

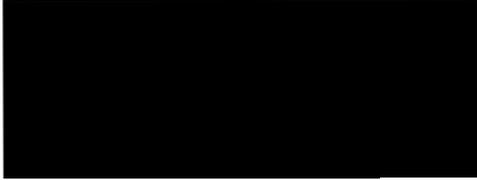
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC-04-114-53616

Office: VERMONT SERVICE CENTER

Date: JUL 27 2006

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and 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 6, 2004 decision denying the petition, the single issue in this case is 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 priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 annually.

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, the petitioner submits no brief and submits additional evidence.

Relevant evidence submitted on appeal includes copies of the petitioner's Form 1120 federal corporate income tax returns for 2000, 2002 and 2003; copies of Form W-2 wage and tax statements for the petitioner's employees for 2001; and a letter dated June 30, 2005 from the petitioner's vice president. Other relevant evidence in the record includes a copy of the petitioner's Form 1120 federal corporate income tax return for 2001; a copy of letter dated March 8, 2001 from the owner of a restaurant in Ecuador where the beneficiary formerly worked, and a copy of an undated letter from that same restaurant owner.

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 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).

On appeal, the petitioner states that the petitioner had the ability to pay the proffered wage as of the time of filing and that evidence submitted on appeal is sufficient to establish that fact.

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 20, 2001, the beneficiary did not claim to have worked for the petitioner. However, the record contains a copy of a Form W-2 Wage and Tax Statement of the beneficiary for 2004. That Form W-2 shows compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2000	not submitted	not applicable	not applicable
2001	not submitted	\$39,291.20	\$39,291.20
2002	not submitted	\$39,291.20	\$39,291.20
2003	not submitted	\$39,291.20	\$39,291.20
2004	\$10,500.00	\$39,291.20	\$28,791.20

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

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 evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000, 2001, 2002 and 2003. The record before the director closed on March 3, 2003 with the receipt by the director of the I-140 petition and supporting documents. As of that date the petitioner's federal tax return for 2003 was not yet due and a copy of that return was not submitted prior to the director's decision. However, a copy of the petitioner's Form 1120 tax return for 2003 is among the documents submitted on appeal.

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)
2000	\$7,930.00	not applicable	not applicable
2001	\$2,850.00	\$39,291.20*	\$(36,441.20)
2002	\$(36,759.00)	\$39,291.20*	\$(76,050.20)
2003	\$(186,585.00)	\$39,291.20*	\$(225,876.20)

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in the years 2001, 2002 or 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 or 2002. As noted above, the year 2003 is not a year at issue in the instant petition, since the petitioner's tax return for 2003 was not yet due when the I-140 petition was submitted on March 3, 2004.

The record also contains copies of Form W-2 wage and tax statements for the petitioner's employees for 2001. However, those Form W-2's contain no significant additional information beyond that shown in the petitioner's Form 1120 tax return for 2001.

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)
2000	\$(13,217.00)	not applicable	not applicable
2001	\$20,568.00	\$39,291.20*	\$(18,723.20)
2002	\$(3,368.00)	\$39,291.20*	\$(42,659.20)
2003	\$12,341.00	\$39,291.20*	\$(26,950.20)

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in the years 2001, 2002 or 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 or 2002. As noted above, the year 2003 is not a year at issue in the instant petition.

The record contains a letter dated June 30, 2005 from the petitioner's vice-president. In that letter, the vice-president states that officer's compensation for the years 2000, 2001, 2002 and 2003 should be considered as additional financial resources of the petitioner.

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 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); *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.

Nonetheless, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. The Form 1120, Schedule E, provides for itemizing the amount of compensation for each officer, along with each officer's social security number, percent of time devoted to the business, percent of corporation stock owned, and amount of compensation.

In the instant petition, the petitioner's Form 1120 tax returns, Schedule E's, show that one individual is the owner of 100% of the common stock of the petitioner and that all payments for compensation of officers were made to that individual. The Schedule E's show that the owner devotes only 1.0% of his time to the business.

The sole shareholder of a corporation has 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.

The petitioner's Form 1120 tax returns show amounts for compensation of officers as shown in the following table.

Tax year	Compensation of officers	Net Income	Total available income	Proffered wage	Surplus or deficit
2000	\$83,200.00	\$7,930.00	\$91,130.00	not applicable	not applicable
2001	\$83,200.00	\$2,850.00	\$86,050.00	\$39,291.20*	\$46,758.80
2002	\$84,800.00	\$(36,759.00)	\$48,041.00	\$39,291.20*	\$8,749.80
2003	\$83,200.00	\$(186,585.00)	\$(103,385.00)	\$39,291.20*	\$(142,767.20)

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002 or 2003

In his letter dated June 30, 2005, the petitioner's vice-president states that officer's compensation for the years 2000, 2001, 2002 and 2003 should be considered as additional financial resources of the petitioner. Moreover, as noted above, the Schedule E's attached to the petitioner's tax returns show that the petitioner's sole shareholder devotes only 1.0% of his time to the petitioner. The foregoing two documents are sufficient to show that amounts paid by the petitioner for compensation of officers do not represent salary payments for specific services, but rather represent a portion of the petitioner's net profits.

The above information shows that the petitioner's total available income in 2001, including funds spent for compensation of officers, would have allowed the petitioner to pay the beneficiary the full proffered wage that year, while still leaving \$46,758.80 in available income. For 2002 the petitioner's total available income would have allowed the petition to pay the beneficiary the full proffered wage, while still leaving \$8,749.80 in available income. As noted above, the year 2003 is not a year at issue in the instant petition, since the petitioner's tax return for 2003 was not yet due when the I-140 petition was submitted on March 3, 2004.

The foregoing information is sufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2002, which are the only two years at issue in the instant petition.

In her decision, the director correctly stated the petitioner's net income in 2001, and correctly calculated the petitioner's year-end net current assets for that year. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in 2001, which is the year of the priority date. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

The record before the director did not include copies of the petitioner's Form 1120 tax returns for 2000, 2002 and 2003 or a copy of the June 30, 2005 letter from the petitioner's vice president, which were among the documents submitted for the first time on appeal.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient to overcome the decision of the director.

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. The petition is approved.