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

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PUBLIC COPY

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 01 2007

LIN-03-043-50036

In re: Petitioner:
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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center ("director"), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office ("AAO") on appeal. The appeal will be dismissed.

The petitioner is a restaurant, and seeks to employ the beneficiary permanently in the United States as a cook, specialty, foreign foods ("Specialty Cook in Arabic Foods"). The petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's September 1, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it can pay the beneficiary the proffered wage.

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]

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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.

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

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 24, 2001. The proffered wage as stated on Form ETA 750 is $25,000 per year based on a schedule of 40 hours per week. The labor certification was approved on July 2, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on October 31, 2002. The petitioner listed the following information on the I-140 Petition: date established: September 9, 1983; gross annual income: $854,681; net annual income: not listed; and current number of employees: 30.

On November 27, 2002, the director issued a Request for Additional Evidence ("RFE") requesting additional documentation to show that the beneficiary met the requirements of the certified labor certification, as the initial letter submitted was deficient. The petitioner responded to the RFE, and provided additional documentation that the beneficiary met the qualifications.

On July 20, 2005, the director issued a Notice of Intent to Deny ("NOID") and requested that the petitioner provide information and/or submit documentation related to the following points: to provide a copy of [redacted]'s menu, the location where the beneficiary would work, to demonstrate that the restaurant offered Arabic style dishes, or to provide information when Arabic dishes would be offered, and the expected pricing of such items. Prior evidence indicated that the menu at [redacted] did not include Middle Eastern, or Arabic cuisine. The NOID requested that the petitioner provide copies of the beneficiary's W-2 statements for the years 2002, 2003, and 2004, and to provide a copy of the beneficiary's most recent paystub, as well as copies of the Employment Authorization Documents ("EADs") issued to the beneficiary in the last three years. Alternatively, if the petitioner did not currently employ the beneficiary pursuant to the EAD, the NOID requested that the petitioner explain the delay in employing the beneficiary. Further, the director requested that the petitioner provide a copy of its most recent state unemployment compensation report form, as well as the 2003 and 2004 report forms, including the lists submitted showing employee names and social security numbers. The NOID requested that the petitioner submit evidence that the listed petitioner, "[redacted]," had the ability to pay the proffered wage, and for [redacted] to provide its 2001, 2002, 2003, and 2004 federal tax returns, as well as The [redacted]'s monthly and annual balance sheets from the priority date onward. The petitioner had submitted tax documentation only for Alfalfas Enterprises. Alternatively, if the beneficiary would receive compensation from [redacted], to provide federal tax returns for 2002, 2003, and 2004 and/or annual and monthly balance sheets for [redacted]. Finally, the NOID asked the petitioner to clarify whether the petitioner identified on the I-140 should be [redacted], or [redacted] The petitioner responded. Following review, the director denied the petition on September 1, 2005 finding that the petitioner did not demonstrate its ability to pay the proffered wage.[2] Counsel appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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. On Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner did not submit any W-2 statements. On appeal, the petitioner did provide several paystubs. The paystubs

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[2] The decision also expressed concern that [redacted]'s menu did not contain Arabic dishes, and that the petitioner, while not required, did not show that it employed the beneficiary pursuant to the EAD issued in connection with his I-485 Adjustment of Status filing. Related to the menu, the petitioner responded to the NOID that H[redacted]s formerly offered Arabic dishes, which were removed from the menu. The George Group's chief executive officer indicated that the menu would be changed to add such items back to the menu when the beneficiary was employed as he was trained to prepare such items.

demonstrate that [redacted] employed and paid the beneficiary $6,611.06 between May 1, 2005 and September 14, 2005.[3]

Form ETA 750 lists the petitioner as: '[redacted]' with an address of: [redacted]. The ETA 750 also lists that the beneficiary will be employed at: '[redacted]. The petitioner submitted tax returns for [redacted]. The director questioned in the NOID, and in the decision the relationship between [redacted], the petitioner, [redacted], where the beneficiary would work, and [redacted]s, the entity, which submitted tax returns.

The petitioner submitted a letter, which provided that [redacted] is an "umbrella company which manages a number of companies, one being [redacted]o in Lakewood. [The beneficiary] will be working for [redacted] once approved." The petitioner did not provide any federal tax identification information, incorporation documentation, doing business as information, or fictitious name registration to evidence the relationship between [redacted] and [redacted] or that the two companies operated under the same federal tax identification number. We note that a 2005 Ohio County Return of Taxable Business Property document identifies that [redacted] operates under the business name of '[redacted]'."[4] The record, however, does not contain any such documentation connecting [redacted] to [redacted]

Wages paid, and financial information related to one company, cannot be used to satisfy the petitioner's need to demonstrate that it can 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 the absence of evidence that [redacted] and [redacted]s are related,[5] the wages paid to the beneficiary in 2005 would not be considered as evidence of the petitioner's ability to pay the proffered wage

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[3] We note that the paystubs reflect that the beneficiary was paid at a rate of $8.00 per hour, which is less than the approximately $12.01 he would receive pursuant to the annual proffered wage of $25,000. We additionally note that the petitioner is not required to pay the beneficiary the proffered wage until the time that the beneficiary adjusts his status.

State of Ohio corporate registration documents exhibit that [redacted]. filed to use the trade name "[redacted]" as of September 1, 1993, and that [redacted]. has renewed the use of the name. *See* http://www1.sos.state.oh.us/pls/portal/portal_BS.BS_QRY_BUS_FILING_DET.SHO... accessed as of May 30, 2007. Further, [redacted]. has filed several Trade Mark/Service Mark applications on behalf of [redacted] to protect phrases used in connection with [redacted]. Filings for the [redacted], also accessed at http://www1.sos.state.oh.us/pls/portal/portal_BS.BS_QRY_AGENT CONTACT DE. . . on May 30, 2007, provide that [redacted]p. incorporated on January 18, 1999, and obtained consent for the use of similar names: [redacted] and [redacted]. Nothing contained in the filings exhibit that [redacted] has any relationship to [redacted]., or [redacted]

[5] Further, [redacted] has not demonstrated that it is the successor-in-interest to [redacted] To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N

for that year. The petitioner would need to demonstrate that it could pay the full proffered wage for the years 2001, 2002, 2003, 2004, and 2005.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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*, 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 petitioner submitted federal tax returns for [redacted], which is structured as a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the Alfalfas Enterprise's ability to pay the proffered wage:

Tax year	Net income or (loss)
2004	$11,175
2003	-$13,043
2002	$19,122
2001	$54,002

Based on the above, the [redacted]' net income would allow for payment of the beneficiary's proffered wage in 2001, but not in any of the other years above. However, we note that the petitioner has failed to provide evidence that [redacted] and [redacted] are the same, and that in the absence of definitive proof of the relationship, the tax returns of [redacted] cannot be used to demonstrate [redacted]'s ability to pay the beneficiary the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18, or, if filed on Form 1120-A, on Part III. If a corporation's 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, and, thus, would evidence the petitioner's

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Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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

ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

Tax year	Net current assets
2004	$12,585
2003	$12,852
2002	$18,507
2001	$16,110

The tax returns for [redacted] cannot establish the ability to pay the beneficiary the proffered wage based on net current assets either.

The petitioner additionally submitted an unaudited compiled balance sheet for [redacted]. for the time period ending November 30, 2002. Again, the evidence provided related to Alfalfas Enterprises, and not the petitioner, [redacted] Further, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statement submitted with the petition is not persuasive evidence. The accountant's report that accompanied the statement makes clear that it was produced pursuant to a compilation rather than an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner additionally submitted [redacted] Quarterly Wage Report for the quarter ending March 2002. In general, 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. [redacted] report did not reflect any wages paid to the beneficiary during this time period.

On appeal, counsel provides that the petitioner can pay the proffered wage; that the beneficiary is working for the petitioner; and that [redacted] is related to [redacted]. In support, counsel resubmitted the letter from [redacted] President of [redacted] that "[redacted] is the umbrella company that oversees all of our corporations including [redacted] The petitioner did not provide any documentation related to corporate registration, or tax identification numbers to demonstrate the relationship between the two companies. 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)).

While counsel did submit evidence that the beneficiary was employed by [redacted] in 2005, and paid by [redacted] 2005, the evidence is insufficient to demonstrate that the petitioner, [redacted], has the ability to pay the beneficiary the proffered wage from April 2001 to the present.

Even if we were to accept that [redacted] and [redacted] were related, or the same entity for purposes of the petition, the evidence in the record does not demonstrate that the petitioner can pay the proffered wage.

Accordingly, based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.