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FILE:

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LIN-04-013-51098

Office: NEBRASKA SERVICE CENTER

Date: JAN 25 2006

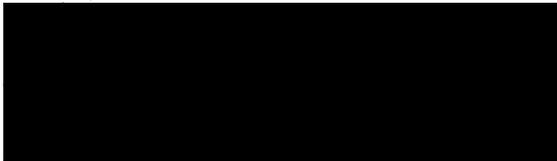
IN RE:

Petitioner:  
Beneficiary



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition<sup>1</sup> was denied by the Acting Director (Director), Nebraska 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 specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time the priority date was established and continuing to the present, and denied the petition accordingly.

On appeal, counsel submits a brief statement.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$27,664 per year. 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 on January 18, 1998, to have a gross annual income of \$200,083.00, a net annual income of \$13,172.00, and to currently employ 6 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The beneficiary did not claim to have worked for the petitioner.

With the instant petition filed on October 20, 2003, the petitioner submitted Form 1120S U.S. Income Tax Return for an S corporation for 2000 and a copy of personal financial statement of [REDACTED] the owner/manager of the petitioner, to demonstrate the petitioner's ability to pay the proffered wage.

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<sup>1</sup> The petitioner through the same counsel filed an I-140 immigrant petition (Receipt Number: LIN-03-138-50114) on behalf of the same beneficiary on March 27, 2003 based on the instant labor certification. The petition was denied on August 20, 2003 because the beneficiary could not be found qualified for classification as a skilled worker.

On May 21, 2004, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence (RFE) pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner "submit evidence to establish that [the petitioner] had the financial ability to pay the offered wage as of 04-30-2001, **and continue to have such ability.**" (emphasis in the original)

In response to the RFE received by the director on August 11, 2004, the petitioner submitted a faxed letter from Accountant [REDACTED] regarding the owner of Asian Buffet, [REDACTED] personal financial status.

The director denied the petition on August 23, 2004, finding that the petitioner's 2002 tax return shows \$13,172 net income and \$6,494 in cash reserves which are less than the proffered wage, and that the owner's personal assets are precluded from being utilized to establish the petitioner's ability to pay since the petitioner was organized as a corporation, not as a sole proprietorship.

Pursuant to the regulations set forth at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Service (CIS) will first examine whether the petitioner employed and paid the beneficiary during a given period to determine the petitioner's ability to pay the proffered wage 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, neither the petitioner nor the beneficiary claimed that the beneficiary worked for the petitioner. The record does not contain any evidence showing the petitioner employed and paid the beneficiary any compensation during the period. Therefore, the petitioner had not established that it employed and paid the beneficiary full of the proffered wage during the period from the priority date through the present.

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 receipts and wage expense is misplaced. 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 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.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001<sup>2</sup> and 2002. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$27,664 per year from the priority date:

In 2001, the Form 1120S stated net income<sup>3</sup> of \$6,638.

In 2002, the Form 1120S stated net income of \$13,172.

Therefore, the petitioner did not have sufficient net income to pay the proffered wage for the year 2001 or 2002.

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

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's Schedule L of Form 1120s indicates the following information concerning the petitioner's current assets and current liability:

Year	Current Assets	Current Liabilities	Net Current Assets
2001	\$9,200	\$(1,018)	\$10,218
2002	\$10,444	\$(1,375)	\$11,819.

<sup>2</sup> The petitioner's 2001 tax return was submitted with the previous petition. See Footnote 1 above.

<sup>3</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>4</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.

The petitioner did not have sufficient net current assets in 2001 or 2002 to pay the proffered wage of \$27,664.

As noted above, the priority date in the instant case is April 30, 2001 and the petitioner's fiscal year is based on calendar year. The record before the director closed on August 17, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 should be available. However, the petitioner did not submit a copy of its federal income tax return for 2003, nor has it submitted that return on appeal. Therefore, the petitioner failed to establish its ability to pay the proffered wage for 2003.

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 wages paid to the beneficiary, or its net income or net current assets.

Counsel argues in his brief accompanying the appeal that: "[t]here are no rules and regulations which precludes a corporation petitioner-owner's personal assets from being utilized, in order to establish the petitioner's financial ability to pay the beneficiary's wage." In the instant case, the petitioner is structured as an S corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Counsel's reliance on the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage is misplaced.

Counsel also claims that "the petitioner submitted an audited financial statement from S & K Accounting re the petitioner Mr. [REDACTED] financial ability to pay the beneficiary's proposed wages of \$27,664, in the past and in the future". Counsel's assertion is incorrect. The statement submitted is not audited. The financial statement from S & K Accounting counsel claimed as audited states at the end that: "[t]he information presented is that of the representation of the individuals. I have not audited or reviewed the accompanying information and accordingly, do not express an opinion or any other form of assurance on them." The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Furthermore, as discussed above the financial statement is about the personal assets of the owner of the petitioner, and the owner's personal assets cannot be used to demonstrate the corporation's 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 any office within the employment system of the

Department of Labor. 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 director's decision, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The certified Form ETA 750 in the instant case states that the position of specialty cook requires one (1) year experience in the job offered. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

Although Part 14 of Form ETA 750B indicated one reference note from Mr. [REDACTED] and one chef certificate, the record of proceedings does not contain any letter from Mr. [REDACTED]. Counsel's submission letters for the previous petition, the instant petition and the response to the RFE did not mention submission of a letter from Mr. [REDACTED] or from any previous or current employer regarding the beneficiary's requisite experience. The record contains a copy of graduation certificate issued by Career Skill Training Center, Jun An District Bureau of Labor, Fuzhou City, Fujian Province, P.R. China to the beneficiary on July 28, 2000 certifying that the beneficiary graduated from two (2) months training from May 2000 to July 2000. It is not a chef certificate, nor is it a letter verifying the beneficiary's one (1) year requisite experience. With the two (2) months training the beneficiary cannot meet the one (1) year requisite experience.

Furthermore, the information provided raises doubts and suggests inconsistencies. The above mentioned graduation certificate indicates that the beneficiary received two (2) months training from May 2000 to July 2000. In Part 15 of Form ETA 750B, which was signed on April 22, 2001 by the beneficiary under a declaration that the information was true and correct, the beneficiary claimed that he worked as a chef intern from May 2000 to July 2001 for Ban Hui Restaurant in Fuzhou, Fujian, China. Form I-485 filed by the beneficiary on March 27, 2003 indicates that his date of last arrival in the United States was January 2000. The record contains no information that explains the beneficiary's various claims that he received the training from May 2000 to July 2000, worked as a chef intern from May 2000 to July 2001 in Fuzhou, China, and was in the United States since January 2000.

Part 15 of Form ETA 750B indicated that the beneficiary's only experience in cooking was working as a chef intern from May 2000 to July 2001 for Ban Hui Restaurant in Fuzhou, Fujian, China. Part 11 listed the beneficiary's education in pertinent part as follows: from September 1997 to July 1999 studied English at [REDACTED] Vocational School. However, the beneficiary claimed on his Form G-325A signed on February 28, 2003 that he worked as a cook for Ban Yao Grant Hotel in Fuzhou, China from October 1997 to October 1999. He did not mention the working experience with Ban Hui Restaurant from May 2000 to July 2001 at all. The record contains a copy of the beneficiary's passport, which was issued on April 28, 1999. The passport indicated the

beneficiary's profession as student instead of cook or others. The petitioner did not explain and resolve these inconsistencies.

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

For the reasons above discussed, the AAO decides that the petitioner did not demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750. In further proceeding, if any, the director should invalidate the labor certification if he finds so based on an investigation.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.