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

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 2 4 2007

LIN-05-099-51561

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, Chief
Administrative Appeals Office

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

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a retail store manager (night manager of retail store). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established its 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 director's October 24, 2005 denial, 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 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).

The instant petition is for a substituted beneficiary.[1] The original Form ETA 750 was accepted on October 2, 2001. The proffered wage as stated on the Form ETA 750 is $21.14 per hour ($43,971.20 per year). The Form ETA 750 states that the position requires two years of college studies in business or accounting, and two years of experience in the job offered or in the related occupation of sales manager of retail store. The I-140 petition was submitted on February 14, 2005. On the Form I-140, the petitioner claimed to have been established in 1987, to have a gross annual income of $1,500,000, to have a net annual income of $150,000, and to currently employ 15 workers.

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[2]. However, counsel did not submit any evidence on appeal in this case.[3] Relevant evidence in the record includes the petitioner's corporate federal tax return for 2002, the petitioner's Form 941 Employer's quarterly Federal Tax Return and Form 940 Employer's Annual Federal Unemployment (FUTA) Tax Return for 2001, 2002 and 2004, and the beneficiary's W-2 forms for 2001, 2002 and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 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's Form 941 and 940 for 2001, 2002 and 2004 do not indicate how much the petitioner paid the beneficiary in each period the report filed, however, the W-2 forms for 2001, 2002 and

---

[1] An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

[2] 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).

[3] On the Form I-290B filed on November 28, 2005 counsel indicated that he would be submitting a separate brief and/or evidence to the AAO within 30 days. On April 25, 2007, the AAO sent a fax requesting a copy of the additional evidence and/or brief since this office had no record that any further evidence or brief was ever received with regard to this appeal. In response to the AAO's fax request, counsel confirmed that he did not file a brief or evidence in support of this appeal.

2004 issued by the petitioner to the beneficiary show that the petitioner paid the beneficiary $9,350.95 in 2001, $23,604.10 in 2002 and $20,190.00 in 2004. Therefore, the petitioner has not established that paid the beneficiary the full proffered wage from the priority date in 2002 to 2004. The petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage of $43,971.20 in 2003 and the difference of $34,620.25 in 2001, $20,367.10 in 2002 and $23,781.20 in 2004 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

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 total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 the 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax return in the record, the petitioner's fiscal year runs from April 1 to March 31. The record contains copies of the petitioner's 2002 tax return, which demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of $43,971.20 in 2002:

- In the fiscal year of 2002 (4/1/2002-3/31/2003), the Form 1120 stated a net income[4] of $(4,081).

Therefore, for its fiscal year of 2002, the petitioner did not have sufficient net income to pay the difference of $20,367.10 between wages actually paid to the beneficiary and the proffered wage that year.

[4] Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

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 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.[5] 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 its fiscal year of 2002 were $47,404[6].

Therefore, for the fiscal year of year 2002, the petitioner had sufficient net current assets to pay the difference of $20,367.10 between wages actually paid to the beneficiary and the proffered wage that year, and thus has established its ability to pay the beneficiary the proffered wage in its fiscal year of 2002 with its net current assets.

However, the regulation expressly requests the petitioner demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. The priority date in the instant case is October 2, 2001, and the record before the director closed on October 11, 2005 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE) dated July 18, 2005. As of that date the petitioner's federal tax returns for its fiscal years of 2003 and 2004 should have been available. However, the petitioner did not submit the petitioner's tax returns for 2001, 2003 and 2004, nor did counsel explain why the tax returns were not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. Without the petitioner's tax returns for 2001, 2003 and 2004, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the proffered wage in 2001, the year of the priority date, and onwards. The petitioner failed to establish its continuing ability to pay the proffered wage because it failed to submit its tax returns or other regulatory-prescribed evidence for these years.

---

[5] 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.

[6] The director erred in calculating the petitioner's current liabilities as $80,342 in his decision. The petitioner's current liabilities in 2002 were $17,269.

Therefore, 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 to the present except 2002 through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. The record contains copies of Form 1040 U.S. Individual Income Tax Return filed by [redacted] and [redacted] for 2002 and balance sheet as of December 31, 2003 for [redacted]. On appeal counsel asserts that the petitioner established its ability to pay the proffered wage with its owner's personal assets. 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. Although [redacted] is the sole shareholder of the petitioner, the petitioner as a C corporation is a separate and distinct legal entity from its owners and shareholders, the assets of [redacted] cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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."

Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for allowing personal assets to be used in the formula to determine the petitioner's ability to pay the proffered wage. Counsel does not state how the DOL Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 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, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

Counsel'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.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner demonstrated that the beneficiary possessed the qualifying experience prior to the priority date. 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).

The regulation at 8 C.F.R. § 204.5(l)(3) states in pertinent part:

> *Initial evidence* – (i) *Labor Certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from DOL, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the DOL's Labor Market Information Pilot Program.

See also 8 C.F.R. §§ 204.5(g)(1) and 103.2(b)(5) requiring submission of the original labor certification application with the visa petition.

The instant I-140 petition was submitted with a copy of the approved labor certification from DOL for an initially sponsored alien worker, [redacted]. In the RFE dated July 18, 2005, the director requested the petitioner to submit the original Form ETA 750 for [redacted] and a signed Form ETA 750 by the substituted beneficiary. The director also asked whether or not the petitioner filed a I-140 for [redacted] and if so the receipt number. However, in response to the director's RFE, counsel did not submit a Form ETA 750 signed by the beneficiary, nor did counsel answer the question whether the petitioner filed a I-140 for [redacted] Without the Form ETA 750B for the substituted beneficiary, the AAO cannot determine whether or not the beneficiary qualifies for the proffered position. The petitioner failed to demonstrate that the substituted beneficiary possessed the required education and experience prior to the priority date, and thus the petition is not approvable.

CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The certified Form ETA 750 in the instant case states that the position of retail store manager requires two (2) years of college studies in business or accounting and two (2) years of experience in the job offered or in a related occupation of sales manager of retail store.

The petitioner must 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains a bachelor's degree and transcripts from San Beda College in the Philippines. The bachelor's degree and transcripts indicate that the beneficiary attended San Beda College from 1989 to 1993, majoring in marketing and was awarded a bachelor of science in commerce by said college on April 3, 1993. Therefore, the petitioner has established that the beneficiary possessed the requisite educational qualifications prior to the priority date in the instant case.

The record also contains an experience letter from the beneficiary's former employer pertinent to the beneficiary's employment. This experience letter is on letterhead of [redacted] signed by [redacted] as "Proprietor" of [redacted] in Pasig City, the Philippines, but without a date. The letter states that: "[t]his is to certify that [the beneficiary] has worked for [redacted] from the year 1992 – 1993 as a Store Supervisor and as a Store Manager from 1993 – 1994." The letter does not indicate the beginning and ending months for each position the beneficiary worked in, nor does the letter verify the beneficiary's full-time employment. The letter does not include a specific description of the duties performed by the beneficiary as set forth in the above quoted regulation. Therefore, the AAO cannot accept this letter as evidence conforming to the regulatory requirements to demonstrate the beneficiary's requisite two years of experience as a retail store manager.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.