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

PUBLIC COPY

[redacted]

B6

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 10 2008

EAC-05-161-50919

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 Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a coffee shop. It seeks to employ the beneficiary permanently in the United States as a baker. 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 failed to provide its financial documentation to establish 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 September 4, 2007 denial, the primary issue in this case is whether or not the petitioner had 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).

Here, the Form ETA 750 was accepted on October 25, 2004. The proffered wage as stated on the Form ETA 750 is $575.00 per week ($29,900 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B signed on June 23, 2004, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 1998, to

have a gross annual income of $640,486, to have a net annual income of $94,727, and to currently employ 20 -25 employees.[1]

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 upon appeal[2]. On appeal, counsel submits a brief, a copy of response to the director's May 20, 2006 request for evidence (RFE), a copy of Interoffice Memorandum issued by William R. Yates, Associate Director for Operations on May 4, 2004 regarding determination of ability to pay under 8 C.F.R. § 204.5(g)(2) (Yates May 4, 2004 memo), and a printout of an AAO decision on January 17, 2003. Other relevant evidence in the record includes Form 1120S U.S. Income Tax Return for an S Corporation filed by Bettencourt II Corp for 2002 through 2005. 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*, at 612.

The petitioner of the instant petition and the employer of the relevant labor certification application is GFTF Corp. d/b/a Dunkin Donuts located at 150 Bridge Street, Pelham, NH 03076. However, the record of proceeding does not contain any regulatory-prescribed evidence to establish the petitioner's ability to pay the proffered wage from the priority date to the present, such as the petitioner's annual reports, tax returns or audited financial statements for those relevant years. Instead the petitioner submitted tax returns for an S corporation named Bettencourt II Corp (Bettencourt), located at 140 Pelham Plaza, Pelham, NH 03076.

On appeal, counsel claims that Bettencourt is owned by [redacted] and therefore, is an affiliate entity of the petitioner. However, counsel did not submit any objective evidence to support his assertions that Bettencourt either is the same entity as the petitioner or qualifies a successor-in-interest to the petitioner. Instead, the New Hampshire Department of State Corporation Division official corporation database shows that the petitioner was established on February 18, 2004 as a New Hampshire domestic corporation and is

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[1] In fact, the petitioner claimed Bettencourt II Corp's federal employer identification number, establishment date, gross income, and net income as its own. *See* Form 1120S U.S. Income Tax Return for an S Corporation filed by Bettencourt II Corp for 2003, at page 1.

[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) and 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).

currently in good standing status; and that Bettencourt was established on February 26, 1998 as a New Hampshire domestic corporation and is currently in good standing status.[3] The official records show that the petitioner and Bettencourt are separate independent corporations. 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). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *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." Consequently, in the instant case, neither assets of the petitioner's shareholder, [redacted] can be considered in determining the petitioning corporation's ability to pay the proffered wage, nor assets of Bettencourt can be considered in determining the petitioner's ability to pay, even though Betterncourt is owned by the same individual, [redacted].

The status of successor-in-interest requires documentary evidence that the successor-in-interest has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. The record does not contain any such documentary evidence. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

The AAO finds that the record does not contain any evidence to establish the same entity or successor-in-interest relationship between the petitioner and Bettencourt and thus, the petitioner must establish its ability to pay the proffered wage with its own net income or net current assets evidence by its own regulatory-prescribed evidence, such as the petitioner's tax returns, annual reports or audited financial statements for 2004, the year of the priority date in the instant case, to the present. The tax returns or other financial documents of [redacted] are not relevant. Therefore, the AAO will solely consider the petitioner's financial documents in determining the petitioner's ability to pay the proffered wage.

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, although the beneficiary and the petitioner claimed that the beneficiary had worked for the petitioner since April 2004,[4] the record does not contain any evidence to show that the petitioner paid the

[3] *See* https://www.sos.nh.gov/corproate/soskb/Corp.asp? (Accessed on March 26, 2008).

[4] As previously noted the beneficiary did not claim to have worked for the petitioner on the Form ETA 750B signed on June 23, 2004, however, in its letter dated March 15, 2005 the petitioner claimed that the beneficiary had been employed by the petitioner. The beneficiary indicated on Form G-325A Biographic Information signed on April 20, 2005 that he had been working for the petitioner as a baker since April 2004 to the present.

beneficiary any amount of compensation in the relevant years. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 2004 onwards.

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).

As an alternative method, 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. In response to the director's RFE, counsel asserted that the petitioner had cash assets on hand in the amount of $163,980 which ensures a reasonable expectation of ability to pay the wage in the future. However, 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.

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.

However, the petitioner did not submit its tax returns, annual reports or audited financial statements for the relevant years. Without the regulatory-prescribed evidence, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the proffered wage. Therefore, the petitioner failed to establish its ability to pay the proffered wage beginning on the priority date to the present with its net income or net current assets.

The record before the director closed on August 15, 2006 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax returns for 2004 and 2005 should have been available. However, the petitioner did not submit the petitioner's tax returns for 2004 and 2005. 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

[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.

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 regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for 2004 and 2005. 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. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner failed to document the relationship between the petitioner and Bettencourt and further failed to establish its ability to pay the proffered wage with its own tax returns or other regulatory-prescribed evidence.

The AAO also notes that even if the petitioner had established that Bettencourt were the same entity as the petitioner, or that Bettencourt qualified as the successor-in-interest to the petitioner, Bettencourt's tax returns and other documentary evidence would not have established the petitioner's continuing ability to pay the proffered wage from the priority date to the present.

The petitioner submitted Bettencourt's Form 1120S U.S. Income Tax Return for an S Corporation for 2002 through 2005 as evidence of the petitioner's ability to pay the proffered wage. According to the tax returns in the record, Bettencourt is structured as an S corporation, and its fiscal year is based on a calendar year. However, the priority date in the instant case is October 25, 2004, and therefore, the tax returns for 2002 and 2003 are not necessarily dispositive. The tax returns for 2004 and 2005 demonstrate that Bettencourt had a net income[6] of $(8,998) in 2004 and $100,162 in 2005, and its net current assets were $(27,805) in 2004 and $85,834 in 2005. Therefore, for the year 2004, Bettencourt did not have sufficient net income or net current assets to pay the proffered wage, and thus failed to establish its ability to pay the proffered wage as of the priority date.

On appeal, counsel cites Yates' May 4, 2004 memo and *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), and also refers to a decision by the AAO to support his assertions. However, none of them provides legal authority to support counsel's assertion that the petitioner is allowed to use another corporation's tax returns to establish its continuing ability to pay the proffered wage in the instant case. The Yates' May 4, 2004 memo relies upon 8 C.F.R. § 204.5(g)(2) as authority for the policy guidance therein. The regulation requires that a *petitioning entity* demonstrate its continuing ability to pay the proffered wage beginning on the priority

[6] 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 1120S 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 line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S (2003), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf; Instructions for Form 1120S (2002), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf.

date. If CIS and the AAO were to interpret and apply the Yates' May 4, 2004 memo as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. It is the petitioner that must demonstrate *its* continuing ability to pay the proffered wage beginning on the priority date with *its own* financial documents, not with another corporation's. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. However, *Sonegawa* does provide any legal authority to allow a petitioner to use another corporation's net income or net current assets to establish its own ability to pay the proffered wage. The record does not contain any evidence showing that the petitioner, not Bettencourt, had unusual circumstances to parallel those in *Sonegawa*, nor has it been established that 2004 and 2005 were uncharacteristically unprofitable years in a framework of profitable or successful years for *the petitioner, GFTF Corp. d/b/a Dunkin Donuts,* instead of Bettencourt, the third party. The AAO decision referred by counsel is not a precedent decision. 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, unpublished 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).

Counsel's assertions on appeal cannot overcome the ground of the director's denial that the petitioner failed to establish the same entity or successor-in-interest relationship between the petitioner and Bettencourt and further failed to demonstrate that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. The decision of the director must be affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether the petitioner demonstrated with regulatory-prescribed evidence that the beneficiary possessed the requisite two years of experience in the job offered 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).

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, 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of baker. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Experience	
	Job Offered	2 years
	Related Occupation	0

The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on June 23, 2004 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been working in various jobs since August 2000. Prior to that, he represented that he worked forty hours per week as a baker for J. Longuinho & Cia Ltda located at Rua Pedro Gusso, No. 385, Novo Mundo, Curitiba, PR Brazil from January 1998 to August 2000. He did not provide any additional information concerning his employment background on that form.

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) or 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.

The record contains an experience letter from J. Longuinho & Cia Ltda. The experience letter in the record was dated October 25, 2004 and signed by [redacted] of J. Longuinho & Cia Ltda. This letter stated concerning the beneficiary's work experience in pertinent part that:

> We declare for all legal purposes, that [the beneficiary] ... was employed by us from January 1993 until December 1997, as a baker and there is no record against him.

The letter is on letterhead of J. Longuinho & Cia. Ltda and signed by [redacted], however, it does not contain his title in the company, and therefore, it is not clear whether the letter is from a former employer or coworker. The letter verifies that the beneficiary was employed for three years from January 1995 to December 1997, however, it does not verify the beneficiary's full-time employment. It is not clear whether the beneficiary's experience meets the two years of full-time experience requirements. The letter does not include a specific description of the duties performed by the beneficiary during his employment with J. Longuinho & Cia. Ltda as required by the regulation. Without such a specific description of the duties, the AAO cannot determine whether the beneficiary's experience with J. Longuinho & Cia. Ltda qualifies him to perform the duties for the proffered position set forth at Item 13 of the Form ETA 750A. Therefore, this experience letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case. The record of proceeding does not contain any other evidence to support the beneficiary's qualifications. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered for the proffered position as required by the ETA 750.

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.