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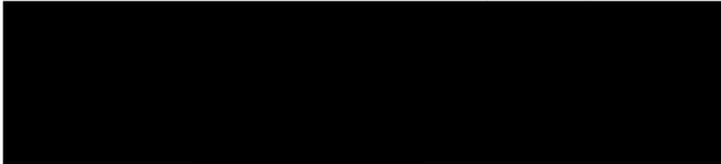
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 03 167 50809

Office: TEXAS SERVICE CENTER

Date:

AUG 14 2006

IN RE:

Petitioner:

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the ability to pay the proffered wage as of the priority date and continuing. The director denied the petition accordingly.

On appeal, counsel states that the petitioner has other financial resources with which to pay the proffered wage. Counsel submits further documentation.

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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.50 an hour, or \$26,000 annually. On the ETA 750, the beneficiary claimed that he had worked for the petitioner since January 2001.

On the petition, the petitioner indicated it was established in September of 1993, has six employees, an annual gross income of \$387,723 and a net annual income of -\$9,347. With the petition, the petitioner submitted a letter of support from the petitioner for the beneficiary, a letter of employment verification from the Angkor Restaurant, Phnom Penh, Cambodia; and the petitioner's IRS Form 1120, corporate income tax return, for tax year 2002. This latter document indicated the petitioner had taxable income before net operating loss deduction and special deductions of -\$9,347.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 13, 2004, the director sent the petitioner a Notice of Intent to Deny (NOID). The director noted that the petitioner's 2002 tax return did not establish the petitioner's ability to pay the proffered wage. The director then specifically requested that the petitioner provide copies of its

ability to pay the proffered wage in tax year 2003. The director stated that the petitioner might submit federal tax returns, annual report, or an audited financial statement. The director also requested that the petitioner submit evidence that the petitioner has been paying the beneficiary the proffered wage. For this purpose the director request the beneficiary's Forms W-2 or Form 1040 for the year 2003.

In response to the NOID, the petitioner submitted the following documents:

A letter from [REDACTED] Accounting and Tax Service, Black Mountain, North Carolina;

The petitioner's Forms 1120S for tax years 2001, 2002, and 2003;

The petitioner's business checking account monthly statements with Carolina Community Bank from January 1, 2001 to September 2001;

The petitioner's business checking account monthly statements with United Community Bank from October 31, 2001 to November 8, 2003;

The deeds for two houses owned by the owners and shareholders worth a combined \$135,000;

The account balance from the petitioner's investment savings account with Wells Real Estate Funds, with a balance of \$50,151.06, dated September 15, 2004;

The petitioner's owner's investment portfolio summary with FirstEagle Fund, as of June 2004, with a balance of \$39,264.38; and

An investment note statement in the name of the petitioner from an entity identified as American Business that shows a balance of \$15,175.32 as of September 30, 2004.

The petitioner's federal tax returns indicated that the petitioner had taxable income before net operating loss deduction and special deductions of -\$759 in tax year 2001, taxable income before net operating loss deduction and special deductions of -\$9,347 in tax year 2002, and taxable income before net operating loss deduction and special deductions of -\$20,072.

Counsel stated that [REDACTED] the petitioner's accountant, extrapolated from the documents submitted to the record how the petitioner had the ability to pay the proffered wage. In his letter [REDACTED] stated that the petitioner's net income is not wholly indicative of the total availability of the petitioner's financial resources and cash flow. [REDACTED] stated that the petitioner's depreciation, cash available at the end of the tax year, business bank balances, and in particular, the petitioner's assets, should be examined in establishing whether the petitioner has the ability to pay the proffered wage.

[REDACTED] then examined the petitioner's 2001 income tax return and noted that the petitioner's gross income was \$379,393, and its net income was -\$759. [REDACTED] stated that after adding back the depreciation expense of

\$9,323, the petitioner's revised net income was \$8,564. [REDACTED] further stated that in addition to this revised net income, the petitioner's business bank statement for the year that ended on December 31, 2001 showed that the petitioner had \$25,558.75 in available income to pay the proffered wage. [REDACTED] also stated that after adding the revised net income of \$8,564, the end of the year cash balance of \$14,215, the petitioner's December 2001 bank balance of \$25,558.75, and the tax refund of \$2,000, the petitioner had \$50,337.75 with which to pay the proffered wage of \$26,000.

For tax year 2002, [REDACTED] stated that the petitioner had a gross income of \$387,723 and a net income of -\$9,347. [REDACTED] noted that the petitioner's business bank statement as of December 31, 2002 showed a balance of \$12,899.91 in income as well as the \$1,500 refund shown on the petitioner's tax return. [REDACTED] stated that the record also showed a Deed of Trust that indicated [REDACTED] sole shareholder of the petitioner, owned property worth \$20,000 as of 2001. [REDACTED] then stated that totaling the petitioner's net income, the end of the year bank statement, and the worth of the property represented by the Deed of Trust gave the petitioner \$34,399.91, which was sufficient to pay the proffered salary of \$26,000.

For tax year 2003, [REDACTED] stated that the petitioner had \$17,487 in available income based on the petitioner's bank account statement for the end of December 2003. [REDACTED] also noted that the petitioner ended the year with \$4,210 in cash and also received a tax refund of \$1,900 in 2003. [REDACTED] also stated that the owner of the petitioner, [REDACTED] whom [REDACTED] described as the petitioner's sole shareholder received a Deed of Trust for a house he owned that is worth \$115,000. [REDACTED] combined the petitioner's bank balance of \$17,487 of December 2003, its cash listed on Schedule L of \$4,201, the petitioner's tax refund of \$1,900 and the stated \$115,000 worth of the petitioner's owner's house for which he received a Deed of Trust in 2003, and stated that the petitioner had \$138,588.50 available to pay the proffered wage of \$26,000.

[REDACTED] also stated that the petitioner also provided evidence as to further funds available to pay the proffered wage through the documentation on the petitioner's investment accounts. [REDACTED] identified further funds such as the investment account with Wells Real Estate Funds, worth \$50,151.06, the portfolio summary with a value of \$39,264.38 as of June 30, 2004, and the investment notes statement that listed two notes worth \$10,000 and \$5,000 respectively. [REDACTED] finally stated that these investment figures that totaled more than \$100,000 were further evidence of the petitioner's ability to pay the proffered wage. Counsel states that based on the financial analysis of the petitioner's accountant, the petitioner had established that it had ample financial resources to pay the proffered wage from the 2001 priority date to the present.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on December 6, 2004, denied the petition. The director examined the petitioner's federal tax returns for tax years 2001, 2002, and 2003 and stated that the petitioner's taxable income was -\$759 in 2001, -\$9,347 in 2002 and -\$20,072 in 2003. The director then determined that the petitioner's Schedules L showed net current assets of \$13,159 in 2001, negative net current assets in 2002, and net current assets of \$773 in tax year 2003. The director stated that the petitioner's tax return did not establish the petitioner's ability to pay the proffered wage in any of the tax years reviewed. The director further stated that counsel's and the petitioner's accountant's reliance on the petitioner's bank balances, investment fund statements, and the value of owned properties was misguided. The director stated that these types of evidence are not among the three types of evidence outlined in 8 C.F.R. § 404.5(G)(2).

On appeal, counsel asserts that the petitioner does have the ability to pay the proffered wage as of the April priority date and to the present. Counsel submits a second letter from [REDACTED] the petitioner's accountant, dated February 1, 2005. In his letter [REDACTED] states that the director failed to take into account that the petitioner works on a cash basis and therefore the return do not adequately reflect the petitioner's considerable income available to pay the proffered wage. [REDACTED] states that the payments made by the petitioner towards the end of the year will show as losses because the new statement from the bank has not yet been issued. Therefore, when the petitioner pays its annual payments by check prior to December 31, [REDACTED] counts these written checks as a debit, which can cause a loss for the year even though the money was still in the account as of December 31 of each year. [REDACTED] also points out that credit card income is not immediately deposited to the petitioner's accounts. [REDACTED] states, that for practical purposes, the petitioner receives credit card deposits days or even a month from the time the customer paid. In a month such as December that is a very busy time of the year, the great amount of income earned in that month was paid by credit cards in January of the next year. Since the transactions were not yet processed, a significant portion of December's traditionally extremely brisk sales are only credited the following year.

[REDACTED] also states that the director fails to take into account standard accounting practices for small businesses which encourage running a loss, or, at most, breaking even at the end of the year. [REDACTED] explains that this keeps corporate taxes low, or even eliminates them. [REDACTED] states that small businesses such as the petitioner pay taxes through its owners and officers, namely [REDACTED] and [REDACTED]. [REDACTED] states that the petitioner paid its officers \$117,600, \$125,600, and \$114,250 for the years 2001, 2002, and 2003 respectively, even though the restaurant posted losses in its net income for each year. [REDACTED] states that this is a good policy because unlike corporate taxes, owners pay personal taxes on the money they are paying into unemployment social security in addition to paying federal taxes on the money. [REDACTED] notes that the payment of such large amounts to the owners demonstrate that the petitioner can easily, and did easily, produce a substantial amount of income that could be used to pay the proffered wage of \$26,000. [REDACTED] adds that a petitioner that can easily year after year remunerate its corporate officers more than \$100,000 can easily afford the proffered wage of \$26,000.

[REDACTED] points out a third issue that he states was overlooked by the director, namely, that restaurants such as the petitioner, are often "asset poor". [REDACTED] states that such petitioners often rent their property and own only the cooking and associated equipment they use to make or transport the food. This type of asset is depreciated out. Therefore, according to [REDACTED], when the Department of Labor¹ simply subtracts the petitioner's assets from its liabilities, it gets a skewed and inaccurate reading of the petitioner's ability to pay the proffered wage because it does not take into account the petitioner's money in the bank, and its investments that are available to pay the proffered wage. The petitioner does not have extensive assets as perhaps would a factory or retail store, yet it has cash as its main asset that shows up in the petitioner's considerable investments in real estate and security.

[REDACTED] again states the depreciation expense should be added back to the petitioner's net income to obtain a more accurate picture, as depreciation does not represent an expense to the business during the year that it is declared, so it must be included as income to the business. [REDACTED] analyzes the petitioner's 2001 tax return again and states that by combining the petitioner's negative net income, the depreciation expense, the petitioner's

¹ [REDACTED] erroneously identifies the agency that issued the denial of the petition as the Department of Labor. The correct agency name is Department of Homeland Security, Citizenship and Immigration Services (CIS).

cash on hand at the end of the year, and the cash in the restaurant's bank account of December 31, 2001, the petitioner has \$48,337 with which to pay the proffered wage of \$26,000. [REDACTED] then reviews the petitioner's tax return for 2002, and states that the net income loss of \$20,072 in no way is indicative of the petitioner's ability to pay the proffered wage. [REDACTED] again states the depreciation expense of \$8,732 has to be subtracted from the net loss as does the \$4,201 in cash on hand which leaves a much narrower loss of \$7,139. [REDACTED] then looks at the petitioner's bank statement as of December 31, 2003, and states that these funds of \$17,487.52 eliminate any loss and bring the petitioner's available income to \$10,348.52. [REDACTED] states that the petitioner has other assets including investment worth \$10,616 through First Eagle Funds, and the main shareholder received a Deed of Trust for a house that he owns, that as of September 29, 2003, was worth \$115,000. [REDACTED] also notes that according to the 2003 tax return, the petitioner paid its officers \$114,250. [REDACTED] states that since the petitioner paid its officers more than \$100,000 without any deleterious effect on the petitioner, it is clear that the petitioner could also pay the proffered wage of \$26,000 to the beneficiary. With regard to 2004, Mr. [REDACTED] states that the petitioner in 2004, paid its officers bonuses of \$6,100 each, in addition to their payment of \$112,700. [REDACTED] notes that the petitioner also has significant investments in its own name, including the Wells Real Estate Funds Investment portfolio worth \$51,029.42. [REDACTED] also notes the petitioner's December 2004 bank statement that shows a balance of \$22,900.26.

[REDACTED] concludes by stating that he has served as the petitioner's accountant for 12 years, and that he serves as the accountant for 29 small and medium-sized business in the Western North Carolina/Asheville Area. [REDACTED] states that after reviewing the petitioner's documentation, it is his professional opinion that the petitioner has had the ability to pay the proffered wage of \$26,000 since April 2001 to the present time.

Counsel also submits to the record W-2 Forms for the petitioner's two shareholders and owners, [REDACTED] and [REDACTED]. These documents indicate that in 2001, [REDACTED] received \$37,200 in compensation and [REDACTED] received \$80,400 in compensation. In 2002, the owners received \$42,600 and \$83,000 respectively. In 2003, the owners received \$37,200 and \$75,050 in compensation, and in 2004, [REDACTED] received \$41,750 in 2004 while [REDACTED] received \$83,150 in compensation. Counsel also submits bank statements from United Community Bank for the petitioner's banking account from December 31, 2003 to November 2004; a statement from Wells Real Estate Funds that shows an balance of \$51,029.42 as of December 2004; a statement of operations for the petitioner which counsel identifies as being for the year 2004; and a statement from FirstEagle Funds for the year 2003, which shows a value of \$10,616.01.

Counsel states that it is clear from the director's denial that the CIS failed to take into account important sources of income for the petitioner that clearly demonstrated that the petitioner had a more than sufficient ability to pay the proffered wage. Counsel asserts that 8 C.F.R. § 204.5(g)(2) states that tax returns are not the only source of information for the petitioner's ability to pay, and that bank statements may also be submitted to the record to establish the petitioner's ability to pay the proffered wage. Counsel states that the bank statements previously submitted and those submitted on appeal demonstrate that the petitioner has at all times had the cash in its bank account to pay the proffered wage. Further, counsel asserts that the W-2 Forms submitted on appeal as well as the

² Mr. Green did not add in the tax refund to the petitioner's cash on hand, net income, and bank balances, in this reiteration of the petitioner's available funds.

income tax returns demonstrate the petitioner paid its officers/ sole shareholders more than enough money to pay the proffered wage of \$26,000.

Counsel further asserts that even though the petitioner is a corporation, the assets as a whole and the assets of a major shareholder may be taken into account when determining the ability. Counsel cites *Ohsawa America*, Board of Alien Labor Certification Appeals (BALCA) 1988-INA-240. Counsel states that in this decision, even though the petitioner had shown prior losses and a negative working capital it established its ability to pay the proffered wage, as the petitioner had also increased sales and reduced operating losses, and the major shareholder had a large personal net worth. Counsel also cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA). Counsel asserts that in addition to reviewing the petitioner's investments, the director should have taken into account the assets of the company's sole shareholder, [REDACTED]

Counsel then states that the priority date was April 30, 2001 and that on a monthly-prorated basis the petitioner only had to show it could pay \$19,503 in tax year 2001. Counsel submits that by taking into account depreciation and cash on hand, the petitioner's \$22,779 in available funds in 2001 demonstrates that it has more than sufficient ability to pay the pro-rate proffered wages for 2001.

Counsel then states that the petitioner's bank accounts confirm the petitioner's ability to pay the proffered wage. Counsel states that from April to December 2001, the petitioner's lowest daily balance was \$2,969.88, recorded in January 2001,⁴ and the average of the statement balances is more than \$15,199. Counsel states that in 2001 there was not a single month in which the petitioner did not have more than sufficient cash in its bank account to pay the proffered wage to the beneficiary. Counsel also states that the amount the petitioner paid out to its officers in 2001 demonstrates the petitioner's strong financial situation. Counsel notes that the petitioner paid its officers, [REDACTED] and [REDACTED] \$117,600 in priority year 2001. Counsel states that the fact that petitioner could compensate its officers at such a level demonstrated that it could easily pay the pro-rated wage of less than \$20,000 in 2001.

Counsel also examines the petitioner's sales, depreciation, officers' compensation, and bank statements for tax years 2002 and 2003 as proof of the petitioner's financial viability. Counsel states that the petitioner has even paid its two officers over \$12,000 in bonuses, which counsel asserts is an action only a thriving corporation can undertake. Counsel also states that the petitioner held considerable funds in investments, and refers to the new statements submitted on appeal from First Eagle and Wells Real Estate Investment. Counsel states that between the combined investment accounts the petitioner had more than \$56,000 in investments available to the petitioner to pay the proffered wages.

Counsel's and the petitioner's accountant's reliance on the balances in the petitioner's bank account is misplaced. First, as correctly noted by the director, 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

³ The record reflects there are two shareholders, [REDACTED] and [REDACTED] although [REDACTED] the petitioner's owner, has 91 percent of shares in the business.

⁴ Counsel appears to refer to the 2001 Carolina Community Bank statements submitted to the record that cover February through December 2001, and reflect a minimum balance of \$2,969.88 on the February 2001 statement.

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. Although [REDACTED] on appeal makes cogent statements with regard to small businesses' use of cash in their operations, as well as credit card payments and cash receipts showing up on bank statements in a delayed fashion, his statements can also be seen as further supporting the non-use of bank statements to establish a petitioner's ability to pay a proffered wage. For example, it is noted that the delayed credit card payments or cash receipts from the petitioner's late 2000 business activities would be reflected in the petitioner's early 2001 bank statements and overall contribute to the petitioner's 2001 financial picture. Likewise, the delayed credit card payments and cash deposits from the petitioner's late 2001 business activities would be reflected in the petitioner's 2002 bank statements and contribute to the end of the year 2002 picture of the petitioner's financial picture. Thus, delayed credit card payments or cash deposits would eventually be included in the petitioner's financial records.

Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statement for April 2001 somehow reflect additional available funds that were not reflected on its 2001 tax return. Counsel did not provide an explanation for why the petitioner's bank statement for April 2001 should be given more probative weight than the petitioner's 2001 federal income tax return.

Counsel cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), apparently in relation to the premise that petitioners can rely on the individual or family assets of shareholders and owners.⁵ Counsel does not state how the Department of Labor's (DOL) Bureau 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. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay.

Counsel states that a Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that in this decision, even though the petitioner had shown prior losses and a negative working capital, it established its ability to pay the proffered wage, based on increased sales and reduced operating losses, and based on the fact that the major shareholder had a large personal net worth. Counsel states that based on this decision, the director should view the assets of the petitioner's owner/majority shareholder. Counsel does not state how DOL precedent is binding in these proceedings. 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).

Furthermore, in the instant petition, the petitioner shows continuous and increasing net income losses, and higher salaries paid out than revenue received so it shows an increase in operating losses as well. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

⁵ Counsel does not explicitly explain the relationship between the findings in *Ranchito Coletero* and the petitioner's circumstances in the instant petition.

Counsel also refers to the concept of pro-rating the proffered wage to determine more accurately how much of the proffered wage the petitioner has to establish it can pay during the priority year. However, 12 months of income will not be considered towards an ability to pay a lesser period of the proffered wage any more than 24 months of income would be considered towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel and the petitioner's accountant also emphasize the use of the owners' and shareholders' assets to establish the petitioner's ability to pay the proffered wage. Contrary to counsel's assertion, Citizenship and Immigration Services (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 usually be considered in determining the petitioning corporation's ability to pay the proffered wage. It is noted that the record is somewhat confused as to which assets submitted to the record are the assets of the petitioner, as opposed to the assets of the petitioner's officers/shareholders. For example, the deeds of trust are clearly the assets of the petitioner's officers/shareholders, while the cash in the Carolina Community Bank statements are clearly assets of the petitioner. Thus, the deeds of trust which are owned by the petitioner's officer(s)/shareholder(s) are not necessarily viewed as assets that can also be utilized by the petitioner to establish its ability to pay the proffered wage. The savings account with Wells Real Estate Funds appear to be the assets of the petitioner, with the petitioner's owner as trustee. The AAO will examine the other assets identified by counsel and the petitioner's accountant further in the proceedings as to whether they can be utilized to establish the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. The beneficiary indicated on ETA Form 750 that he had worked for the petitioner since October 2001. However, the petitioner provided no further evidentiary documentation such as W-2 Forms to establish its employment of the beneficiary. Therefore the petitioner cannot establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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, contrary to counsel's and the petitioner's accountant's assertions, 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). Showing that the petitioner's gross receipts 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 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, now CIS, should have considered income before expenses were paid rather than net income.

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* 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.

Thus, counsel's and [REDACTED] assertions with regard to adding back depreciation to the petitioner's net income are not convincing.

The petitioner is structured as a corporation. The petitioner's net income is the sum shown on line 28, taxable income before NOL deduction and special deductions IRS Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns for 2001, 2002, and 2003 reflect the following net income: -\$759, -\$9,347, and -\$20,072. These figures are not sufficient to pay the proffered wage of \$26,000 in any of the three years examined.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. In addition, 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.⁶ 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The tax returns reflect the following information for the following years:

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

	2001	2002	2003
Taxable income ⁷	\$ -759	\$ -9,347	\$ -20,072
Current Assets	\$ 19,202	\$ -3,873	\$ 9,699
Current Liabilities	\$ 6,043	\$ 9,517	\$ 8,926
Net current assets	\$ 13,159	\$ -13,390	\$ 773

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of -\$759, and net current assets of \$13,159, and has not, therefore, demonstrated the ability to pay the proffered wage of \$26,000. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, as previously illustrated, the petitioner shows a taxable income of -\$20,072, and negative net current assets of \$13,390, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2003. In 2003, as previously illustrated, the petitioner shows a taxable income of -\$1,615, and negative net current assets of \$17,775, and has not, therefore, demonstrated the ability to pay the proffered wage. Therefore the petitioner cannot establish its ability to pay the proffered wage as of the 2001 priority and to the present, based on its net income or net current assets.

As previously stated, counsel submitted evidence of bank statements, investment portfolio statements, a real estate trust investment fund, and deeds of trust for two properties owned by the petitioner's owners and shareholders. Counsel also submits the W-2 Forms for the petitioner's owners and shareholders for tax years 2001, 2002, and 2003. As previously stated, CIS does not view bank statements as evidence of additional funds available to pay the proffered wage. In addition, statements in the name of the petitioner's owner, namely the First Eagle Savings account, are viewed as the personal assets of the shareholder/owner, and are not considered as additional funds with which to pay the proffered wage. It is further noted that other documents submitted to establish the assets of the petitioner are addressed to both the petitioner and the two individual owners which only confuses the record as to which statements document the petitioner's assets, and which document the petitioner's owner's assets. For purpose of these proceedings, any statement addressed to one of the petitioner's shareholder is viewed as a personal shareholder asset, while documents addressed to the petitioner are viewed as the petitioner's property. Thus, the petitioner's bank statements from Carolina Community Bank, from Wells Real Estate Funds, and the Investment Note Statement from American Business dated September 30, 2004 in the amount of \$15,175.32 are viewed as assets of the petitioner; while the deeds of trust, and the stocks in the First Eagle Funds are viewed as assets of the petitioner's owners/shareholders. However, when reviewing the assets represented by Wells Real Estate Funds, or from American Business, the record does not reflect that these funds were available to pay the proffered wage as of April 2001. All documentation with regard to these funds are dated either 2003 or 2004. Thus, the petitioner has not established that it possesses additional funds as of the April 2001 priority date with which to pay the proffered wage.

⁷ As previously stated, taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

However, counsel's and the petitioner's accountant's comments with regard to the compensation provided to the petitioner's officers/shareholders cannot be overlooked, when examining the totality of the petitioner's circumstances. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). As stated previously, the petitioner's tax return indicate two shareholders/officers, and also indicate that [REDACTED] is the majority shareholder with 91 percent ownership of the petitioner. The shareholders, in particular the majority shareholder, of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 91 percent of the petitioner's stock, while Mey Lim hold 9 per cent of the petitioner's stock. According to the petitioner's 2001 IRS Form 1120 Schedule E (Compensation of Officers), the shareholders elected to pay themselves \$80,400 and \$37,200, respectively. According to the Schedule E for 2002, the shareholders paid themselves \$83,000 and \$42,600, respectively. According to the Schedule E for 2003 the shareholders paid themselves \$77,050 and \$37,200 respectively. These figures are supported by the shareholders' W-2 Forms for 2001, 2002, and 2003 which were submitted for the record on appeal. We note here that the compensation received by the company's shareholders/owners during these three years was not a fixed salary and amounted to over \$100,000 per year.

As previously stated, CIS (legacy INS) has long held that it 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.

In the present case, however, counsel is not suggesting that CIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their corporation. Furthermore the compensation of the majority shareholder, and to a lesser extent the second shareholder, is significantly higher in tax years 2001, 2002, and 2003 than the beneficiary's proffered wage of \$26,000. The petitioner's owners' assets shown in the record of proceedings also lend further credibility to the premise that the shareholders could have foregone \$26,000 of their annual compensation to pay the proffered wage.

In addition, the petitioner indicated that it had been in business since 1993, thus exhibiting some longevity in the restaurant business. Thus, the petitioning entity is a profitable enterprise for its owners. We concur with the arguments presented by counsel on appeal with regard to officer compensation. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owners confirms that the job offer is realistic and that the proffered salary of \$26,000 can be paid by the petitioner.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977), also see *Sonegawa*. Accordingly, after a review of the petitioner's federal tax returns, the shareholders' compensation and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

As stated previously, the petitioner has established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision will be withdrawn, and the petition shall be sustained. 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 met that burden.

ORDER: The appeal is sustained.