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

U.S. Citizenship
and Immigration
Services

[redacted]

FILE: LIN-02-265-52396 Office: NEBRASKA SERVICE CENTER Date: SEP 23 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

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska 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 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 beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 April 23, 2001. The proffered wage as stated on the Form ETA 750 is $458.80 per week, which amounts to $23,857.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on June 2, 1994, to have a gross annual income of $250,000, and to currently employ nine workers.[1] In support of the petition, the petitioner submitted bank statements for the period from February 2001 through December 31, 2001, and its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, and 1999-2000[2]. The 2001 tax return reflects the following information:

| | 2001 |
|---|---|
| Net income[3] | -$1,106 |

[1] This assertion is corroborated by the petitioner's tax returns.

[2] The petitioner's financial situation in 1999 and 2000 is not dispositive of the petitioner's continuing ability to pay the proffered wage as of the priority date, which was established in 2001, and figures from the returns will not be recited.

[3] Ordinary income (loss) from trade or business activities as reported on Line 21.

| | |
|---|---|
| Current Assets | $3,947 |
| Current Liabilities | $1,973 |
| Net current Assets | $1,974 |

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 5, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence of any compensation paid to the beneficiary, such as quarterly federal tax forms or forms W-2, wage and tax statements.

In response, the petitioner submitted copies of the petitioner's checking account statements for the period from December 1, 2000[4] through December 31, 2002 and the petitioner's quarterly wage report for the fourth quarter of 2002. The quarterly wage report does not show that the petitioner paid any wages to the beneficiary during the quarter covered by the report. Counsel stated in her accompanying cover letter that the beneficiary is not presently working for the petitioner. Counsel also submitted an unaudited financial statement of the petitioner's owner's personal financial situation on January 20, 2003.

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 June 18, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's bank accounts reflect sufficient cash to support its ability to pay the proffered wage and its investors and owners personally guarantee payment of the proffered wage to the beneficiary. The petitioner resubmits copies of the petitioner's bank statements with new statements covering the period January 1, 2003 through June 30, 2003. Additionally, the petitioner submits copies of settlement statements issued to [redacted] petitioner's owners, reflecting their ownership of three real estate properties. B[redacted] also present notarized statements detailing their holding of real estate assets and personal guarantee to use those assets to guarantee payment of the proffered wage to the beneficiary. Finally, an additional notarized letter is presented into the record of proceeding from Jo-Ping Wang, apparently a resident of Taiwan. The letter is dated July 4, 2003 and reads as follows:

> Please be advised that I am an interested investor of China Renaissance Chinese Restaurant which is operated by [the petitioner].
>
> I guarantee the payment of the employee [beneficiary's] salary using my own personal asset [sic] as evidenced by the attached Bank Letter.

An attached Certificate of Account Balance in Kanji and English reflects that a [redacted] has "an amount in excess of USD $30,000.00" in [redacted] Bank, Keelung Branch.

At the outset, counsel's reliance on the assets of the petitioner's owners, [redacted] is not persuasive. 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). Citizenship & Immigration Services (CIS)

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[4] Evidence pre-dating the priority date of 2001 is not dispositive of the petitioner's ability to pay the proffered wage.

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). Thus, neither the personal guarantees nor the evidence of their real estate holdings will be considered. Regardless of the inability to pierce the corporate veil, real estate holdings are not typically the type of liquefiable asset contemplated by employers to pay wages. Additionally, their unaudited financial statement will not be considered. In addition to not being considered because it reflects the assets of owners of the petitioner, the unaudited financial statements that counsel submitted in response to the request for evidence are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited.

Counsel's reliance on the balances in the petitioner's bank account is also 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 cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

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. The petitioner's net income in 2001 was -$1,106 and it could not possibly pay the proffered wage of $23,857.60 out of it. Thus, the petitioner cannot prove its ability to pay the proffered wage out of its net income.

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.[5] 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 current assets. The petitioner's net current assets during the year in question, 2001, however, were only $1,974. As such, the petitioner cannot demonstrate its ability to pay the proffered wage out of its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of -$1,106 and net current assets of only $1,974 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel submits a personal guarantee from an "interested investor" resident in Taiwan. First of all, it is unclear whether this "interested investor" is an "interested investor" according to business principles. Whether [redacted] has an actual monetary interest in the petitioner, such that she or he holds a percentage ownership in the petitioner's corporation, or is merely interested in the petitioner's business, is unclear from the evidence in the record of proceeding.[6] [redacted] holds a financial interest in the petitioner's business, such as ownership or entitlement, then [redacted] personal guarantee would be precluded from consideration because of the inability to pierce the corporate veil as discussed above. *See Matter of Tessel*, 17 I&N at 631; *Matter of Aphrodite Investments Limited*, 17 I&N at 530; *Matter of M-*, 8 I&N at 24; and *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 at *3. Additionally, a personal guarantee from an individual residing in a foreign country poses realistic problems concerning its enforceability because the U.S., and residents of the U.S., lacks jurisdiction over residents in Taiwan. Thus, it is unclear how a collection effort would be undertaken if [redacted] did not make good on the personal guarantee. Finally, even [redacted] personal guarantee could be accepted and considered, it is dated July 4, 2003, which is two years after the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001 based on the personal guarantee issued by [redacted]

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[5] 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.

[6] Jo-Ping Wang's name does not appear on any financial documents filed by the petitioner contained in the record of proceeding, such as the federal income tax return, quarterly tax return, bank statements, or anywhere else.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or subsequently. Therefore, the petitioner has not established 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.