U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: EAC-04-072-50346 Office: VERMONT SERVICE CENTER Date: MAY 24 2006

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, Chief
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 cook. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the Acting Center Director's (Director) July 30, 2004, denial, the sole issue in this case concerns whether or not the petitioner has the ability to pay the proffered wage. The director found that the petitioner did not demonstrate the ability to pay the required wage, and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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. *See* 8 CFR § 204.5(d). 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 for processing by the relevant office within the DOL employment system on July 30, 2003. The proffered wage as stated on the Form ETA 750 is $13.50 per hour ($28,080 per year). The Form ETA 750 states that the position requires two years of experience in the job offered as a Specialty Cook.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1]. Relevant evidence

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which

in the record included with the initial filing is the petitioner's 2002 federal tax return. On appeal, the petitioner asserts that he had initially filed the preference visa petition without the benefit of counsel, and had only submitted his 2002 business tax return. The petitioner claims that this did not fully reflect his assets and finances and his ability to pay the wage in question. In his appeal, the petitioner notes that the sponsoring entity is structured as a "S Corporation" under the laws of New Hampshire. He notes that he and his wife are the only shareholders. On appeal, the petitioner submitted documents related to the petitioning entity: bank statements, and business wage tax assessments; and documents related to his personal finances: Certificates of Deposit, personal bank statements for himself, and his wife, mortgage account information, and property tax assessment information. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage. Petitioner claims that his personal assets are available to capitalize the financial needs of the company, and that his personal assets are sufficient to prove the petitioner's ability to pay the prevailing wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner listed that it was established in 1989, and that the business currently employs three workers. Petitioner filed Form ETA 750B on July 30, 2003. On Form ETA 750B, the beneficiary did not claim to have worked for the petitioner, but rather resides outside the U.S. and listed his employment abroad (the beneficiary signed, but did not date the Form ETA 750B). DOL certified the ETA 750 on December 2, 2003, and the petitioner filed the I-140 on January 14, 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 case at hand, the petitioner has not employed, and has not paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in July 2003 or subsequently. Based on the ETA Form and I-140 form filed, the beneficiary currently resides outside the U.S. in Tehran, Iran, and intends to consular process should the I-140 be approved.

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

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are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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). Reliance on the petitioner's gross receipts and wage expense is misplaced.

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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $28,080 per year from the priority date. The petitioner is established as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. Line 21 indicates ordinary income for the year 2002 in the amount of -$325.

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are shown on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. Here, petitioner's tax returns do not indicate income from other activities. Therefore, the ordinary income figure of the petitioner's Form 1120S tax return, line 21 (-$325), does accurately reflect the petitioner's income. Based on the 2002 tax return submitted, the petitioner did not have sufficient net income to pay the proffered wage in the year 2002, the only year for which the petitioner submitted tax returns.[2] The petitioner did not demonstrate its ability, or continuing ability, to pay the proffered wage.

Further, the petitioner cannot demonstrate its continuing ability to pay the required wage under a second test used based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during 2002 were $292. Therefore, for the year 2002, the petitioner did not have sufficient net current assets to pay the proffered wage.

Petitioner asserts that his business maintains a "cash cushion" of approximately $3,000 per month after all the business' bills, expenses, and wages have been paid, and has submitted bank statements in support. The petitioner's reliance on the balance in the petitioner's bank account 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

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[2] The petitioner's 2003 tax return was not yet available when it submitted the instant petition. Nevertheless, in any future proceedings, the petitioner should include any and all tax returns pertinent to the period of time covering the priority date and forward, as such documentation would be more probative than the 2002 tax return.

[3] 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.

petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable, or that the tax return submitted provides an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustained ability to pay a proffered wage. Third, the petitioner submitted no evidence 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 petitioner's taxable income (income minus deductions).

Petitioner contends that he has additional personal assets that can be used to guarantee the proffered wage, which should be considered, including Certificates of Deposit, personal bank account statements, and equity in his home. This analysis would be appropriate, and CIS would consider personal assets, if the petitioner's business was structured as a sole proprietorship.

A sole proprietorship, unlike a corporation, does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Accordingly, a sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Here, however, the petitioner's business is structured as an S corporation, and, analysis based on personal assets is not required, and would not be appropriate for the case.[4] We note that the beneficiary may be related to the petitioner based on the same surname [redacted] Additionally, the beneficiary lists on Form ETA 750B that he will reside at the petitioner's home address (as evidenced by the address on the petitioner's personal bank statements, and mortgage documentation submitted). While it may be that the owner of the petitioning entity would be more likely to liquidate personal assets to pay a relative as opposed to an ordinary employee, the personal assets of the owner and/or individual shareholders are not considered in the context of a corporation.[5]

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[4] 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). 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. 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.

[5] We note that if the beneficiary were related to the owner, this might have required additional scrutiny at the Department of Labor level prior to certification. *See Paris Bakery Corporation,* 1998-INA-337 (Jan. 4, 1990) (en banc), which addressed familial relationships: "We did not hold nor did we mean to imply in Young Seal that a close family relationship between the alien and the person having authority, standing alone, establishes, that the job opportunity is not bona fide or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for the employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification."

The petitioner also claims that the addition of the beneficiary to his staff will help grow the business and generate increased income. The beneficiary's certified ETA 750A job duties, include that he will "prepare and marinate kabobs and other foods," and lists special requirements in box 15, that the beneficiary must be "well aquainted (sic) with all kitchen equiptment (sic)." The petitioner submits as evidence of future growth a statement of tax rate determination, showing that taxable wages have increased from $12,228 in 2001 to $25,185 in 2002. This argument is speculative in the absence of any other evidence to show how the addition of a skilled kabob maker will expand and grow the petitioner's pizza business to generate additional income (the petitioner contends only that he observed the beneficiary's skill and work ethic at the Sheraton Hotel in Tehran, where the beneficiary has been employed in Iran). In contrast to *Matter of Sonegawa*, 12 I & N Dec. 612, 1967, where evidence was provided to show that the petitioner had sustained significant expenses in one year related to the relocation of the business, and an increase in rent, which accounted for the petitioner's decrease in ability to pay the required wages, the petitioner in the case at hand has not provided any evidence why 2002 was a difficult year, and prevented the petitioner from demonstrating the ability to pay the proffered wage. The petitioner in *Sonegawa* also provided magazine articles, which helped to establish the petitioner's reputation, and potential future growth. Further, the petitioner here has not presented other evidence that might reflect that his business is well known in the area with an expectation of growth, or market studies that the addition of marinated kabobs to the menu would expand his pizza restaurant revenues.

Even going beyond the above formulations to consider other elements on the petitioner's tax return, the petitioner still cannot demonstrate its ability to pay the proffered wage. For example, in certain instances, the AAO considers items such as Officer Compensation, line 7. Even if petitioner's owner would forgo the listed 2002 Officer's Compensation in the amount of $22,148, this amount would still not be enough to show the continuing ability to pay the proffered wage.

Based on the foregoing, 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 continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or net income, or net current assets.

The Petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner 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 denied.