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

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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 19 2005
EAC 03 146 50591

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, 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 pastry baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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, the 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 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, 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 13, 1998. The proffered wage as stated on the Form ETA 750 is $18.89 per hour ($34,379.80 per year).[1] The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor; and, a copy of United States federal Form 1120 tax return for 1998 as well as other documents.

Because the Director determined the evidence submitted 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:

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[1] Based upon a 35-hour week.

Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of $34,379.80 per year as of January 13, 1998, the date of filing and continuing to the present.

Submit the 1997 U.S. federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax returns. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.

Submit copies of business bank statements for six months prior to January 1998.

If the beneficiary was employed by you in 1997 and 1998, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the beneficiary's Internal Revenue Service (IRS) Form 1120 tax returns for years 1997[2] and 2001, a personal tax return and bank statement from the company's owner and other documents.

The director denied the petition on November 13, 2003, 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, as additional evidence, counsel submits the petitioner's federal tax returns for 2000, 2001, and 2002, and a personal 1998 tax return as well as the personal bank statements of the sole shareholder of the petitioner for the period June 1997 through 1998.[3]

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

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[2] The fiscal year of petitioner is from July 1 through June 30th each year.

[3] Petitioner's Exhibit D-9, that is noted as an "Accountant's Letter," is not included in the evidence as received by CIS.

petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner's tax returns submitted demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $34,379.80 per year from the priority date of January 13, 1998:

- In 1997, the Form 1120 stated a taxable income loss[4] of <$12,978.00>[5].
- In 1998, the Form 1120 stated a taxable income loss of <$6,635.00>.
- In 1999, the Form 1120 stated a taxable income loss of <$5,252.00>.
- In 2000, the Form 1120 stated a taxable income of $2,323.00.
- In 2001, the Form 1120 stated a taxable income loss of <$28,191.00>.
- In 2002, the Form 1120 stated a taxable income loss of <$3,464.00>.

Since the petitioner's tax year July 1 through June 30th of each year, the 1997 return is probative of the ability to pay the proffered wage. Based upon an examination of the above six tax returns, the petitioner was unable to pay the proffered wage from taxable income from the priority date through June 30, 2003, the end of the petitioner's fiscal year 2002/2003.

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. There is no evidence the petitioner employed the beneficiary.

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. 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.[6][7] 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 and 1120 federal tax returns. 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 1220 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

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[4] IRS Form 1120, Line 28.

[5] 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.

[6] 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.

[7] In counsel's brief, he refers to net current assets of $76,318.00 when, in fact, that was the total asset amount.

- In 1997, the petitioner's Form 1120 return stated current assets of $7,633.00 and $0.00 in current liabilities. Therefore, the petitioner had $7,633.00 in net current assets for 1997. Since the proffered wage was $34,379.80 per year, this sum is less than the proffered wage.
- In 1998, the petitioner's Form 1120 return stated current assets of $13,068.00 and $0.00 in current liabilities. Therefore, the petitioner had $13,068.00 in net current assets for 1998. Since the proffered wage was $34,379.80 per year, this sum is less than the proffered wage.
- In 1999, the petitioner's Form 1120 return stated current assets of $19,086.00 and $0.00 in current liabilities. Therefore, the petitioner had $19,086.00 in net current assets for 1999. Since the proffered wage was $34,379.80 per year, this sum is less than the proffered wage.
- In 2000, the petitioner's Form 1120 return stated current assets of $30,956.00 and $0.00 in current liabilities. Therefore, the petitioner had $30,956.00in net current assets for 2000. Since the proffered wage was $34,379.80 per year, this sum is less than the proffered wage.
- In 2001, the petitioner's Form 1120 return stated current assets of $31,634.00 and $0.00 in current liabilities. Therefore, the petitioner had $31,634.00 in net current assets for 2001. Since the proffered wage was $34,379.80 per year, this sum is less than the proffered wage.
- In 2002, the petitioner's Form 1120 return stated current assets of $29,890.00 and $0.00 in current liabilities. Therefore, the petitioner had $29,890.00 in net current assets for 2002. Since the proffered wage was $34,379.80 per year, this sum is less than the proffered wage.

Therefore, for the priority date through June 30, 2003 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.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. The common elements of this contention are according to counsel's brief in the matter: taxable income or loss; net current assets; reallocation of deductions such as depreciation, wages/salary, and compensation to officers; and, the availability of the sole stockholder's compensation and personal funds. According to counsel, when all the aforementioned are combined, they show the ability to pay the proffered wage. According to regulation,[8] copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

As discussed above, taxable income and net current assets were insufficient to pay the proffered wage of $34,379.80 per year. Net current assets may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage as combined with taxable income since that is a duplicative method to determine the ability to pay. That method double-counts the petitioner's income contrary to the utilization of either the cash-or accrual basis of accounting. The first page of a federal tax return relates to an income statement that includes the petitioner's net income. The net income is an amount summarizing the petitioner's revenues, costs and expenses over time. The tax statement "Schedule L" reflects assets and liabilities on dates certain during the fiscal year. It is used to compose the final summary presented on the income statements as the net income amount. Therefore, to add these two final dollar amounts together from the two pages of the federal tax return essentially double counts the dollar amounts to distort the true representation of the petitioner's finances.

[8] 8 C.F.R. § 204.5(g)(2).

The depreciation or amortization deduction, considered by counsel as an asset, is also not available to show the ability to pay the proffered wage. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

> Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel asserts on the appeal that there would be savings achieved by employing the beneficiary and replacing existing or former workers of the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of the workers indicated by name in the record of proceeding involve the same duties as those set forth in the certified Form ETA 750. The petitioner has not documented the position, duty, and or termination of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a pastry baker will significantly increase the petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel also suggests that the beneficiary will augment or take over the owner's duties as Head Chef, but since the beneficiary will be employed as a pastry baker, it is not relevant under the terms of the labor certification to discuss other occupations other than pastry baker. If the beneficiary has been offered work in an occupation other than pastry baker, then in that case, the petitioner is not complying with the terms of the labor certification.

Counsel has submitted the personal tax return and banking statements of the sole shareholder of the petitioner as a resource from which the corporation may pay the proffered wage. The implication here is that the owner of the business could deal directly, not in a corporate capacity, with either his own company or the beneficiary to pay the proffered wage. For the reasons stated below, CIS cannot recognize these accounts as proof of the ability to pay.

Contrary to counsel's 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."[9]

Also, counsel's reliance on the balances in the petitioner's checking account is misplaced. 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.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by the petitioner, that from the priority date to June 30, 2003 demonstrated that the petitioner did not have the 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.

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[9] Officer compensation as noted on the tax returns submitted into evidence was never more than approximately $11,000.00 and usually much lower. Even if CIS could add that compensation with the taxable income (generally a loss) it would not amount to the proffered wage in any year examined.