

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

JUN 28 2007

File: [REDACTED]
EAC-05-113-50823

Office: VERMONT SERVICE CENTER

Date:

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:

[REDACTED]

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 Director, Vermont Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner is a restaurant, and seeks to employ the beneficiary permanently in the United States as a manager, food services. The petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s November 22, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate that it can pay the beneficiary the proffered wage.

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.¹

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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.

¹ 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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 19, 2001. The proffered wage as stated on Form ETA 750 is \$1,024 per week, which is equivalent to \$53,248 per year² based on a schedule of 40 hours per week. The labor certification was approved on August 6, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on March 7, 2005. The petitioner listed the following information on the I-140 Petition: date established: January 23, 1990; gross annual income: \$355,400; net annual income: not listed; and current number of employees: 26.

Form ETA 750 lists the petitioner as: [REDACTED].” However, we note that the form appeared to originally list just “[REDACTED].” Above [REDACTED] on the ETA 750A was written “[REDACTED] Inc. d/b/a,” which was then “whited out” and typed over to read [REDACTED]. The typed additions are in a different type print than the initial [REDACTED].” Further, we note that the addition does not contain any DOL stamp to reflect acceptance of a correction or addition.³ Additionally, the DOL “Final Determination” cover page, only lists the petitioner as just “[REDACTED].”⁴ The petitioner’s address is listed as: [REDACTED] Huntington, NY, and [REDACTED], Port Washington, NY. The ETA 750 also lists that the beneficiary will be employed at both of the foregoing addresses. The petitioner is listed on Form I-140 as “[REDACTED]” with an address of [REDACTED] Huntington, NY,” and a Federal Tax Identification Number of: [REDACTED]. In the absence of confirmation from DOL, we would conclude that the petitioner is solely Pomodoro.

On April 19, 2005, the director issued a Request for Additional Evidence (“RFE”) for the petitioner to provide further evidence of the petitioner’s ability to pay the proffered wage from April 2001 onward. Further, the petitioner had initially provided Forms W-2 for the beneficiary issued by other employers: [REDACTED], [REDACTED], and [REDACTED]. The RFE requested that the petitioner explain the relationship, if any, between these companies. The petitioner responded to the RFE. Following review, the director denied the petition on November 22, 2005 finding that the petitioner did not demonstrate its ability to pay the proffered wage. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner’s ability to pay based on the petitioner’s prior history of wage payment to the beneficiary, if any. 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. On Form ETA 750B, signed by the beneficiary on March 23, 2001, the beneficiary listed that he has been employed with the petitioner from March 2000 to the present (date of signature, March 23, 2001). The petitioner submitted the following W-2 statements:

<u>Year</u>	<u>Entity</u>	<u>FEIN</u>	<u>W-2 Wages</u>
2003	[REDACTED]	[REDACTED]	\$2,176.36
			\$18,941.07

² We note that a correction was made to the wage prior to certification, which was initialed by the petitioner, and stamped approved by DOL. The petitioner used “white out” over the initial figure listed, so it is unclear what the petitioner initially listed as the rate of pay.

³ We also note that a correction was made to the required experience. The ETA 750A lists that 2 years of experience was required, but the number of months required was “whited out.” The number of years of experience in a related occupation was also white out. The change does contain a date and the petitioner’s representative’s initials, but does not contain a stamp that DOL accepted the changes.

⁴ Form ETA 750B similarly contains white out over the petitioner’s name, which initially read just “Pomodoro.” The form was changed to read “[REDACTED].” Similarly, the change on ETA 750B does not contain any initials or DOL stamp that it approved the name change.

			\$208.91
2002			\$22,726.48
2001			\$492.00
			\$2,625
			\$18,083.66

Wages paid, and financial information related to one company, cannot be used to satisfy the petitioner's need to demonstrate that it can 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). 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.

All of the foregoing entities have separate tax identification numbers and would be treated as separate entities. In the absence of definitive proof that DOL accepted the change from [REDACTED] to [REDACTED], or of the relationship between [REDACTED] and [REDACTED], the wages of [REDACTED] cannot be used to demonstrate [REDACTED] ability to pay the beneficiary the proffered wage. Similarly, the petitioner would need to demonstrate that Pomodoro Suffolk Inc. and Pomodoro are the same entity, if we were to accept the W-2 wages for [REDACTED]

Even if we were to accept the wages paid by [REDACTED], or [REDACTED] the petitioner is unable to demonstrate its ability to pay the full proffered wage in any of the above years. The petitioner would need to establish that it could pay the full proffered wage for the years 2002, 2003, 2004, and 2005, and the difference between the wages paid, and the proffered wage in 2001.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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). 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 petitioner submitted federal tax returns for [REDACTED]⁵ which is structured as a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the [REDACTED]'s ability to pay the proffered wage:

The tax returns do not list [REDACTED] but only [REDACTED]. The petitioner did not submit any corporate registration or other documents to show that it did business as or operated as [REDACTED]. A review of New York corporate records reflects that [REDACTED] and [REDACTED] are incorporated as two separate entities. While they indicate the same owner, the companies do not list a "d/b/a" relationship. See http://appsext.dos.state.ny.us.corp/public/corpsearch.entity_information?p_nameid=15238... accessed as of June 7, 2007.

<u>Tax year</u> ⁶	<u>Net income or (loss)</u>
2002	\$25,400
2001	-\$32,668

Based on the above, [REDACTED]'s net income would not allow for payment of the beneficiary's proffered wage in either year. In the absence of definitive proof of the relationship between [REDACTED] and [REDACTED], the tax returns of [REDACTED] cannot be used to demonstrate [REDACTED]'s ability to pay the beneficiary the proffered wage.

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 the difference between the petitioner's current assets and current liabilities.⁷ 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, or, if filed on Form 1120-A, on Part III. 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, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2002	-\$14,699
2001	-\$49,387

The tax returns for [REDACTED] cannot establish the ability to pay the beneficiary the proffered wage based on net current assets either.⁸

On appeal, counsel provides that the petitioner is one of 14 restaurants, 5 buildings, and 2 management companies under the control of the same majority shareholder.

Counsel cites to *Matter of X*, WAC-02-266-52209 (August 23, 2004) where the decision was based on the totality of the financial circumstances, and suggests that the totality analysis should include "the financial health of sister companies to the petitioner."

⁶ The petitioner files its tax returns on a fiscal year, rather than a calendar year. The petitioner's tax year runs from April 1 to March 31 of the following year, so that the petitioner's 2002 tax return covers the time period April 1, 2002 to March 31, 2003, and its 2001 tax return covers the time period April 1, 2001 to March 31, 2002. We note that the petitioner did not submit its 2003 federal tax return, which should have been available at the time of filing, or at the time that the petitioner responded to the RFE. Further, the petitioner did not submit its 2003 or 2004 tax returns on appeal, which both should have been available at that time.

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

⁸ Again, we note that in the absence of definitive proof of the relationship between [REDACTED] and [REDACTED], the tax returns of [REDACTED] and [REDACTED] cannot be used to demonstrate [REDACTED]'s ability to pay the beneficiary the proffered wage.

Counsel, however, does acknowledge that there are “a line of cases that hold that it is only the petitioner, and not a related company, whose income and assets may be considered in determining the prevailing wage.”

Related to the first case, based on *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), we will consider the “totality of the circumstances” in determining a petitioner’s ability to pay the proffered wage. However, this would not extend as counsel suggests to include assets of sister corporations.

Counsel is correct that there are a line of cases, which provide that only the petitioner’s financial status will be considered to determine the ability to pay the proffered wage. Wages paid, and financial information related to one company, cannot be used to satisfy the petitioner’s need to demonstrate that it can 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). 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.

Counsel contends, however, that in the instant case, the situation would be different based on the contract between [REDACTED] and [REDACTED], which would obligate [REDACTED] to assist [REDACTED], if that entity required additional funds.⁹

The president of [REDACTED], also the president of another company, [REDACTED] provided a statement dated November 5, 2004, that he, as president, would be “willing to make up any difference in [the beneficiary’s] salary.” The federal tax returns submitted for S [REDACTED] do evidence that he is a corporate officer, however, the returns do not list that he received any compensation from [REDACTED]. The petitioner also submitted a 2002 federal tax return for [REDACTED] which shows that the president received \$358,490 in compensation in that year. [REDACTED] did not list any gross receipts, but listed that its income was based on management fees received in the amount of \$482,882.

The president of [REDACTED] c. also submitted an agreement, which he signed in his capacity of president of [REDACTED] and of [REDACTED], which provided that:

Agreement made this 1st day of January 2000, by and between [REDACTED] . . . and [REDACTED] . . . hereinafter known as [REDACTED] . . . The parties hold leases to the business premises in the name of various real estate companies and operate the restaurants under different corporate entities, and . . . upon presentation of the restaurant corporation, [REDACTED] to the President of the Real Estate corporation known as [REDACTED] of a request, either written or oral, for funds to pay expenses for a period certain, that the president of [REDACTED] shall immediately pay to [REDACTED] the sum requested.

The petitioner additionally submitted a letter from its Chief Financial Officer (“CFO”), which provides that [REDACTED] has been in business for 15 years and that [REDACTED] owns 14 restaurants.

Counsel notes that the director’s decision questioned the relationship between [REDACTED] and [REDACTED] Restaurant, Inc. On appeal, the petitioner has submitted stock certificates to show that [REDACTED] is the majority shareholder of both companies, and as such has the ability to enter into an agreement between [REDACTED] c. and [REDACTED]. Further, the wages between the two companies together would exhibit the petitioner’s ability to pay the proffered wage.

The CFO provides that N [REDACTED] owns 90% of Society, and that Society “compensates [REDACTED] by paying a managing company named [REDACTED]. . . . [REDACTED] does not devote any time to the restaurant and therefore any salary or management fee paid is really the profit of the corporation. Profits of the corporation are distributed in the form of salaries and/or management fees.” The CFO then goes on to consider [REDACTED] management fees in combination with [REDACTED] profit¹¹ and depreciation.¹² Further, he provides that [REDACTED] paid [REDACTED] the following amounts: fiscal year 2001: \$272,722 based on management fee income of \$380,040; fiscal year 2002: \$417,685 based on management fee income of \$475,527; and fiscal year 2003: \$358,490 based on management fee income of \$399,838. We note that the petitioner did not provide W-2 statements to evidence these payments. 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)).

We find that the agreement executed by the same individual, even if for two separate companies, would as a practical matter be unenforceable. Such an agreement in this case would not abrogate the general rule that wages paid, and financial information related to one company, cannot be used to satisfy the petitioner’s need to demonstrate that it can pay the proffered wage. 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). 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.”

[REDACTED]’s 2002 tax return, for the tax year June 1, 2002 to May 31, 2003, reflects that the petitioner owns 50% of the company, and a second shareholder owns the other 50%. The president received all of the officer compensation issued. The petitioner only supplied [REDACTED]’s 2002 federal tax return.

¹¹ Wages paid, and financial information related to one company, cannot be used to satisfy the petitioner’s need to demonstrate that it can pay the proffered wage. 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).

¹² The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) 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.

Therefore, the AAO is not persuaded that the petitioner’s depreciation can show its ability to pay the proffered wage.

As we do not accept the agreement between [REDACTED] and [REDACTED] c. as valid, the petitioner has not demonstrated its ability to pay the proffered wage.¹³ Further, we note that the Form ETA 750 presents a question of the actual petitioner. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Accordingly, based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. 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.

¹³ Even if we were to accept that S [REDACTED] c. and [REDACTED] were related, or the same entity for purposes of the petition, the evidence in the record does not demonstrate that the petitioner can pay the proffered wage. The evidence does not demonstrate that S [REDACTED] or [REDACTED] paid the beneficiary sufficient wages to show that either, or both combined, could pay the proffered wage. Further, based on the tax returns submitted for [REDACTED], the entity cannot show its ability to pay the proffered wage through either its net income or its net current assets.