

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship and Immigration Services

B6

PUBLIC COPY



FILE: [Redacted]
EAC 04 042 50874

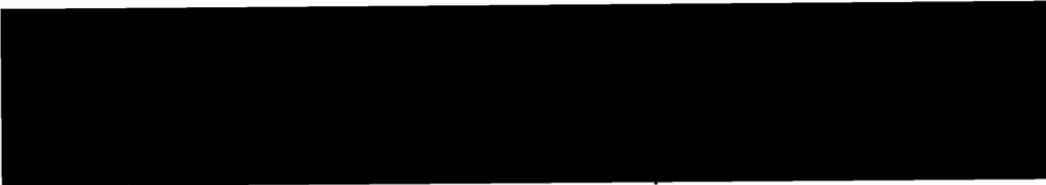
Office: VERMONT SERVICE CENTER

Date: JUL 31 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a head chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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. The director 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.

As set forth in the acting director's denial dated May 25, 2004 and the AAO's decision dated March 16, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, 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 C.F.R. § 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 on April 23, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$560.00 per week (\$29,120.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2001 (partial copy) and 2002; a support letter from the petitioner dated October 27, 2003; a job verification letter dated October 27, 2003 from [REDACTED] manager, of the Beechen Grand Hotel of Anshan Municipal Supply and Marketing Trade Central company, the Peoples Republic of China; a letter from the petitioner's accountant dated April 15, 2004; a letter from [REDACTED] the petitioner's vice president; a cover letter from counsel; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1995 and to currently employ 5 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, undated but signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the appeal prior to the current motion, the petitioner asserted that the monthly ending balances of the petitioner's business checking account statements are evidence of the ability to pay the proffered wage. Counsel cited the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). Further counsel cited an unpublished AAO decision in support of his proposition that net income should be based upon a total of taxable income, depreciation and "cash on hand," and, that therefore the 2001 and 2002 tax returns should have been afforded enough weight in the acting director's deliberations.

Accompanying the appeal, counsel submitted a legal brief and additional evidence that included the following documents: approximately 12 of the petitioner's monthly business checking account statements for three months of 2001 and of 2004.

The AAO dismissed the appeal on March 16, 2006, finding that the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001² and 2002.

¹ It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² Since the petitioner only submitted one page of 2001 U.S. federal tax return, it failed to come forward with independent objective for tax year 2001. The petitioner chose to submit a state return for 2001 that is not acceptable since state taxing rules and regulations are not uniform within the United States. Federal tax returns are required by regulation and were requested by the acting director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

On April 14, 2006, counsel filed a motion to reconsider the AAO's decision of March 16, 2006. Counsel asserts that the petitioner had sufficient net income if the petitioner's net income for 2001 was prorated for that year. Further, counsel claims that officer's compensation for tax years 2001 and 2002 is evidence of the ability to pay the proffered wage. Counsel cites an unpublished AAO decision in support of this contention. Further counsel cites a federal court case for the proposition that agency standards applied in an inconsistent manner "across similar situation evinces such a lack of rationality as to be arbitrary and capricious (citing *Vargas v. INS*, 938 F.2d 358, 362 (2d cir. 1991)). Counsel has not elaborated on this assertion other than to say that in the case cited, the AAO took into consideration bank statements. However since counsel has submitted only fragmentary evidence of the petitioner's banking balances for one quarter of 2001 and one quarter of 2004, there is not sufficient evidence presented to determine over a full year from 2001, 2002, 2003 and 2004 if there was a sufficient ending balance each month to cover the proffered wage.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion does qualify as a motion to reconsider because counsel has identified conclusions of law or statements of fact for the appeal he contends are erroneous, and, he asserts a precedent decision for his position. There was a brief in the matter.

In support of counsel's appeal, he resubmits the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2001 (partial copy) and 2002.

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, Citizenship and Immigration Services (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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further 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.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120S stated net income³ of \$23,175.00.
- In 2002, the Form 1120S stated net income of \$17,751.00.

Since the proffered wage is \$29,120.00 per year, the petitioner did not have the ability to pay the proffered wage from an examination of its net income for year 2001 and 2002. There has been sufficient time since the

³ 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. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

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 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

submission of the petition to CIS in 2003 for the petitioner to submit more current tax returns since it is obligated by regulation to demonstrate its continuing ability to pay the proffered wage.

If the net income the petitioner demonstrates it had available during the 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 assets⁵ during 2002 were \$7,500.00.

Therefore, for 2002, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date⁶ 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 its net income or 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. According to regulation, copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel asserted on appeal that the monthly ending balances of the petitioner's business checking account statements are evidence of the ability to pay the proffered wage. Throughout these proceedings counsel has submitted the same bank checking statements for three months of 2001, and three months of 2004. Since counsel has not submitted any financial evidence whatsoever for tax year 2004, we have nothing to compare the balances in the checking account in 2004. Further, although four years has passed since the petition was filed, through the two appeals, counsel has re-submitted the same partial years checking statements, one quarter for 2001 and then three years later one quarter of year 2004. It is impossible from the paucity of

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.

⁵ Only the first page of the U.S. federal corporate return was submitted in this matter although there has been sufficient time to do so in this proceeding.

⁶ The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

information concerning the checking account as submitted to determine if the petitioner could have paid the proffered wage for an entire year's time from the priority date.

Further counsel's reliance on the balances in the petitioner's bank accounts even for the six months 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L in determining the petitioner's net current assets.

Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date, April 23, 2001. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel claims that officer's compensation for tax years 2001 and 2002 is evidence of the ability to pay the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. The AAO notes that this is counsel's contention and that nowhere in the record of proceeding do the shareholders, the owners and officers of the petitioner, offer to pay the proffered wage from officer's compensation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). For this reason, the petitioner's figures for compensation of officers may not be considered as additional financial resources of the petitioner as an addition to its figures for ordinary income.⁷

⁷ CIS (legacy INS) has long held that it 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

Counsel cited an unpublished AAO decision⁸ in support of his proposition that net income should be based upon a total of taxable income, depreciation and “cash on hand.” As noted above depreciation which is an expense utilized as a deduction cannot also be considered as asset. *See Chi-Feng Chang*. Further counsel is requesting that net income (i.e. taxable income) and “cash on hand” from Schedule L of the return be added with depreciation to become an asset available to pay the proffered wage. Cash on hand is already reflected in the net income of the petitioner’s tax return.

Further, Counsel urges that the petitioner’s Schedule L Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner’s revenue during a given year is paid in expenses and the balance is the petitioner’s net income. Of its net income, some is retained as cash. Adding the petitioner’s Schedule L Cash to its net income would likely be duplicative, at least in part. The petitioner’s Schedule L Cash is included in the calculation of the petitioner’s net current assets, which are considered separately from its net income.

Counsel cites *Matter of Sonogawa*. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the years for which financial evidence were submitted were an uncharacteristically unprofitable period for the petitioner.

The evidence submitted fails to establish that the petitioner has 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 motion will be granted, the previous decision of the AAO is affirmed, and the petition will remain denied.

⁸ 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).