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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: EAC 06 092 52177 Office: NEBRASKA SERVICE CENTER Date: MAR 25 2008

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

The nature of the petitioner's business[1] is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Italian specialties. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated September 21, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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[1] The petitioner has filed one other I-140 petition identified by Citizenship and Immigration Services (CIS) receipt number EAC 05 136 54187 for beneficiary [redacted]

Here, the Form ETA 750 was accepted on April 6, 2001.[2] The proffered wage as stated on the Form ETA 750 is $16.00 per hour ($33,280.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience as an assistant cook

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.[3]

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from counsel dated August 17, 2006; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2001, 2002, 2003, 2004 and 2005; approximately 13 copies of the petitioner's bank statements from November 3, 2001 to January 4, 2005; 2 copies of the petitioner's owner's bank statement from December 17, 2004 to January 14, 2005; the owner of petitioner's personal joint U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002, **2003, 2004 and 2005; IRS Form W-2 Wage and Tax Statements for 2001 and** 2002 issued by the petitioner to [redacted] its owner in the amounts of $46,800.00 and $55,900.00 respectively; a document between [redacted] and spouse and a bank entitled "Home Equity Line of **Credit dated May 27, 2005;" a statement by** [redacted] dated August 18, 2006 concerning his personal finances/assets; a copy of the case precedent, *Ranchito Coletero*, 2002-INA-104 (2004 BALCA); a copy of a two web pages of a summary entitled "Minutes of ISD Liaison Teleconference," June 27, 2002, as accessed from the American Immigration Lawyers Association website at www.aila.org; two pages from a larger article concerning the ability to pay the proffered wage from American Immigration Lawyers Association publication of "VSC's Written Answers to AILA's Liaison Questions (3/4/03)" (no reference provided); and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996 and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were $22,006.00 and $504,349.00 respectively. On the Form ETA 750, signed by the beneficiary on March 28, 2001, the beneficiary did claim to have worked for the petitioner since February 1996.

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

[3] The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

Accompanying the appeal, counsel submits a legal brief and no new additional evidence. Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[4] copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

On appeal, counsel asserts that depreciation in the amount of $3,521.00 stated on the petitioner's 2001 tax return may be considered as evidence of the petitioner's ability to pay the proffered wage. Counsel's appellate argument that its depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985), 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,* 719 F.Supp. 532 (N.D. Texas 1989) further noted:

> Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos,* 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

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

On appeal, counsel asserts that cash available at the end of the year 2001 in the amount of $21,423.00 is evidence of the ability to pay the proffered wage. Counsel urges that the petitioner's Schedule L Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would likely be duplicative, at least in part. The petitioner's Schedule L Cash is included in the calculation of the petitioner's net current assets, which are considered separately from its net income.

On appeal, counsel asserts that loans from shareholders that in 2001 were $14,336.00 are evidence of the ability to pay the proffered wage. Counsel's contention is misplaced. Shareholder loans are not current assets or liabilities, and the cash or compensation received by the corporation is off-set by its liability to repay the loans. Shareholder proceeds (the right to receive loan repayment), or liabilities (the obligation of the corporation to repay the loans) for that matter, cannot be evidence of the ability to pay by their very nature.

On appeal, counsel asserts that the petitioner's capital stock of $200.00 is evidence of the ability to pay the proffered wage. Capital stock and paid-in capital are not current asset items but rather the equity of the corporation and as such, they are unavailable to pay the proffered wage.

On appeal, counsel asserts that the petitioner's retained earnings of $15,777.00 are evidence of the ability to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus

[4] 8 C.F.R. § 204.5(g)(2).

any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

As the petitioner's deductions for depreciation, cash available at the end of the year, loans from shareholders, capital stock, and retained earnings in 2001 cannot be considered individually, these items cannot be considered in combination with the petitioner's net income, as counsel asserts, as evidence of the petitioner's ability to pay the proffered wage. Counsel on appeal makes the same additive calculation utilizing the figures stated in the petitioner's 2002, 2003 and 2005 tax returns that depreciation, cash available at the end of the year, loans from shareholders, the petitioner's capital stock, and retained earnings, together with the petitioner's net income are for each year, are evidence of the ability to pay the proffered wage. For the reasons above stated, counsel's contentions are erroneous.

Counsel cites the case precedent of *Ranchito Coletero,* 2002-INA-104 (2004 BALCA), to support his contentions. *Ranchito Coletero* concerns entities in an agricultural business that regularly fail to show profits and typically rely upon individual or family assets. Counsel has introduced evidence of the petitioner corporation owner's personal assets and finances. Counsel does not state how the 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 has submitted copies of the petitioner's owner's bank statement from December 17, 2004 to January 14, 2005; the owner of the petitioner's personal joint U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002, 2003, 2004 and 2005; IRS Form W-2 Wage and Tax Statements for 2001 and 2002 issued by the petitioner to [redacted], the petitioner's owner in the amounts of $46,800.00 and $55,900.00 respectively; a document between [redacted] and spouse and a bank entitled "Home Equity Line of Credit, etc.;" and a statement by [redacted] dated August 18, 2006 concerning his personal finances/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.[5] 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)(also cited by counsel), 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 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 has submitted approximately 13 copies of the petitioner's bank statements from November 3, 2001 to January 4, 2005 as evidence of the petitioner's ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel has submitted a copy of a two web pages of a summary entitled "Minutes of ISD Liaison Teleconference," dated June 27, 2002, as accessed from the American Immigration Lawyers Association website at www.aila.org. Counsel's reliance on the AILA minutes is misplaced. The only advisory statement related to the ability to pay in the excerpt submitted relates to the submission of W-2 statements. Since the petitioner has withheld submission of wage evidence although it was requested by the director in his request for evidence dated June 27, 2006, (as discussed below), the AILA minutes do not apply to the instant case.

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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting

[5] Counsel has introduced two pages from a larger article concerning the ability to pay the proffered wage and the compensation of officers' expense (as stated on corporate income tax returns) from the American Immigration Lawyers Association publication of "VSC's Written Answers to AILA's Liaison Questions (3/4/03)" (no reference provided). There is no contention or reference in the record of proceeding advocating compensation of officers' expense as evidence of the petitioner's ability to pay. Further no corporate officer in the record has offered his/her compensation to pay the proffered wage.

the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

According to the labor certification, the beneficiary has been in the petitioner's employ since February 1996. Although the director by his request for evidence dated June 27, 2006, requested indicia of the compensation (Forms 1099-MISC statements) or wages (W-2 statements) that counsel states on appeal was paid to the beneficiary, no evidence was submitted by the petitioner. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The AAO must therefore evaluate the petitioner's ability to pay the entire proffered wage as of the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's Form 1120S[6] tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120S stated net income (Schedule K, line 23) of $16,203.00.
- In 2002, the Form 1120S stated a loss of <$18,476.00>.

[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. However, where an S corporation has income, credits, deductions or other adjustments from sources other than from a trade or business, net income is found on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, then in that case net income is found on line 23 (2001-2003) or 17e (2004-2005) of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-pdf/i1120s.pdf, (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner has additional deductions shown on its Schedule K for 2001, 2004 and 2005, the petitioner's net income is found on Schedule K of its tax returns for 2001, 2004 and 2005.

- In 2003, the petitioner's New York State tax return stated a loss of <$2,371.00>.
- In 2004, the Form 1120S stated net income (Schedule K, line 17.e) of $15,006.00.
- In 2005, the Form 1120S stated net income (Schedule K, line 23) of $0.00.

Since the proffered wage is $33,280.00 per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2001, 2002, 2003, 2004 and 2005.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[7] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets for the periods for which tax returns were submitted were as follows:

- 2001 $20,012.00
- 2002 $ 3,730.00
- 2003 $ 3,460.00
- 2004 $20,770.00
- 2005 $ 6,940.00

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage.

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 through an examination of its net income or net current assets.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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[7] 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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.