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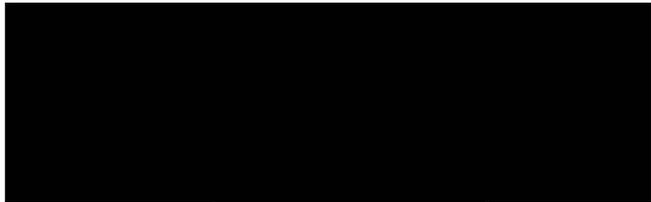
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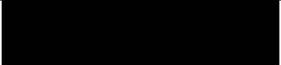
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FILE:



EAC 05 068 50903

Office: VERMONT SERVICE CENTER

Date: DEC 28 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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's March 16, 2005 denial, 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 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.

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 DOL. *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 DOL 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 August 24, 2001. The proffered wage as stated on the Form ETA 750 is \$11.47 per hour (\$23,857.60 per year based on a 40 hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered or two years of experience as a cook helper.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> On appeal,

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case

counsel submits two briefs, a copy of an interoffice memorandum (Yates Memo) dated February 16, 2005 from William R. Yates, Associate Director of Operations, Citizenship and Immigration Services (CIS), to Service Center Directors and other CIS officials entitled Requests for Evidence (RFE) and Notices of Intent to Deny (NOID), receipts for equipment and renovation materials and services, a statement from the petitioner's shareholder, the petitioner's banks statements from Bank of America for April through December 2001, and January through December 2003, a letter dated May 13, 2005 from [REDACTED] and the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Returns, for the last three quarters of 2001. Relevant evidence in the record includes a letter from the petitioner's shareholder, the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for 2001, 2002 and 2003, and the petitioner's shareholder's IRS Forms 1040, U.S. Individual Income Tax Returns, for 2001, 2002 and 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in March 2000 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. On the Form ETA 750B, signed by the beneficiary on December 21, 2004, the beneficiary did not claim to have worked for the petitioner.<sup>2</sup>

On appeal, counsel asserts that based on the Yates Memo, the director should have issued an RFE in the instant case since the director's decision was not based on clear evidence of ineligibility. Counsel further asserts that the director should have considered the petitioner's depreciation deductions, its equipment expenses, the balances in its bank accounts, the petitioner's shareholder's income and the petitioner's shareholder's investment into the petitioner's business in 2001 in his determination of the petitioner's ability to pay the proffered wage. Counsel also asserts that the proffered wage should be prorated from the priority date through the end of 2001. Counsel also states that the petitioner hired temporary cook helpers to assist the existing cook, and that the wages of the temporary cook helpers may be used to pay the proffered wage. Citing a letter from a CPA, counsel states that the petitioner's losses reported on its tax returns were due to its hybrid method of accounting and therefore, the petitioner had sufficient funds to pay the proffered wage. Counsel states that under Virginia law, the concept of "piercing the corporate veil" justifies the proposition that the petitioner's shareholder is responsible for payment of the proffered wage. Counsel also states that the financial viability of the petitioner was stronger than its tax returns reflect, and that its revenue grew in 2002 and 2003.

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 the petitioning

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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).

<sup>2</sup> The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

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

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

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on December 27, 2004. As of that date, the petitioner's 2003 federal income tax return is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001, 2002 and 2003, as shown in the table below.

- In 2001, the Form 1120 stated net income of -\$16,874.00.
- In 2002, the Form 1120 stated net income of -\$4,800.00.
- In 2003, the Form 1120 stated net income of \$11,261.00.

Therefore, for the years 2001, 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$23,857.60.

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. Net current assets are the difference between the petitioner's current assets

and current liabilities.<sup>3</sup> 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 tax returns demonstrate its end-of-year net current assets for 2001, 2002 and 2003, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of -\$1,879.00.
- In 2002, the Form 1120 stated net current assets of \$5,457.00.
- In 2003, the Form 1120 stated net current assets of \$27,021.00.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage of \$23,857.60. For the year 2003, the petitioner had sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, 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 wages paid to the beneficiary, or its net income or net current assets except for 2003.

On appeal, counsel asserts that based on the Yates Memo, the director should have issued an RFE in the instant case since the director's decision was not based on clear evidence of ineligibility. However, counsel's application of the Yates Memo to the instant case is erroneous. The regulation at 8 C.F.R. § 103.2(b)(8) provides that a petition may be denied if there is clear evidence of ineligibility, notwithstanding the lack of initial evidence. The Yates memorandum states that clear ineligibility exists when the adjudicator can be sure that a petition cannot meet a basic statutory or regulatory requirement. Pursuant to the Yates memo, inability to meet a basic statutory or regulatory requirement includes circumstances where the evidence submitted clearly establishes that a substantive requirement cannot be met. In the instant case, the director determined that the initial evidence submitted by the petitioner supported a decision of denial, based on the petitioner's inability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2). Therefore, the director's denial was proper without the issuance of an RFE.

Further, counsel requests that CIS prorate the proffered wage for the portion of 2001 that occurred after the priority date. CIS will prorate the proffered wage if the record contains evidence of net income specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. The petitioner's federal tax returns indicate that the petitioner was incorporated on May 2, 2000. Despite counsel's claim that the petitioner opened in April 2001, the petitioner has submitted no evidence of its net income specifically covering the portion of the year that occurred after the priority date in August 2001. Therefore, CIS will not prorate the proffered wage for 2001.

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<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Counsel also asserts that the petitioner hired temporary cook helpers to assist the existing cook, and that the wages of the temporary cook helpers may be used to pay the proffered wage. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. However, counsel specifically states in his brief on appeal that the duties of a cook helper are not substantially comparable to the duties of the proffered position. Therefore, the wages paid to the petitioner's cook helpers may not be utilized to prove the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition.

Counsel further asserts that the director should have considered the petitioner's shareholder's income and the petitioner's shareholder's investment into the petitioner's business in 2001 in his determination of the petitioner's ability to pay the proffered wage. Counsel states that under Virginia law, the concept of "piercing the corporate veil" justifies the proposition that the petitioner's shareholder is responsible for payment of the proffered wage. Contrary to counsel's assertion, the petitioner's shareholder is not legally liable for the financial obligations of the corporation. 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).<sup>4</sup> Consequently, assets of its shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel further asserts that the director should have considered the balances in the petitioner's bank accounts in his determination of the petitioner's ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account 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 was considered in determining the petitioner's net current assets.

Finally, counsel also states that the financial viability of the petitioner was stronger than its tax returns reflect, and that its revenue grew in 2002 and 2003. CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie

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<sup>4</sup> 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."

actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, CIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner was incorporated in May 2000. Despite counsel's claim that the petitioner's revenue grew in 2002 and 2003, the petitioner's gross receipts were \$167,793.00, \$202,746.00 and \$181,072.00 in 2001, 2002 and 2003, respectively. The petitioner paid minimal salaries and wages in each relevant year. The record does not establish the occurrence of any uncharacteristic business expenditures or losses or the petitioner's reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.<sup>5</sup> 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 foreign food specialty cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                         |                            |
|-----|-------------------------|----------------------------|
| 14. | Education               |                            |
|     | Grade School            | blank                      |
|     | High School             | blank                      |
|     | College                 | blank                      |
|     | College Degree Required | none specifically required |
|     | Major Field of Study    | blank                      |

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<sup>5</sup> 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The applicant must also have two years of experience in the job offered or two years of experience as a cook helper. The duties of the offered job 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 states that experience and references are required.

The beneficiary set forth her credentials on Form ETA-750B. On Part 15, eliciting information of the beneficiary's work experience, she represented that she worked as an assistant manager at Anshan City [REDACTED] From September 2002 to September 2004, that she worked as an accountant for [REDACTED] from April 1999 to August 2002, and that she worked as a cook for [REDACTED] from January 1995 to October 1998. She does not provide any additional information concerning her employment background on that form.

With the petition, the petitioner submitted a letter dated October 20, 1998 from [REDACTED] International Hotel certifying that the beneficiary worked as a Japanese Cook in the Japanese Cuisine Department of [REDACTED] International Hotel from January 1995 to October 1998.

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

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The letter from [REDACTED] International Hotel does not describe the beneficiary's job duties as specifically required by the regulation or state her hours of work to determine if she worked full-time or not. Thus, the petitioner failed to provide sufficient documentation of the beneficiary's prior work experience as required by 8 C.F.R. § 204.5(l)(3). Therefore, the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience in the job offered or as a cook helper from the evidence submitted into this record of proceeding and thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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