**U.S. Department of Homeland Security**
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Washington, DC 20529

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

[redacted]

FILE: EAC 02 083 52479 Office: VERMONT SERVICE CENTER Date: AUG 16 2004

IN RE: Petitioner: [redacted]
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:

[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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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**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 restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence relevant to the petitioner's principal shareholders and asserts that it establishes the petitioner's ability to pay the proffered wage.

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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 26, 2000. The proffered wage as stated on the Form ETA 750 is $11.87 per hour, which amounts to $24,689.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner as of August 1996.

On the petition, the petitioner claims to have been established in 1995, to have a net annual income of $150,000, and to currently employ eight workers. In support of the petition, the petitioner submitted no evidence of its ability to pay the proffered wage, but submitted a letter from one of the petitioner's principal shareholders, Mr. Chong Up Lee, as an endorsement of the beneficiary's experience as a cook for the petitioner since August 1996.

Because the director deemed the initial evidence submitted with the petition insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 22, 2002, the director requested additional evidence pertinent to that ability. The director advised the petitioner that it must demonstrate this ability to pay the beneficiary's wage offer as of the priority date and continuing until the beneficiary gains lawful permanent resident status. The director specifically requested that the petitioner provide

a copy of its 2000 federal tax return, copies of its quarterly federal tax returns for 2000, copies of the Wage and Tax Statements (W-2s) for all of the workers it employed for the year 2000, copies of its Transmittal of Wage and Tax Statements (W-3) for 2000, and copies of the petitioner's bank statements, which shows monthly ending balances for the year 2000.

In response, the petitioner did not submit copies of its bank statements, but did submit a copy of a 2000 W-3 under the name of "Riggs Seafood and Crabs, LLC" and a copy of a 2000 W-3 under the name of "Riggs Seafood, Inc." Each entity has a different employer identification number (EIN). As the petitioner failed to complete all of Part 1 of the I-140, namely the box for its IRS tax number, we cannot determine if either EIN relates to the petitioner. One W-3 shows that total wages of approximately $62,000 were paid in 2000. The other W-3 shows that total wages of approximately $101,000 were paid in 2000. Copies of eight W-2s, issued by Riggs Seafood and Crabs, LLC, including two in the names of the petitioner's principal shareholders, were also submitted. Copies of seven W-2s, including two in the names of the petitioner's principal shareholders, accompanied the Riggs Seafood, Inc. W-3. With the exception of one person, the employees' W-2s were issued to the same individuals by both entities. None of the W-2s bear the beneficiary's name.

The AAO notes here, that with regard to the petitioner's ability to pay the proffered salary, the petitioner offered no explanation of the discrepancies between the evidence from Riggs Seafood and Crabs, LLC and Riggs Seafood, Inc., or clarified the position of the petitioner, "Seafood and Crabs Restaurant," in relation to either one of these entities. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988). For the reasons set forth below, the AAO concurs with the director's denial based on the petitioner's failure to establish its continuing ability to pay the proffered wage, but also finds that even if the financial documentation, primarily from Riggs Seafood, Inc., had demonstrated a capacity to pay the beneficiary's wage offer, the petitioner would additionally have to demonstrate that it is the same entity as Riggs Seafood, Inc.

The petitioner also submitted Form 1120, U.S. Corporation Income Tax Return for Riggs Seafood, Inc., for the year 2000 in response to the director's request for additional evidence. The tax return lists the same address as the petitioner's address stated on the visa petition. If taken to represent the petitioner's financial position during that period, it shows that the petitioner declared -$17,874 as net income in 2000. Schedule L of the tax return reflects that the petitioner reported $10,467 in current assets and declared no current liabilities, resulting in $10,467 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] Besides reviewing a petitioner's net income during a given period, CIS will also examine a petitioner's net current assets in connection with its ability to pay a beneficiary's proposed wage. A corporation's year-end current assets and current liabilities are shown on Schedule L. 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 current assets.

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[1] 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On August 5, 2002, the director initially denied the petition due to abandonment. Counsel submitted a motion to reopen with copies of the previously submitted materials, including a copy of Riggs Seafood, Inc.'s Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. The director agreed to reopen the decision and reviewed the financial information submitted in response to the director's request for evidence. On November 19, 2002, the director denied the petition, citing the petitioner's lack of necessary funds to cover the proffered wage as shown on its 2000 corporate tax return.

On appeal, counsel submits Chong Up Lee's "Statement of Changes in Net Worth For the Year Ended December 31, 2001," a copy of the principal shareholders' individual amended tax return (Form 1040) for 2001, and a copy of the Internal Revenue Service computer record of the principal shareholders' individual tax return (Form 1040) for 2000. Counsel claims that consideration of this evidence, combined with the evidence previously submitted, establishes the petitioner's ability to pay the proffered wage.

Counsel's reliance on the individual assets as presented by Mr. Lee's net worth statement and the principal shareholders' individual tax returns is not persuasive. The financial evidence submitted in support of the petitioner's ability to pay the beneficiary's wage offer reflects that it is a corporation. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. To the extent that the petitioner paid wages to the beneficiary, credit will be given to these amounts, if credibly documented, in reviewing the petitioner's ability to pay the proffered wage. In the instant case, although the ETA-750B suggests that the beneficiary has been employed by the petitioner, the petitioner submitted no W-2 or any evidence of wages paid to the beneficiary during the relevant period.

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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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 the Service should have considered income before expenses were paid rather than net income.

In the instant matter, although Rigg's Seafood, Inc.'s 2001 corporate tax return, submitted in support of the petitioner's ability to pay the proffered wage and with counsel's motion to reopen, indicates $39,439 in net income, which was sufficient to cover the proffered wage during that period, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning as of the visa priority date. In this case, the AAO concurs with the director's conclusion that the petitioner's evidence as shown on the Rigg's Seafood Inc. 2000 corporate tax return, whether looking at the net income -$17,874 or net current assets of $10,467, was insufficient to demonstrate the petitioner's ability to pay the proposed annual wage offer of $24,689.60. The petitioner submitted no other persuasive evidence to overcome this conclusion. Although CIS will prorate the proffered wage, in some circumstances, if the record contains credible evidence of net income or payment of the beneficiary's wages specifically covering that portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Based on a review of the financial data contained in the record the petitioner failed to submit evidence sufficient to demonstrate that it had 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.