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



U.S. Citizenship  
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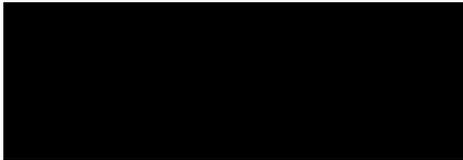
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FILE: LIN-02-254-53205 Office: NEBRASKA SERVICE CENTER Date: JAN 07 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:



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 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 statement 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 August 6, 2001. The proffered wage as stated on the Form ETA 750 is \$450 per week, which amounts to \$23,400 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of January 2001.

In support of the petition, the petitioner submitted bank account statements from April 2001 through June 2002 and its Form 1120, U.S. Corporation Income Tax Return for 2001. The tax return reflects the following information:

	<u>2001</u>
Net income <sup>1</sup>	\$630
Current Assets	\$12,155
Current Liabilities	\$0
Net current assets	\$12,155

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 January 13, 2003, the director requested additional

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<sup>1</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

evidence pertinent to that ability. The director specifically requested audited profit/loss statements, bank account records prior to August 6, 2001, personnel records, and quarterly federal tax forms or state unemployment compensation reports. The director also requested an explanation for the petitioner's reported location in New York on its taxes.

In response, counsel wrote that the income tax records are for the petitioner in New York "because the accountant is located in New York." Additionally, counsel provided missing information about the petitioner, such as its date of establishment in 1996, three employees, gross annual income of \$181,000, and net income of \$630. In addition, counsel submitted copies of the petitioner's checking account statements for the period from June 2002 through December 2002 and the petitioner's multiple-state and federal quarterly wage reports for July 2001 to the first quarter in 2003. The federal quarterly wage reports reflect wages of only \$10,800 in 2001; \$21,600 in 2002; and \$5400 for the first quarter in 2003. The federal quarterly wage reports show that the petitioner consistently paid the beneficiary \$5,400 per quarter, which totals an annual wage of \$21,600, which is less than the proffered wage of \$23,400.

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 May 22, 2003, denied the petition. The director considered the combined resources of the petitioner's net income and annual bank account balances.

On appeal, counsel asserts that the petitioner's owner's assets are sufficient to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner submits the petitioner's owner's individual income tax returns and proof of cash assets. Subsequent to the filing of the appeal, counsel also submits the petitioner's 2003 corporate tax return which reflects \$23,502 in net income and \$25,444 in net current assets.

The director's and counsel's reliance on the balances in the petitioner's bank accounts 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 cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's reliance on the assets of the petitioner's owners 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). 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. In the instant case, the petitioner established that it paid the beneficiary wages of \$10,800 in 2001; \$21,600 in 2002; and \$5400 for the first quarter in 2003. As the proffered wage is \$23,400,

the petitioner must demonstrate it can pay the remaining wages of \$12,600 in 2001; \$1,800 in 2002; and \$18,000 in 2003.

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 was \$630 in 2001 and \$23,502 in 2003. The petitioner never submitted its tax return for 2002. The petitioner's net income of \$630 is insufficient to cover the remaining proffered wage of \$12,600 in 2001. Since no information was provided concerning 2002, the petitioner has not met its burden of proof concerning its net income for that year. Thus, the petitioner has not established its continuing ability to pay the proffered wage as of the priority date out of its net income in 2001 or 2002. The petitioner's net income of \$23,502 is sufficient to cover the remaining proffered wage of \$18,000 in 2003. Thus, the petitioner has established its ability to pay the proffered wage out of its net income in 2003.

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.<sup>2</sup> 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 \$12,155, which is lower than

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

\$12,600 in remaining wages. The petitioner failed to submit its tax return for 2002 and thus no information is available concerning its net current assets for that year. As such, the petitioner did not establish its continuing ability to pay the proffered wage out of its net current assets for the years 2001 or 2002.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001. In 2001, the petitioner shows a net income of only \$630 and net current assets of only \$12,155 and has not, therefore, demonstrated the ability to pay the difference between the wage paid and 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. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2002. The petitioner failed to submit regulatory-sanctioned evidence concerning its ability to pay the proffered wage in 2002. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2002.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2003. In 2003, the petitioner shows a net income of \$23,502, however, which demonstrates the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during the salient portion of 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently during 2002. 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.