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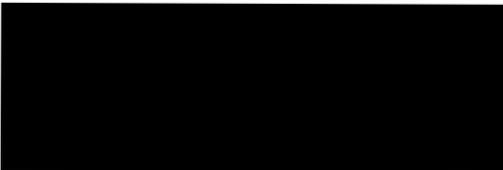


FILE: LIN 05 024 50810 Office: NEBRASKA SERVICE CENTER Date: FEB 14 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner submitted an appeal that was subsequently dismissed by 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 based on the petitioner's net income and cash assets the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 1997 priority date of the visa petition and continuing to the present. 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.

As set forth in the director's September 6, 2005 denial, the single issue in this case is whether or not the petitioner has the 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 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). 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 U.S. Department of Labor 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 September 10, 1997. The proffered wage as stated on the Form ETA 750 is \$8 per hour (\$16,640 per year). The Form ETA 750 states that the position requires the completion of high school and two years of experience in the proffered position.

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, counsel submits an appraisal of the property on which the petitioner is located, as well as a mortgage loan statement. Counsel also resubmits the petitioner's corporate tax returns for 1997 and 2003, along with the beneficiary's W-2 forms for 1997, 2003, and 2004. Other relevant evidence in the record includes the petitioner's corporate tax returns for the years 1997, 1999, 2002, and 2003 and the petitioner's Forms 941 for the last two quarters of tax year 1997 and for the first quarter of 2005. Counsel also submitted the petitioner's bank statement dated May 31, 2005 that showed a balance of -\$1,575.59, as well as the beneficiary's W-2 forms for tax years 1996, 1997, 1999, 2001, 2002, 2003, and 2004. 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 an S corporation. On the petition, the petitioner claimed to have been established in November 10, 1992 and to currently employ 10 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 July 15, 1997, the beneficiary claimed to have worked for the petitioner since January 1994.

On appeal, counsel asserts that the director erred in only considering the petitioner's net income and cash assets. Counsel cites the following excerpt from an unpublished AAO decision, *Matter of X*, (August 16, 2004): "The petitioning Italian restaurant established its ability to pay the proffered wage to a specialty cook through evidence of both its annual net current assets and the actual wages paid to the beneficiary during the year in which the priority date fell."

Counsel then examines the petitioner's net current assets and the beneficiary's wages in 1997, the priority date in the instant petition. Counsel states that in 1997, the priority date year, the petitioner had ordinary income of \$15,883, while the beneficiary received wages of \$5,458. Counsel then notes that the combination of the petitioner's net income and the beneficiary's wages total \$21,341.50, which is greater than the proffered wage of \$16,640.

Counsel also states that the director should have also considered the petitioner's total assets as noted on Schedule L of the petitioner's Form 1120S in his deliberations. Counsel asserts that in tax year 2003, the combination of the petitioner's total assets of \$19,281<sup>2</sup> and the beneficiary's wages of \$9,213 were greater than the proffered wage of \$16,640. Counsel further asserts that the petitioner operates out of a one-story commercial building owned by the petitioner's sole shareholder with an appraised value as of 2001 of \$675,000. Counsel also notes that the petitioner's sole shareholder has net asset value in the restaurant building of \$365,000, based on her mortgage payout statement.

In conclusion, counsel reiterates that based on the precedent set by the unpublished AAO decision, *Matter of X*, the petitioner established that in the priority year 1997 the petitioner's net current assets and the actual

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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 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> Counsel utilizes the figure on line 15 of the petitioner's 2003 tax return, Schedule L, identified as "total assets".

wages paid to the beneficiary exceeded the proffered wage. Counsel then asserts that since the petitioner met its burden of proof during the priority year of 1997, the petitioner has met its burden of proof to establish its continuing ability to pay the proffered wage.

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. Contrary to counsel's assertion, the petitioner's ability to pay the proffered wage during the priority year alone is not sufficient to establish that the petitioner has the same ability continuing up to the present time. Thus, the AAO examines the petitioner's ability to pay the proffered wage as of the priority date and to the present time.

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, Citizenship and Immigration Services (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).

On appeal, counsel refers to a decision issued by the AAO concerning the petitioner's ability to pay the proffered wage, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore the regulations at 8 C.F.R. § 204.5(g)(2) clearly state that the petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Thus, while counsel is correct that the petitioner must establish its ability to pay the proffered wage as of the priority date, he is incorrect in his assumption that the petitioner's responsibilities with regard to its ability to pay the proffered wage do not include an examination of the years following the establishment of the priority date.

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 established that it paid the beneficiary wages in tax years 1996,<sup>3</sup> 1997, 1999, 2001, 2002, 2003, and 2004. As documented by the beneficiary's W-2 forms, the petitioner paid the beneficiary the following wages: in 1997, \$5,458.50; in 1999, \$1,944; in 2001, \$5,820; in 2002, \$7,050; in 2003, \$9,123; and in 2004, \$9,648. None of these wages is equal to or greater than the proffered wage of \$16,640. Therefore the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 1997 and onward. The petitioner, thus, has to establish its ability to pay the difference between the beneficiary's wages and the actual proffered wage in the years in which the beneficiary received wages, and its ability to pay the entire proffered wage in the years 1998, and 2000, for which no W-2 forms were submitted.

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<sup>3</sup> Since the petition's priority date is September 10, 1997, the beneficiary's wages in tax year 1996 are not dispositive of the petitioner's ability to pay the proffered wage as of the priority date. Therefore these 1996 wages will not be examined or discussed in these proceedings.

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.

As noted previously, the petitioner did not submit its federal income tax returns or other regulatory-prescribed evidence for tax years 1998, 2000, and 2001. See 8 C.F.R. § 204.5(g)(2). Therefore the petitioner cannot establish its ability to pay the proffered wage based on its net income or net current assets during those years. Without these documents, the petitioner also cannot establish its ability to pay the proffered wage or the difference between the beneficiary's wages and the proffered wage as of the 1997 priority date and to the present. Therefore the director's decision is affirmed and the petitioner is denied. Nevertheless, for further clarification of the petitioner's ability to pay the proffered wage, the AAO will examine those federal income tax returns that the petitioner submitted to the record. The tax returns submitted to the record demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$16,640 per year from the priority date and onward based on the petitioner's net income:

- In 1997, the Form 1120S stated net income<sup>4</sup> of \$15,883.
- In 1999, the Form 1120S stated net income of -\$43,853.
- In 2002, the Form 1120S stated net income of -\$79,060.
- In 2003, the Form 1120S stated net income of -\$63,371.

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<sup>4</sup> Ordinary income (loss) from trade or business activities as reported on Line 21, Form 1120S.

For the priority year 1997, as correctly noted by counsel, the petitioner had net income of \$15,883, a sum sufficient to pay the difference between the beneficiary's actual wages of \$5,458.50 and the proffered wage of \$16,640, namely, \$11,181.50. Therefore, for the year 1997, the petitioner did have sufficient net income to pay the proffered wage. This part of the director's decision will be withdrawn. However, in the tax years 1999, 2002, and 2003, the petitioner's negative net income would not be sufficient to pay the difference between the beneficiary's actual wages and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, counsel's idea that the petitioner's total assets during tax year 2003 should have been considered in the determination of the ability to pay the proffered wage. We equally reject the director's consideration of the petitioner's net income and cash assets alone in his review of the petitioner's ability to pay the proffered wage. As discussed below, the AAO considers cash assets as one of the petitioner's current assets identified on the petitioner's Schedule L. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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>5</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 net current assets during 1999 were \$4,356.
  - The petitioner's net current assets during 2002 were \$10,776.
- The petitioner's net current assets during 2003 were \$5,935.

Therefore, for the year 1999, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages of \$1,944 and the proffered wage of \$16,640, namely \$14,696. For tax year 2002, the petitioner did have sufficient net income to pay the difference between the beneficiary's actual wages of \$7,050, and the proffered wage of \$16,640, namely, \$9,590. And finally, in tax year 2003, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages, \$9,123, and the proffered wage, namely, \$7,517. Thus, the petitioner only established its ability to pay the proffered wage based on its current net assets in tax year 2002.

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

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<sup>5</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.

of the 1997 priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. The petitioner has only established its ability to pay the proffered wage in tax years 1997 and 2002.

Counsel asserts in his brief accompanying the appeal that the sole shareholder's real estate property should be taken into consideration when determining the petitioner's continuing ability to pay the proffered wage from the priority date. However, 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."

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 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.

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.