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

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 20 2007

SRC 06 176 50382

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 preference visa petition was denied by the Director, Texas 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 chef/cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor (DOL). 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. Therefore, the director denied the petition.

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.

According to the director's October 10, 2006 denial, the issue in this case is whether 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 ETA Form 9089 is accepted for processing by any office within the employment system of the DOL. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the ETA Form 9089 for processing on April 13, 2006. The proffered wage as stated on the ETA Form 9089 is $19.70 per hour, 40 hours per week, or $40,976 annually. The ETA Form 9089 states that the position requires a high school diploma and six years of experience carrying out the duties of the proffered position.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the

federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage:

- the IRS Form 1065, U.S. Return of Partnership Income, for 2004 for [redacted] an entity having two partners, one of whom is apparently the petitioner's owner;
- copies of [redacted]'s monthly business checking statements for June 2006 and July 2006;
- a letter dated August 30, 2006 from the petitioner's owner which indicates that the petitioner did not begin operations until May 2006, after the April 13, 2006 priority date, and which indicates that, while the petitioner does not yet have any federal tax returns, annual reports or audited financial statements, the June and July 2006 checking statements for [redacted] LLC demonstrate the petitioner's ability to pay the proffered wage from the priority date onwards;[2]
- counsel's appeal brief dated December 8, 2006 which indicates that the petitioner has demonstrated an ability to pay the proffered wage from the priority date onwards.

The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

There is no direct evidence in the record as to whether the petitioner is structured as a C corporation, an S corporation, a sole proprietorship, etc. On the petition, the petitioner indicated that it was established in 2005. However, on the ETA Form 9089, the petitioner indicated that it was established in 2001. As noted above, the petitioner's owner indicated in his letter dated August 30, 2006 that the petitioning restaurant began operations in May 2006, subsequent to the April 13, 2006 priority date. On the petition, the petitioner indicated that it currently employed 10 employees and that its gross annual income is $350,000. On the ETA Form 9089, signed by the beneficiary on May 5, 2006, the beneficiary did claim at Part J, Item 21 to have gained qualifying experience while working for the petitioner. However, in her appeal brief, counsel indicates that the beneficiary has never worked for the petitioner.

On appeal, counsel indicated that the petitioning restaurant did not begin operations until May 2006. She asserted that because of this, Citizenship and Immigration Services (CIS) cannot request that the petitioner

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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 this 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).

[2] This office again notes that the June 2006 and July 2006 checking statements are for [redacted] not for the petitioner. In his letter dated August 30, 2006, the petitioner's owner stated that the petitioning restaurant is "held under our company [redacted] However, the 2004 [redacted] federal tax return submitted into the record gives no indication that the petitioner's financial information is reported on that form or that the petitioning restaurant is otherwise a part of [redacted] Moreover, on appeal counsel acknowledged that [redacted] is a separate company from the petitioning restaurant, but claimed that [redacted] is owned by the petitioner's owner. Regarding the latter point, it is noted that according to its 2004 federal tax return, [redacted], has two partners who each share fifty-percent of the profit, loss and capital of that entity. One partner is Alice Eddy and one is Panagiotis Theodoropoulos, the petitioning restaurant's owner.

provide its federal tax returns for 2005. Counsel also indicated that the federal tax return for a company owned by the petitioner's owner, and the checking statements for this business [redacted] for June and July of 2006 as well as a statement from the petitioner's owner that includes his promise to use his funds acquired from other sources to pay the proffered wage if needed is sufficient to show an ability to pay the wage from the priority date onwards.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition subsequently based on that ETA Form 9089, 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, 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 this case, the beneficiary did indicate on the ETA Form 9089 that he had worked for the petitioner in the past. However, there is no evidence in the record such as the Form W-2, Wage and Tax Statement, pay stubs, etc. to document that he worked for the petitioner during the relevant period of analysis. Further, on appeal, counsel indicated that the beneficiary had never worked for the petitioner.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. It is also insufficient for the petitioner to show that it paid wages in excess of the proffered wage.

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 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* stated:

> 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* 719 F. Supp. at 537.

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.[3] Generally, if the total of a petitioner'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 did not provide any of its tax returns. Moreover, the petitioner's owner and counsel both have indicated that the petitioning restaurant did not begin operations until after the April 13, 2006 priority date. As such, the petitioner could not demonstrate an ability to pay the proffered wage from the priority date onwards, as it was not even operating at the time of priority date.

This office notes that the petitioner did provide the 2004 tax returns of an entity for which the petitioner's owner is apparently one of the partners. While this tax return covers a period before the priority date, if the information on this form related to the petitioning entity and if the petitioner could show good cause for not being able to produce the tax return for the relevant period of analysis or for the tax year just prior to the year of the priority date, this tax return might be considered by CIS in its analysis of the petitioner's ability to pay the proffered wage. However, there is no indication on that 2004 tax return that the petitioner lists any of its financial information on that form.[4] Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and consider the assets of the petitioner's owner to satisfy the petitioning corporation's requirement that it demonstrate an 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, the assets of the petitioner's owner or shareholders, and their promises to pay the proffered wage from their own funds or from the funds of other enterprises or corporations in their control cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.[5]

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

[4] This office notes that the tax returns of [redacted] state that its principal business is sales and that its principal product is olive oil. There is no reference to an ancillary business such as the petitioning restaurant or other entity on its returns.

[5] This office also notes that even if the petitioner were able to show that the financial information on the 2004 tax return in the record relates to the petitioning restaurant, that tax return would not help demonstrate an

For similar reasons, the June 2006 and July 2006 checking account statements of [redacted] an entity for which the petitioner's owner is one of the partners, are not relevant to whether the petitioning restaurant has had the ability to pay the proffered wage from the priority date onwards. This office notes further that even if these checking account statements did relate to the petitioner, bank statements are not among the three types of evidence enumerated in 8 C.F.R. § 204.5(g)(2) as the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional evidence to be considered "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner in this matter. Also, the two bank statements submitted show the amount in a business checking account on a given date. Such statements standing alone cannot show an ability to pay the proffered wage from the priority date onwards.

Thus, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage from the priority date onwards.

Beyond the decision of the director, the record fails to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. 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 or District Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also* 5 U.S.C. 557(b) (which states that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991); and *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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, Madany 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).

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of its filing date which as noted above is April 13, 2006. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In this case, the ETA Form 9089, Part H, Items 4 and 6, set forth the minimum education, training, and experience that an applicant must have for the position of chef/cook. Item 4 indicates that the applicant must have a high school diploma to qualify for the proffered position. Item 6 indicates that to qualify the applicant must also have seventy-two months or six years of experience in the proffered position. The duties of the proffered position are delineated at Part H, Item 11 of the ETA Form 9089 as follows:

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ability to pay the proffered wage. That is, the 2004 tax return shows a net income/loss of -$15,931. Further, that return does not include the Schedule L such that this office might review that entity's net current assets to consider whether the net current assets might help demonstrate an ability to pay the proffered wage.

> Preparing and Cooking traditional Greek food according to menu and recipes. Examines the quality and specifications of food and products. Prepare, season, cook meats, vegetables, dessers [sic]. Specialize in Greek appetizers such as eggplant salad, taramosalata, etc... Has to have knowledge in operation of all kitchen equipment: Such as stoves, conventional ovens, combi steam ovens, gridddles [sic] and char-broilers.

Part H, Item 14 of ETA Form 9089 also lists the following specific skills and other requirements for the proffered position:

> Technical Kitchen skills required: Operating equipement [sic] in Restaurant such as stoves, conventional ovens, combi steam, broilers, charcoal broilers. Food inspection skills required. Social skills for managing and coordinating lower cooks and other staff such as cleaning crew.

The beneficiary set forth his credentials on the ETA Form 9089 and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part K, Item 1, eliciting information of the beneficiary's work experience, the beneficiary indicated that he performed all the duties listed at Part H, Items 11 and 14 of that form on a full-time basis while employed by Hohinstaufin Restaurant in Schwibgmund, Germany from March 1991 through April 1999. The beneficiary does not provide any additional information concerning his employment background on that form.

The beneficiary did submit a letter that is not dated which indicates that he worked as a cook on two prior occasions. First, the letter indicates that from March 1980 until February 1985, he was head cook at an establishment named "[redacted]" The letter seems to indicate that "[redacted]" is located at "[redacted]" While the letter does not identify an exact street address, nor the country in which "[redacted]" is located, the letter does provide the telephone number for a "[redacted]" who is apparently the owner of "[redacted]" The record does not include any other information regarding that former position, such as a letter from the owner at "Artemis" which verifies this work experience and details the beneficiary's duties at this position. Second, on the beneficiary's undated letter, he indicated that from 1987 until 1991, he owned an establishment named "[redacted]" where he apparently worked as a cook. The record does not any other information regarding this position, such as an address or an employment verification letter. Also when requested to list all past work experience that might qualify him for the proffered position on the ETA Form 9089, the beneficiary did not list any past work experience at [redacted]

At Part J, Items 13, 14 and 15 of the ETA Form 9089, the beneficiary represented that he completed high school in 1978 at an institution named "Greece High School." The beneficiary left blank the space in which he was to list the street address, city and postal code of that institution. Instead, he included only the name of the country in which "Greece High School" is located: "Greece."

In response to the director's request for evidence regarding the beneficiary's qualifications for the proffered position, the petitioner submitted a statement from the petitioner's owner dated September 18, 2006 in which the petitioner's owner indicated that he contacted the beneficiary's former employer in Germany to confirm that the beneficiary had performed the duties of the proffered position while employed in Germany. The record does not include any other documentation to substantiate the beneficiary's qualifying experience in Germany or elsewhere.

The record also does not include any documentary evidence to substantiate that the beneficiary received his high school diploma.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner failed to provide a letter from the beneficiary's employer in Germany or elsewhere which includes the name, address and title of that employer, as well as a detailed description of the experience which the beneficiary gained while working in Germany or elsewhere. A statement from the petitioner's owner which indicates that he contacted the beneficiary's former employer in Germany is not sufficient to demonstrate that the beneficiary has six years of qualifying experience carrying out the duties of the proffered position. *See* 8 C.F.R. § 204.5(l)(3).

Thus, the record does not demonstrate that, as of the priority date, the beneficiary had acquired six years of experience as a chef/cook with duties as set forth on the ETA Form 9089.

The record also contains no documentary evidence that the beneficiary has a high school diploma as required by an applicant for the proffered position according to the terms of the ETA Form 9089 as certified. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(B).

As such, the petitioner has not shown that the beneficiary is qualified, in terms of his past work experience or in terms of his educational background, to carry out the duties of the proffered position.

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. That burden has not been met.

ORDER: The appeal is dismissed.