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

B-6

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC-02-025-53869 Office: VERMONT SERVICE CENTER Date: JUL 15 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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

PUBLIC COPY

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, reaffirmed by the director on motion, 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, Filipino food specialty. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the evidence failed to establish the petitioner's ability to pay the proffered wage. On appeal counsel states that the director erred in his analysis of the petitioner's financial documents.

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.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date 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). The petition's priority date in this instance is March 7, 2001. The beneficiary's salary as stated on the labor certification is $10.66 per hour or $22,172.80 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The evidence relevant to that issue consisted of the following: a copy of the Form 1120S U.S. Income Tax Return for an S Corporation for 2000 of the Masagana Corporation; and a copy of Form 1065ME/1120SME, Maine Information Return for 2000 of the Masagana Corporation. As discussed below, the Masagana Corporation is the corporation which does business under the petitioner's name.

In a request for evidence (RFE) dated December 4, 2001, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage.

In response to the RFE counsel submitted a letter dated February 28, 2002 accompanied by the following: a copy of the Form 1120S U.S. Income Tax Return for an S Corporation for 2000 of the Masagana Corporation; a copy of Form 1065ME/1120SME, Maine Information Return for 2000 of the Masagana Corporation; and copies of the Masagana Corporation's tax returns for 2001.

In a second RFE dated March 15, 2002 the director stated that the evidence submitted failed to establish the petitioner's ability to pay the proffered wage, and again requested additional evidence on that issue.

Counsel responded to the second RFE with a letter dated June 6, 2002 accompanied by the following: a copy of the Form 1040 U.S. Individual Income Tax Return for 2001 of the petitioner's owners, which is a joint return of a husband and wife; copies of Form W-2 wage and tax statements for 2001 of the petitioner's owners; a copy of Form 1120S U.S. Income Tax Return for an S Corporation for 2001 for Taste of Orient corporation; a copy of page 518 from *Kurzban's Immigration Law Sourcebook* (edition not stated); a copy of the decision in *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989); and additional copies of the Masagana Corporation's tax returns for 2001, previously submitted.

Counsel's response to the second RFE was mailed to the California Service Center rather than to the Vermont Service Center. It may be noted that although the petitioner is located in Brunswick, Maine, the address of the beneficiary shown on the I-140 petition is in Long Beach, California, and the address of counsel shown on the G-28 notices of entry of appearance as attorney or representative is in Los Angeles, California.

In a decision dated July 7, 2002 the director stated that no response had been received to the second RFE, and denied the petition on the ground of abandonment.

In response to the director's July 7, 2002 decision counsel submitted a motion to reconsider and reopen, which was received by the Vermont Service Center on July 26, 2002. With the motion counsel submitted the following: a copy of the director's decision of July 7, 2002; a copy of the RFE dated March 15, 2002; a copy of an envelope from the Vermont Service Center postmarked July 15, 2002; a copy of a FedEx invoice and tracking documents showing a mailing by counsel on June 6, 2002 to the California Service Center and its delivery the following day; a copy of the decision in *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001); and additional copies of all of the documents which had been submitted with counsel's initial response to the second RFE, the documents which had been incorrectly sent to the California Service Center.

In a decision dated January 23, 2003 the director stated that his previous finding that no response to the second RFE had been submitted was incorrect. The director stated "It has now come to our attention that, in fact, you did send a response to our request, but through no fault of yours, your response did not reach the record of proceeding before the petition was denied." The director then stated that the Service (now CIS) was moving to reopen the decision denying the petition. The director then evaluated the evidence in the record and found that it failed to establish the petitioner's ability to pay the proffered wage. The director therefore denied the petition.

On appeal, counsel submits a brief and evidence. All of the evidence submitted on appeal consists of documents previously in the record, except for two Form I-290B notice of appeal forms which are apparently copies of the blank forms sent to the petitioner by the director, with the only information filled in being the caption and the lines for the date of the decision and the deadline for the appeal. Counsel also submits a copy of page 651 from *Kurzban's Immigration Law Sourcebook* (6th edition), highlighting language summarizing the decision in *Masonry Masters Inc. v. Thornburgh*, 875 F. 2d 898 (D.C. Cir. 1989), the same language which was highlighted on the page from that treatise which counsel had submitted previously, a page apparently from an earlier edition of that treatise. None of the documents submitted for the first time on appeal are evidence relevant to any facts at issue in the present petition, and the newly-submitted documents appear to be intended as reference materials supporting counsel's brief.

Counsel states on appeal that the petitioner is an S corporation, the income of which is attributed to its owners for tax purposes, and that in evaluating the petitioner's ability to pay the proffered wage the director therefore erred in failing to take into account the financial resources of the owners of the petitioner and in failing to take into account the financial resources of another S corporation owned by the same owners.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

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 present matter, the petitioner did not establish that it had previously employed the beneficiary.

As another 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.

The record contains tax returns of the Masagana Corporation, an S corporation. Counsel states that the petitioner's name is the business name for the Masagana Corporation. Counsel's assertion is supported by an entry on the I-140 petition which shows an Internal Revenue Service tax number for the petitioner which is the same as the employer identification number on the tax returns of the Masagana Corporation. The address of the petitioner on the I-140 petition is also the same as the address of the Masagana Corporation on its tax returns.

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 the 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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.

For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the following amounts for ordinary income: $863.00 for 2000; and $7,335.00 for 2001. Since each of those figures is less than the proffered wage of $22,172.80 those figures fail to establish the ability of the petitioner to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's 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. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: $4,663.00 for the end of 2000; and $4,154.00 for the end of 2001. Since each of those figures is less than the proffered wage of $22,172.80, they also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of the Form 1040 U.S. Individual Income Tax Return for 2001 of the petitioner's owners, which is a joint return of a husband and wife, as well as copies of the Form 1120S U.S. Income Tax Return for an S Corporation for 2001 of another S corporation owned by the petitioner's owners, the Taste of Orient. The other S corporation, like the petitioner, is also a restaurant, and it is also located in the state of Maine, though in a different town than the petitioner.

Counsel asserts that the director erred in failing to taking into account the personal financial resources of the owners as well as the financial resources of the other S corporation owned by those same owners. Nonetheless, 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. Even though the income of an S corporation is attributed to its owners for income tax purposes, that fact does not make the owners liable for the financial obligations of the corporation.

Counsel asserts that in limiting its financial analysis to the assets of the petitioner alone, CIS is improperly failing to consider the substance underlying the petitioner's corporate structure, namely that the petitioner's owners have had full control over the petitioner, including control over the amount of money they have chosen to take out of the corporation as compensation of officers. Counsel's assertions are not persuasive, since in withdrawing funds from the corporation as compensation of officers the owners thereby assured that those funds would be legally protected from being used to satisfy any liabilities of the corporation. Nothing in the governing regulation at 8 C.F.R. § 204.5 allows CIS to consider the assets or resources of individuals or entities that have no legal obligation to pay the proffered wage. *See Sitar v. Ashcroft,* (2003 WL 22203713 (D. Mass)).

Counsel includes in his documentation copies of the decision in *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), and copies of excerpts from *Kurzban's Immigration Law Sourcebook* summarizing the portion of that decision which supports the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Although part of that 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 will significantly increase the petitioner's net income. Such a hypothesis does not outweigh the evidence presented in the corporate tax returns.

Counsel also includes in his documentation a copy of the decision in *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001). That case concerns reinstatements of prior orders of deportation or removal, an issue not relevant to the instant petition.

In his decision of January 23, 2003 the director found that the petitioner's ordinary income and net current assets in 2000 and 2001 were insufficient to pay the proffered wage. The director correctly stated the ordinary income figures and correctly calculated the year-end net current assets for each of those years. The director also correctly

declined to consider the information on the individual tax returns of the petitioner's owners or the information on the tax returns of the other S corporation submitted in evidence. For the reasons stated above, the appeal fails to overcome the decision of the director.

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.