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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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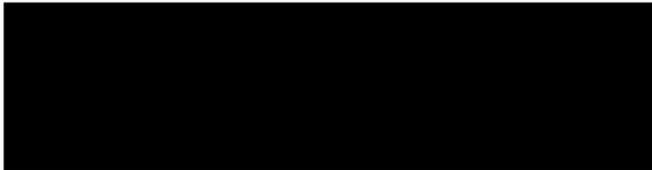
Date: JUL 30 2009

IN RE: Petitioner:  
Beneficiary:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary<sup>1</sup> permanently in the United States as a cook of Italian style food. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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 2002 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 February 14, 2007 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 at 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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<sup>1</sup> The beneficiary identified on the I-140 petition is substituted for [REDACTED] the original beneficiary named on the approved labor certification. The petitioner did not submit an executed Part B of the ETA Form 750, containing the new beneficiary's information and experience in connection with this I-140 filing. The director, in her RFE dated November 8, 2006, requested that the petitioner submit a Part B, Form 750 for the instant beneficiary and explain the relationship between the initial beneficiary and the instant beneficiary. The petitioner's response stated that Mr. [REDACTED], the initial beneficiary, is the ex-husband of the instant beneficiary. United States Citizenship and Immigration Services (USCIS) records indicate that [REDACTED] was deported from the United States on September 12, 2003.

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 DOL. *See* 8 C.F.R. § 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 DOL 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 November 26, 2002. The proffered wage as stated on the Form ETA 750 is \$12.12 per hour (\$25,209.60 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

Relevant evidence in the record includes the first pages of the petitioner's IRS Form 1120, U.S. Income Tax Return for A Corporation, for tax years 2001 to 2005.<sup>3</sup> In response to the director's RFE, counsel submitted W-2 Wage and Tax Statements for persons identified as ex-employees or officers in tax years 2001 to 2005.<sup>4</sup> The petitioner's two officers are identified as [REDACTED] and [REDACTED] in tax years 2002 to 2005. Based on the submitted W-2 Forms, in tax years 2002, 2003, and 2005, the two officers earned \$9,000.16 respectively. In tax year 2004, the two officers earned \$9,173.24, respectively. A third employee, [REDACTED], is identified by the petitioner as an ex-employee. His W-2 forms indicate he was paid the following wages: \$39,291.20 in 2002; \$34,757.60 in 2003; \$40,046.80 in 2004 and \$17,022.40 in 2005. Counsel states that the petitioner's ability to pay the proffered wage to the instant beneficiary is based on the totals of officers' salaries, the petitioner's cash value and the wages paid to ex-employees in the relevant tax years. For tax years 2002 to 2005, counsel identified the petitioner's financial resources in these areas as

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<sup>2</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>3</sup> The petitioner submitted this documentation with the initial I-140 petition. The AAO notes that the petitioner's 2001 tax return is not relevant to the instant petition, as the petitioner's priority date is November 26, 2002. The petitioner's 2001 tax return will not be discussed further in these proceedings.

<sup>4</sup> As the petitioner's priority year is 2002, the wages paid to officers or employees in tax year 2001 are not relevant to these proceedings.

\$256,621.52; \$236,595.92; \$223,859.28; and \$194,970.72. Counsel notes that the ex-employee income is now available to compensate the beneficiary.

On appeal, [REDACTED], identifying himself as the petitioner's owner, submits a notarized statement that reiterates counsel's earlier statements with regard to the availability of officer's wages, an ex-employee's wages and the petitioner's total assets to establish the petitioner's ability to pay the proffered wage. [REDACTED] also resubmits the petitioner's W-2 Forms for 2001 to 2005. He also submits a document that identifies the market value of his personal property in Flushing, New York as \$586,000 for tax year 2007. [REDACTED] states that he guarantees the beneficiary's salary based on his personal property. 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 a C corporation. On the petition, the petitioner claimed to have been established on May 23, 1993, to have a gross annual income of \$415,634, a net annual income of \$331,894, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on January 15, 2007, the beneficiary did not claim to have worked for the petitioner.

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, United States Citizenship and Immigration Services (USCIS) 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, [REDACTED] provides documentation on the market value of his residential property and states that he guarantees the beneficiary's proffered wage. However, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). 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. Therefore the value of [REDACTED] personal property cannot be used to establish the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 not established that it employed and paid the beneficiary the full proffered wage from the priority date. Therefore the petitioner has to establish its ability to pay the entire proffered wage beginning on November 26, 2002.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. In the instant case, the record does not clearly identify which employee or employees were full-time cooks of Italian food for the petitioner in tax years 2002 to 2005. The W-2 Forms submitted to the record for 2002 to 2005 indicate three employees, two of which as officers earned less than [REDACTED] whose wages were substantially higher than the proffered wage in tax years 2002 to 2004<sup>5</sup>. This raises questions as to the specific job performed by [REDACTED] for the petitioner. There is no evidence in the record that Mr. [REDACTED] position involved the same duties as those set forth in the Form ETA 750. Therefore the petitioner has not documented the position, duties, and the termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 USCIS, 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.

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In tax year 2005, [REDACTED] earned \$17,000, wages less than the proffered wage of \$25,209.60. Thus, even if the petitioner established that [REDACTED] worked as a cook of Italian style food, it can not establish that the wages paid to [REDACTED] in 2005 support the petitioner's ability to pay the proffered wage, based on earlier wages paid to employees with similar job duties.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. “[USCIS] 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.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on January 15, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2006 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2005 is the most recent return available. The petitioner’s tax returns demonstrate its net income for tax years 2002 to 2005, as shown in the table below.

- In 2002, the Form 1120 stated net income of -\$92,134.
- In 2003, the Form 1120 stated net income of -\$120,162.
- In 2004, the Form 1120 stated net income of -\$46,957.
- In 2005, the Form 1120 stated net income of -\$11,956.

Therefore, for the years 2002 to 2005, the petitioner did not have sufficient net income to pay 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, USCIS will review the petitioner’s assets.

Counsel, in the petitioner's response to the director's RFE, and the petitioner's owner on appeal refer to the combination of the petitioner's cash value or total assets identified on item D, page one of Form 1120 with wages paid to other employees or officers, as a means of establishing the petitioner's ability to pay the proffered wage. We reject this notion. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS 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>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 tax returns demonstrate its end-of-year net current assets for tax years 2002 to 2005, as shown in the table below.

- In 2002, the Form 1120 stated net current assets of -\$61,400.
- In 2003 the Form 1120 stated net current assets of -\$46,566.
- In 2004, the Form 1120 stated net current assets of -\$57,889.
- In 2005, the Form 1120 stated net current assets of -\$60,172.

Therefore, for the years 2002 to 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established the continuing ability to pay the beneficiary the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the

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<sup>6</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.

petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, based on the I-140 petition, the petitioner has been in business for sixteen years. The record reflects that for at least five of these years, the petitioner had both negative net income and net current assets.<sup>7</sup> There is no pattern in the instant case of an unprofitable year in between other profitable years, such as the petitioner in *Sonegawa* experienced. The AAO notes that the petitioner had three employees in the years 2002 to 2005, and that the wages paid to the officers and/or employees are not significant enough to overcome the petitioner's negative net income and net current assets in all four relevant years. Beyond these factors, the record does not contain any further evidence as to the petitioner's long term business viability, or its profile within the restaurant industry in New York City that would mitigate the evidence of the petitioner's pattern of negative net income and net current assets. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.

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<sup>7</sup> The AAO examined the petitioner's net income and net current assets in tax year 2001 in its consideration of the petitioner's totality of circumstances. In 2001, the petitioner had negative net income and net current assets.