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

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

B6

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 10 2005

EAC 04 041 51019

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:

SELF-REPRESENTED

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

CC: [redacted]

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a diner/restaurant/catering hall. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, which was approved by the Department of Labor. The beneficiary is a substituted beneficiary. 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. The director denied the petition accordingly.

On appeal, the petitioner submits a brief.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with

the instant petition as of the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Here, the Form ETA 750 was accepted on May 1, 1996. The proffered wage as stated on the Form ETA 750 is $17.61 per hour ($36,628.80 per year). The Form ETA 750 states that the position requires two years experience. The named alien is Piotr Paluch. The substitute alien, who is the beneficiary, is [redacted] There is no Form ETA 750 Part B prepared for the intended substitute alien [redacted] ttached to the certified Form ETA 750 found in the record of proceeding evidencing the intent of the petitioner to employ the petitioner in the occupation. There is no description of the intended substitute beneficiary's education, vocational training or work history to perform the occupation of cook in a diner/restaurant/catering hall. The record does contain a copy of a pending Alien Employment Application submitted by another employer for [redacted] for the occupation "cook (Irish style)" in a "restaurant and bar." According to that Form ETA part B, dated March 28, 2001 the alien stated in section 15 "a." that he was working on that date as a cook preparing "stuffed cabbage, corned beef and Irish stew."

According to the regulation at 20 C.F.R. § Part 656.30 (C)(2) "A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form." In the present case, no Form ETA 750 B was prepared for the beneficiary [redacted] and submitted by the petitioner to accompany the Form I-140 filed in this matter. Therefore, there is no statement from the alien that he qualifies to perform services as a cook for a diner/restaurant/catering hall in the specified job location. On the contrary, according to the G-325 A Form prepared by the beneficiary in the record of proceedings as dated November 21, 2003, he was self-employed on that date as a carpenter. By all the evidence submitted, the beneficiary does not qualify as a cook according to the pertinent section of the Act first above stated or by his own signed statement in the Form G-235A.

With the petition, petitioner submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor for another alien; U.S. Internal Revenue Service Form tax returns for 1996 to 2000; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested additional evidence of the petitioner's ability to pay the proffered wage as of the priority date. Also, the Director requested annual reports for the years 1996 through 2002 accompanied by audited or reviewed[1] financial statements.

---

[1] An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for years 1996, 1997, 1998, 1999, 2000, 2001, and 2002.

The director denied the petition on June 18, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, petitioner asserts, among other contentions, that the "S" corporation status of the petitioner allows the profits to be distributed to the petitioner's shareholder and therefore the petitioner has sufficient resources to pay the proffered wage. Also, the total assets, corporate sales, gross profit, and retained earnings all prove the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. Petitioner maintains that corporate sales, and gross profit show the ability to pay the proffered wage. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax returns submitted demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $36,628.80 per year from the priority date May 1, 1996.

- In 1996, the Form 1120S stated a taxable income loss [2] of <$18,097.00>.[3]
- In 1997, the Form 1120S stated a taxable income loss of <$25,639.00>.
- In 1998, the Form 1120S stated a taxable income loss of <$1,249.00>.
- In 1999, the Form 1120S stated a taxable income loss of <$8,049.00>.
- In 2000, the Form 1120S stated a taxable income loss of <$24,100.00>.

(SSARS) No.1. Accountants only express limited assurances in reviews.

[2] IRS Form 1120S, Line 21.

[3] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

- In 2001, the Form 1120S stated a taxable income loss of <$9,561.00>.
- In 2002, the Form 1120S stated a taxable income loss of <$22,000.00>.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 1996 through 2001 for which the petitioner's tax returns are offered for evidence.

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.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 1996, petitioner's Form 1120S return stated current assets of $7,763.00 and $6,458.00 in current liabilities. Therefore, the petitioner had $1,305.00 in net current assets. Since the proffered wage is $36,628.80, this sum is less than the proffered wage.
- In 1997, petitioner's Form 1120S return stated current assets of $4,746.00 and $7,763.00 in current liabilities. Therefore, the petitioner had <$3,017.00> in net current assets. Since the proffered wage is $36,628.80, this sum is less than the proffered wage.
- In 1998, petitioner's Form 1120S return stated current assets of $5,012.00 and $8,010.00 in current liabilities. Therefore, the petitioner had <$2,998.00> in net current assets. Since the proffered wage is $36,628.80 per year, this sum is less than the proffered wage.
- In 1999, petitioner's Form 1120S return stated current assets of $5,458.00 and $26,765.00 in current liabilities. Therefore, the petitioner had <$21,307.00> in net current assets. Since the proffered wage is $36,628.80 per year, this sum is less than the proffered wage.
- In 2000, petitioner's Form 1120S return stated current assets of $6,458.00 and $28,781.00 in current liabilities. Therefore, the petitioner had <$22,323.00> in net current assets. Since the proffered wage is $36,628.80 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120S return stated current assets of $5,239.00 and $31,091.00 in current liabilities. Therefore, the petitioner had <$25,852.00> in net current assets. Since the proffered wage is $36,628.80 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of $3,024.00 and $20,132.00 in current liabilities. Therefore, the petitioner had <$17,108.00> in net current assets. Since the proffered wage is $36,628.80 per year, this sum is less than the proffered wage.

---

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

Therefore, for the period 1996 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Petitioner asserts in its brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[5] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. Petitioner is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result.

Petitioner asserts that the "S" corporation status of the petitioner allows the profits to be distributed to the petitioner's shareholder and therefore the petitioner has sufficient resources to pay the proffered wage. Contrary to petitioner's primary assertion, 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. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Petitioner contends that the total assets of the corporation demonstrate the ability to pay. We reject the petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.

Petitioner asserts that retained earnings of the petitioner[6] prove the ability to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and net current assets is therefore duplicative, at least in part.

Further, even if considered separately from net income and net current assets, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer pay to its employees in cash while continuing in business. They are not, therefore, a clear and convincing index of a company's ability to pay additional wages.

---

[5] 8 C.F.R. § 204.5(g)(2).

[6] The stated retained earnings of the petitioner for years 1996 through 2001 are negative.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary had the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

Petitioner's contentions cannot be concluded to outweigh the evidence presented in the seven corporate tax returns as submitted by petitioner that by any test shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.