

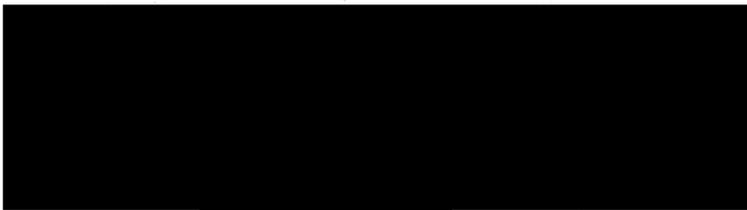
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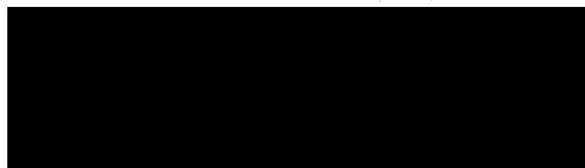
FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 25 2006
WAC-04-026-51738

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer and importer of textile and apparel. It seeks to employ the beneficiary permanently in the United States as a Specialty Cook (Chinese Cuisine). 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 continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and had not established that it is the same legal entity as the employer which filed the ETA 750 application, or a successor in interest to that employer. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 7, 2004 decision denying the petition, the issues in this case are whether the petitioner is a successor in interest to the employer which submitted the ETA 750 and whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence

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

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

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The name of the employer on the ETA 750 is Formosa Textile Group, Inc. The ETA 750 was filed on March 26, 2001. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour, which amounts to \$29,120.00 annually.

On the Form ETA 750B, signed by the beneficiary on February 8, 2001, the beneficiary claimed to have worked for the Formosa Textile Group, Inc., beginning in June 2000 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on September 11, 2003.

The I-140 petition was submitted on November 5, 2003. The name of the petitioner on the I-140 petition is "Campus Group, Inc. (Previously Known as) Formosa Textile Group, Inc." (I-140 petition, Part 1). On the petition, the petitioner claimed to have been established on October 27, 1999, to currently have six employees, to have a gross annual income of \$6,103,863.00, and to have a net annual income of \$30,229.00. With the petition, the petitioner submitted supporting evidence.

The beneficiary's I-485 application to adjust status to that of permanent resident was filed concurrently with the I-140 petition, on November 5, 2003.

As of May 3, 2004 the I-140 petition and the I-485 application had been pending for 180 days.

In a request for evidence (RFE) dated August 2, 2004, the director requested additional evidence relevant to the petitioner's ability to pay the proffered wage and additional evidence relevant to whether the petitioner is a successor in interest to the employer which filed the ETA 750.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on August 20, 2004.

In a decision dated October 7, 2004 the director determined that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director also found that the record did not contain an individual labor certification from the I-140 petitioner and that the record lacked evidence of a successor in interest. The director therefore denied the petition. On that same date, the director denied the beneficiary's I-485 application to adjust status to lawful permanent resident status.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, counsel submits a legal memorandum in the form of a motion for reconsideration and submits no additional evidence. Counsel also submits additional copies of documents previously submitted for the record. Counsel also submits a copy of a memorandum dated May 12, 2005 from the CIS Associate Director of Operations, which is not an evidentiary document, but which is submitted as legal authority in support of the petition.

Relevant evidence in the record includes copies of Form 1120 corporate tax returns of a corporation named Campus Sports, Inc., a copy of an undated letter from the manager of a Taipan Bistro, a restaurant in Long Beach, California, stating the beneficiary's work experience with that restaurant from April 1998 to May 2000, a copy of a menu from the Taipan Bistro, and a copy of a June 7, 2004 letter from the manager of the Taipan Bistro offering the beneficiary a permanent and full-time job as Specialty Cook (Japanese Cuisine).

On appeal, counsel states that the beneficiary of the instant petition is subject to the portability provisions of American Competitiveness in the 21st Century Act (AC21), and that memoranda from the CIS Associate Director of Operations establish procedures under which the instant petition should be adjudicated. Counsel states that the beneficiary filed a Form I-485 application to adjust status to permanent residence concurrently with the instant I-140 petition, and that both petitions were still pending as of 180 days after the filing date. Counsel states that the I-140 petition was "approvable" as of that date.

The instant appeal raises the issue of the relationships among the portability provisions of AC21 and the regulation at 8 C.F.R. § 204.5(g)(2) concerning the petitioner's ability to pay the proffered wage to the

beneficiary. AC21 does not directly apply to I-140 petitions, but rather pertains to the adjudication of I-485 applications to adjust status to permanent resident status. Nonetheless, in certain circumstances the provisions of AC21 affect the adjudication of I-140 petitions, notably in situations where an I-140 petition and an I-485 application have been filed concurrently and where both the I-140 and the I-485 have remained pending for a period of at least 180 days. Such a situation is applicable to the instant I-140 petition.

The American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313, became law on October 17, 2000. AC21 § 106(c) added a new subsection (j) to section 204 of the INA, which states:

Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence - A petition under subsection (a)(1)(D) for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

INA § 204(j) (*added by The American Competitiveness in the 21st Century Act (AC21)*, Pub.L.No. 106-313, § 106(c), 114 Stat. 1251 (2000)).

AC21 also provides that where an I-140 petition and a new job offer satisfy the requirements of INA § 204(j), the underlying labor certification also remains valid. *American Competitiveness in the 21st Century Act*, Pub.L.No. 106-313, § 106(c)(2).

A memorandum to CIS Regional Directors and to Service Center Directors dated December 27, 2005 by Michael Aytes, Acting Director of Domestic Operations, presents interim guidance for processing Form I-140 petitions and Form I-485 and H-1B petitions affected by AC 21. The memorandum reissues an earlier memorandum on the same topic dated May 12, 2005 by William R. Yates, Associate Director for Operations. The memorandum is not binding on the AAO, but it presents a reasonable interpretation of the statute. The memorandum states in pertinent part as follows:

Question 1.

How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under § 106(c) of AC21?

Answer:

If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:

- A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it be adjudicated within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of the petition, approve the petition on its merits. Then adjudicate the adjustment of status application to determine if the new position is the same or similar occupational classification for I-140 portability purposes.
- B. If additional evidence is necessary to resolve a material post-filing issue such as ability to pay, an RFE can be sent to try to resolve the issue. When a response is received, and if the petition is approvable, follow the procedures in part A above.

Memo. from Michael Aytes, Acting Director of Domestic Operations, to Regional Directors and Service Center Directors, *Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2001 (AC21)(Public Law 106-313)* at 3 (December 27, 2005) (available at <http://uscis.gov/graphics/index.htm>; *path* Immigration Laws, Regulations and Guides; Immigration Handbooks, Manuals and Policy Guidance; Immigration Policy and Procedure Memoranda; *topic category* American Competitiveness in the Twenty-First Century Act of 2000 (AC21)).

The memorandum from Michael Aytes also discusses the situation where the alien has left his or her employment with the I-140 petitioner. The memorandum states in pertinent part as follows:

Question 10.

Should service centers or district offices deny portability cases on the sole basis that the alien has left his or her employment with the I-140 petitioner prior to the I-485 application pending for 180 days?

Answer:

No. The basis for adjustment is not actual (current) employment but prospective employment. Since there is no requirement that the alien have ever been employed by the petitioner while the I-140 and/or I-485 was pending, the fact that an alien left the I-140 petitioner before the I-485 has been pending 180 days will not necessarily render the alien ineligible to port. However, in all cases an offer of employment must have been bona fide. This means that, as of the time the I-140 was filed and at the time of filing the I-485 if not filed concurrently, the I-140 petitioner must have had the intent to employ the beneficiary, and the alien must have intended to undertake the employment, upon adjustment. Adjudicators should not presume absence of such intent and may take the I-140 and supporting documents themselves as prima facie evidence of such intent, but in appropriate cases additional evidence or investigation may be appropriate.

Id., at 4.

Concerning the issue of when an I-140 is no longer valid for porting purposes, the Aytes memorandum states as follows:

Question 11.

When is an I-140 no longer valid for porting purposes?

Answer:

An I-140 is no longer valid for porting purposes when:

- A. an I-140 is withdrawn before the alien's I-485 has been pending 180 days, or
- B. an I-140 is denied or revoked at any time except when it is revoked based on a withdrawal that was submitted after an I-485 has been pending for 180 days.

Id., at 4.

Counsel relies upon as legal authority the May 12, 2005 memorandum from William R. Yates mentioned above, as well as on an earlier memorandum dated August 4, 2003 by William R. Yates. Counsel has submitted copies of each of those memoranda for the record in the instant petition. Although both of those memoranda remain in effect, the most current memorandum on I-140 petitions and AC21 is the December 27, 2005 memorandum from Michael Aytes referenced above. The matters referenced by counsel in the two

memoranda by William R. Yates are also covered in the December 27, 2005 memorandum by Michael Aytes, with no substantive changes from the earlier memoranda by William R. Yates. Therefore, the Aytes memorandum will be considered to be the applicable memorandum.

In the instant case, the I-140 petition and the I-485 petition were both submitted on November 5, 2003, and as of May 3, 2004 they had been pending for 180 days with no decisions. Since the I-485 application remained pending for a period of more than 180 days, by operation of INA § 204(j), the I-140 petition, if approvable, would have been valid with respect to any new job for the beneficiary in the same or a similar job occupational classification.

The record in the instant case contains a copy of an undated letter from the manager of a Taipan Bistro, a restaurant in Long Beach, California, stating the beneficiary's work experience with that restaurant from April 1998 to May 2000, a copy of a menu from the Taipan Bistro, and a copy of a June 7, 2004 letter from the manager of the Taipan Bistro offering the beneficiary a permanent and full-time job as Specialty Cook (Japanese Cuisine). The June 7, 2004 letter is dated more than a month after the I-485 application had been pending for 180 days. Therefore, the June 7, 2004 letter falls within the terms of AC21.

The decision of the director to deny the beneficiary's I-485 application is not now before the AAO on appeal, and in any event, the AAO would lack jurisdiction for any administrative appeal of the director's decision of the beneficiary's I-485 application. The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.). Thus, since an AC21 determination pertains to the beneficiary's I-485, the AAO is limited to making a determination as to whether or not the petition's denial was appropriate.

An initial issue in the instant I-140 petition concerns the identity of the petitioner. As noted above, the ETA 750 was filed by a company named Formosa Textile Group, Inc. (ETA 750, Part A, block 4). The name of the petitioner on the I-140 petition is "Campus Group, Inc. (Previously Known as) Formosa Textile Group, Inc." (I-140 petition, Part 1).

In the RFE, the director requested evidence to show that the petitioner is a successor in interest to the original employer. That status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The record contains a letter dated October 15, 2003 on the letterhead of counsel's office, signed by counsel's paralegal, which includes the following statement: "Please be advised that the employer has filed an Amendment to Articles of Incorporations, and amend the corporation's name." (Letter signed by counsel's paralegal, October 15, 2003).

The letter signed by counsel's paralegal must be understood as a representation made on behalf of counsel, not as a letter signed by an independent witness. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). However, the record in the beneficiary's I-485 application contains a copy of a transcript issued on March 7, 2001 by the California Secretary of State, and an attached certificate of amendment of articles of

incorporation showing that the corporation "Formosa Textile Group Inc." changed its corporate name to "Campus Group, Inc." The certificate of amendment is dated February 23, 2001. The ETA 750 was filed on March 26, 2001, with the employer's name stated as Formosa Textile Group Inc. As of that date, the corporation's name had already been changed to Campus Group, Inc. Nonetheless, the certificate of amendment is sufficient to establish that the petitioner is the same legal entity as the employer which filed the ETA 750.

In his decision, the director found that the record did not contain an individual labor certification from the I-140 petitioner and that the record lacked evidence of a successor in interest. The director evidently failed to consider the certificate of amendment of the article of incorporation, which is found in the file among the documents supporting the beneficiary's I-485 application, rather than among the documents supporting the I-140 petition. The I-485 application was filed concurrently with the I-140 petition, and it appears from the record order that the certificate of amendment was among the documents submitted with that concurrent filing. For the foregoing reasons, the evidence in the record is sufficient to overcome the decision of the director concerning the issue of the identity of the employer which filed the ETA 750 and the identity of the petitioner. Since the evidence shows that the same legal entity filed both documents, no need exists to establish that the petitioner is a successor in interest to the employer which filed the ETA 750.

Another reason cited by the director for denying the petition was the failure of the evidence to establish the petitioner's ability to pay the proffered wage in 2001, which is the year of the priority date.

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 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on February 8, 2001, the beneficiary claimed to have worked for the Formosa Textile Group, Inc., beginning in June 2000 and continuing through the date of the ETA 750B. That corporate name is the petitioner's former name. However, no evidence in the record supports the beneficiary's claim to have worked for the petitioner, nor does any evidence in the record indicate the amount of any compensation paid by the petitioner to the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The record contains copies of Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002 of Campus Sports Inc. That name differs from the petitioner's name on the I-140 petition, which is "Campus Group, Inc. (Previously Known as) Formosa Textile Group, Inc." (I-140 petition, Part 1). On the I-140 petition, the Internal Revenue Service tax number is a number ending in the three digits "386." (I-140 petition, Part 1). That number is the same as the employer identification number which appears on the Form 1120 income tax returns of Campus Sports Inc. That information will be considered sufficient to establish that Campus Sports Inc. is the same legal entity as the petitioner.

The record before the director closed on August 20, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. In the RFE, the director had specifically requested a copy of the petitioner's federal tax return for 2003, with all schedules and accompanying tables. Nonetheless, the petitioner's submissions in response to the RFE did not include any federal tax return for 2003, nor is a copy of the petitioner's federal tax return for 2003 found elsewhere in the record.

Absent any evidence pertaining to AC21, the years at issue in the instant petition would be 2001, 2002 and 2003. However, since the record indicates that the instant I-140 petition is to be used as the basis for an adjustment of status under AC21, the only years at issue are those from the priority date until the date of the filing of the I-140 petition. The I-140 petition was filed on November 5, 2003. As of that date, the most recent year for which a federal tax return was available was 2002. Therefore the years at issue in the instant petition are 2001 and 2002. See Memo. from Michael Aytes, Acting Director of Domestic Operations, to Regional Directors and Service Center Directors, *Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2001 (AC21)(Public Law 106-313)* at 3 (December 27, 2005) (available at <http://uscis.gov/graphics/index.htm>; *path* Immigration Laws, Regulations and Guides; Immigration Handbooks, Manuals and Policy Guidance; Immigration Policy and Procedure Memoranda; *topic category* American Competitiveness in the Twenty-First Century Act of 2000 (AC21)).

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return.

The petitioner's tax returns state amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$4,561.00	\$29,120.00*	\$(24,559.00)
2002	\$30,229.00	\$29,120.00*	\$1,109.00
2003	not submitted	\$29,120.00*	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information fails to establish the petitioner's ability to pay the proffered wage in 2001, but the above information is sufficient to establish that ability in 2002, which is the other year at issue in the instant petition, as discussed above.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$(62,716.00)	\$29,120.00*	\$(91,836.00)
2002	\$416,753.00	\$29,120.00*	\$387,633.00
2003	not submitted	\$29,120.00*	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information fails to establish the petitioner's ability to pay the proffered wage in 2001, but it is sufficient to establish that ability in 2002, which, as noted above, is the only other year at issue in the instant petition.

The record also contains copies of California Form 100 Franchise or Income Tax Returns of Campus Sports Inc. for 2001 and 2002, but those tax returns contain no significant information beyond the information in the corporation's federal corporate income tax returns for 2001 and 2002, discussed above.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage in 2001, which is the year of the priority date.

In his decision, the director incorrectly considered the petitioner's net income to be its figures for taxable income, which are shown on line 30 of the Form 1120 U.S. Corporation Income Tax Return. However, the correct figure for net income is the figure for taxable income before net operating loss deduction and special deductions, shown on line 28 of the Form 1120. Nonetheless, that error did not affect the director's analysis, since on the Form 1120 for 2001 the difference between those two figures was only \$500.00, while on the form 1120 for 2002 the figures on lines 28 and 30 were the same. The director correctly calculated the petitioner's year-end net current assets for 2001 and 2002. The director correctly found that the information on the petitioner's tax returns failed to establish the petitioner's ability to pay the proffered wage in the year 2001.

The director's decision to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the record lacks evidence to establish that the petitioner was in fact intending to hire the beneficiary at the time the I-140 petition was filed. The regulation at 8 C.F.R. § 204.5(c) states in pertinent part, "Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act." The instant petition has been filed under section 203(b)(3) of the Act.

As noted above, the petitioner is a manufacturer and importer of textile and apparel. It states on the I-140 petition that it has six employees. The offered position is as a Specialty Cook (Chinese Cuisine). The record lacks evidence to establish for whom the beneficiary would be cooking Chinese food if hired by the petitioner.

As noted above, the record contains a letter dated October 15, 2003 on the letterhead of counsel's office, signed by counsel's paralegal. That letter includes the statement discussed above concerning an amendment to the petitioner's articles of incorporation to change the corporation's name. The letter then continues with the following statement: "Also, the petitioner also owns Club Landmark, a cafeteria/restaurant of 31-60 seats that provides its employees, and the employees in the same building, and surrounding area breakfast and lunch, which seeks the alien beneficiary to perform duties as specialty cook." (Letter signed by counsel's paralegal, October 15, 2003).

As noted above, the letter signed by counsel's paralegal must be understood as a representation made on behalf of counsel, not as a letter signed by an independent witness. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record lacks documentation to establish that the petitioner owns a cafeteria/restaurant. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The record contains a copy of a public health operating permit issued by the County of Los Angeles on January 12, 2001 to Club Landmark Inc. The permit states that it pertains to a restaurant with 31 to 60 seats. The name of the permit holder, Club Landmark Inc., indicates that the permit holder is a corporation.

It is a basic rule of law concerning corporations 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). The petitioner in the instant I-40 petition is Campus Group, Inc. Assets of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The public health operating permit indicates that Club Landmark Inc. operates a restaurant in Los Angeles County. But that permit does not establish that the petitioner operates a restaurant there or elsewhere.

The evidence therefore fails to establish that when the I-140 petition was filed the petitioner was an employer desiring and intending to employ the beneficiary as a Specialty Cook (Chinese Cuisine) as required by the regulation at 8 C.F.R. § 204.5(c).

In summary, the evidence establishes that the petitioner is the same legal entity as the employer which filed the ETA 750 application. However, the evidence fails to establish the petitioner's ability to pay the proffered wage in

2001, which is the year of the priority date. Beyond the decision of the director, the evidence fails to establish that the petitioner was an employer desiring and intending to hire the beneficiary as of the date the I-140 petition was filed.

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.