted, copies of the petitioner's 1997 and 1998 income tax returns with all supporting schedules for the business, and copies of Forms W-2, 1099, W-3, and 1096 for 1998 and 1999.[1]

In response, counsel provided copies of the petitioner's 1997 and 1998 Forms 1120, U.S. Corporation Income Tax Returns, copies of the petitioner's 1998 and 1999 Forms W-3, Transmittal of Wage and Tax Statements, copies of 1998 and 1999 Forms W-2, Wage and Tax Statements, for the petitioner's employees, and Forms 941, Employer's Quarterly Federal Tax Return, for the quarters ended June 30, 2000 and September 30, 2000. The 1997 tax return reflected a taxable income before net operating loss deduction and special deductions of $9,659 and net current assets of $62,279. The 1998 taxable income and net current assets are stated above.

The director determined 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, on April 4, 2001, denied the petition.

On appeal, counsel submits copies of the petitioner's 2000 and 2001 Forms 1120, U.S. Corporation Income Tax Returns, and copies of the petitioner's bank statements for the period December 1999 through February 2001. The 2000 tax return reflects a taxable income before net operating loss deduction and special deductions of -$15,076 and net current assets of -$12,923. The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of $13,117 and net current assets of $3,661. Counsel states:

> It appears from your NOD of April 4, 2001, that the employer's petition is denied on erroneous conclusion that the employer did not submit 199[9] business tax return and a finding of the petitioning employer's inability to pay the proffered wages. Your said letter has failed to point out the controlling provision/s and/or the regulation/s which define an employer's ability [to] pay, as required. Failing to define the threshold requirement of net income an/or taxable income to overcome the denial and failing to specify the employer's inability to pay, ignoring the evidence in the record, without pointing [out] any shortcoming in employer's ability to pay, appear to be legally insufficient reasons for denial.
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> The very reason that the petitioner has offered permanent employment to the captioned applicant is to increase its business with a permanent cook in its kitchen which will

[1] It is noted that the director also requested evidence of the petitioning owner's personal expenses, number of family members, and cost of living in Virginia Beach, Virginia for 1999. Since the petitioner is a corporation, this evidence is not required and cannot be used in determining the ability of the petitioner to pay the proffered wage. 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.

> definitely increase its business. Lack of stable and permanent cooks in the area of employer's operation prompted it to file this petition in the first place. Needless to say that unavailability of Chinese cooks in the past has been predominant reason for not having substantial profits in the restaurant in the past few years. Undoubtedly, your office has focused solely on the 1999 tax return, which focus is in contradiction with and in violation of the relevant provisions of the INA and/or the regulations. Specifically, 8 CFR Sec. 204.5(g)(2), does not give any indication as to equate employer's ability to pay wages to that of income reflected in the tax returns only. The total assets of the employer as indicated on the tax returns, the net losses ($440.00 for 1999), and the bank statements of the employer, prove that the employer is in a comfortable financial position to pay the proffered wage to the applicant.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the petitioner did not establish that it had employed the beneficiary in 1999.

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 also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

A further means of determining the petitioner's ability to pay the proffered wage includes reviewing the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] Net current assets identify the amount of "liquidity" that the petitioner has as of the date

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[2] A petitioner's "current assets" consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner's balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner's "current liabilities" are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner's accounts

of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

The 1997 and 1998 tax returns reflect a taxable income before net operating loss deduction and special deductions of $9,659 and $1,670, respectively. Because the priority date of the petition is December 27, 1999, the petitioner's 1997 and 1998 tax returns have no direct relevance to the petitioner's ability to pay the proffered wage and will not be considered as evidence of the petitioner's ability to pay the wage beginning on the priority date and continuing.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a cook will significantly increase profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. 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).

Counsel cites several unpublished decisions and several BALCA decisions in an effort to convince CIS that other forms of evidence must be considered in place of the petitioner's federal tax returns. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In addition, CIS is not bound by any BALCA decisions and will only consider them as supplemental evidence.

Counsel asserts, "Section 204.5(g)(2), on its face, refers to "additional evidence" which must be considered when submitted by the employer, which your office has failed to follow." The unambiguous language of the regulation clearly indicates what the basic evidentiary standard is to determine the ability to pay. There is nothing to indicate that the three basic evidentiary forms outlined in the regulation, e.g., federal tax forms, annual reports, and audited financial statements, are to become secondary or tangential evidence. Rather, the regulations clearly state that in "appropriate cases" CIS might request or a petitioner might submit additional evidence such as bank accounts, profit/loss statements, or personnel records. What is required is verifiable evidence that supports the entire record. Moreover, counsel has not sufficiently explained why the petitioner's tax returns are inapplicable or otherwise paint an inaccurate financial picture of the petitioner.

Even though the petitioner submitted its commercial bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage, there is no proof that they somehow represent additional funds beyond those reflected on the tax returns, such as the cash stated on Schedule L, considered in determining net current assets.

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payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The 1999 tax return reflects a taxable income before net operating loss deduction and special deductions of -$440 and net current assets of $8,033. The petitioner could not pay the proffered wage in 1999 from either its taxable income or its net current assets.

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The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of $13,117 and net current assets of $3,661. The petitioner could not pay the proffered wage in 2001 from either its taxable income or its net current assets.

Counsel states that where a "number of workers have been employed by the employer, copies of payroll records, 941s, state reports, W-2/W-3 forms, bank statements, and/or the tax returns substantiating that a number of other workers have actually been paid, constitutes substantive evidence of the employer's ability to pay the proffered wage to the beneficiary." While the above-mentioned forms might help demonstrate the ability to pay the proffered wage, these types of documents generally in and of themselves do not present the entire picture. It is the petitioner's burden to present demonstrable and verifiable documentation to support the claim. The mere fact that a corporation has paid wages in the past is not sufficient evidence of its ability to pay the proffered wage.

In summary, the petitioner has not established that it had the ability to pay the proffered wage at the priority date and continuing.

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.