U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship
and Immigration
Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

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NOV 19 2009

IN RE: Petitioner: [redacted]
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:

[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.

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).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Burger King restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant operations manager. 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).[1] 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 1997 priority date of the visa petition. 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 August 11, 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.

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,

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[1] The Form ETA 750 was submitted by the petitioner for [redacted] The instant beneficiary is being substituted for [redacted]. According to counsel on appeal, the previous I-140 petition was approved on January 9, 2002. Counsel also notes that [redacted] had already applied for adjustment of status based on the I-140 prior approval; however the petition was withdrawn by the petitioner on the basis of misconduct by the original beneficiary. USCIS computer records indicate this earlier petition was revoked on May 29, 2007.

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 December 18, 1997. The proffered wage as stated on the Form ETA 750 is $21.39 per hour ($44,491 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position and a certification by a major fast food chain in basic management training.

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.[2]

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 in September 1, 1994, to have a gross annual income of $1,082,000; to have a net annual income of $27,500; and to current employ 20 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 May 26, 2005, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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[2] 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 submits a reviewed balance sheet prepared by , Hollis Hills, New York. This document reviews balance sheets for the Clarke Food Service Groups as of December 31, 2004 and 2005. In the first note of the balance sheet, it states:

> The Clarke Food Service Group is comprised of four separate wholly New York entities operating franchised restaurants. Three entities: Tomoliv Corp (Douglaston), Hicksville Burger Co. Inc. (Hicksville), and Springfield Burger Co Inc. (Springfield) operate Burger King Restaurants. Fresh Meadow Food Service LLC (Fresh Meadows) operates an Arby's franchised restaurant. All entitles are NYS S Corporations or limited liability corporations jointed owned by . and ,'

The AAO notes that the balance sheets submitted to the record on appeal are not audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the accountant's report makes clear, the financial statement is the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In a cover letter dated September 6, 2007, the petitioner's owner and a CPA, states that he started with one restaurant and now owns five: three Burger Kings and two Arby's. states that the income for the Hicksville business has been reduced for training and developing costs for the subsequent restaurants. The petitioner's owner states that the beneficiary, as part of his supervisory duties, trains managers who then get positioned at other restaurants. notes that the combined businesses generate a combined cash flow more than sufficient to cover the proffered wage, and refers to the reviewed balance sheet document.

also states that his business is structured so that one business owns the land and the other entities operate each restaurant and that the petitioner has a ground lease for its property from an entity wholly owned by and his wife, namely, . states that the petitioner's rent is structured to cover the payments for the mortgage plus an administrative fee, and that the mortgage is a self-liquidating ten-year loan that will be paid off in four years. agrees that non-liquid assets should not be considered; however he notes that the petitioner's projected cash flow available after the mortgage is satisfied is in excess of $120,000. also states that the beneficiary is recognized by Burger King as the franchise group's Certified Restaurant Trainer (CRT), and that while Hicksville Burger Co. Inc. was selected to be the

petitioner, in fact the petition is for the group, which includes Springfield Burger Co. and Tomoliv Corporation.

Although clearly states the relationship between the petitioner and other businesses, he does not provide any further documentation to further establish his assertions.

On appeal, counsel asserts that the petitioner's previous I-140 petition was approved on January 9, 2002. Counsel also notes that the beneficiary of the earlier petition, had already applied for adjustment of status based on the I-140 prior approval; however the petition was withdrawn by the petitioner on the basis of misconduct by the original beneficiary. The petitioner then utilized the same Form ETA 750 to file a I-140 petition for the instant beneficiary. Counsel states that the petitioner's owner owns three Burger Kings and two Arby's, and that the petitioner has been in operation for thirteen years and continues to serve millions of customers under the umbrella company of Burger King. Counsel notes that although it is impossible to have several petitioners sponsor one immigration petition, in reality the petitioner has the financial support of the other entities for which submits financial statements.

The AAO acknowledges the petitioner's owner's comments on his overall business operations, however, contrary to and counsel's assertions, USCIS may not "pierce the corporate veil" and look to the other 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.

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 response to the director's RFE dated April 12, 2007, the petitioner submitted W-2 Wage and Tax Statements for the beneficiary for tax years 2000 to 2006. These documents establish that the petitioner paid the beneficiary the following wages: $23,146.42 in 2000; $24,660 in 2001; $23,580 in 2002; $23,220 in 2003; $25,560.72 in 2004; $25,440.10 in 2005; $37,939.95 in 2006 and $21,140 as of June 28, 2007. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the 1997 priority date. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 1997 to 1999, and to pay the difference between the beneficiary's actual wages and the proffered wage from tax year 2000 to 2006.

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 (1st 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.

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 July 9, 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 due; however, the petitioner did not submit it to the record. 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 1997 to 2005, as shown in the table below.

- In 1997, the Form 1120 stated net income of $20,446.
- In 1998, the Form 1120 stated net income of $15,626.
- In 1999, the Form 1120 stated net income of $1,288.
- In 2000, the Form 1120 stated net income of $38,791.
- In 2001, the Form 1120 stated net income of $33,326.
- In 2002, the Form 1120 stated net income of $32,204.
- In 2003, the Form 1120 stated net income of $58,390.
- In 2004, the Form 1120 stated net income of $12,840.
- In 2005, the Form 1120 stated net income of $2,752.

Therefore, for the years 2000 to 2003, the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage. In tax years 1997 to 1999, the petitioner did not establish its ability to pay the entire proffered wage; while in tax years 2004 and 2005, the petitioner did not have sufficient net income 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, USCIS will review the petitioner's assets. 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.[3] 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

[3]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.

using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for tax years 1997 to 1999, and 2004 and 2005, as shown in the table below.

- In 1997, the Form 1120 stated net current assets of -$109,973.
- In 1998, the Form 1120 stated net current assets of -$108,792.
- In 1999, the Form 1120 stated net current assets of -$81,597.
- In 2004, the Form 1120 stated net current assets of -$6,868.
- In 2005, the Form 1120 stated net current assets of -$14,331.

Therefore, for the years 1997 to 1999, the petitioner did not have sufficient net current assets to pay the entire proffered wage, and in tax years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wage and the proffered wage.

From the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax years 2000 to 2003.

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 DOL. Although the petitioner is a franchise, this status by itself does not eliminate the possibility of unprofitable years with subsequent closings of franchises.

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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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 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, the petitioner has been in business since 1994, a period of eleven years prior to the filing of the instant petition. The tax returns in the record indicate steady amounts of salaries and wages in the range of $250,000. The petitioner's officer compensation fluctuates widely with $42,725 in 1997, to no officer compensation indicated in tax years 2004 and 2005. The petitioner's gross receipts, while not utilized in the examination of the petitioner's ability to pay the proffered wage through its net income, have been over $1,000,000 during the relevant time in question. The petitioner has always shown positive net income during the relevant period of time. However, the petitioner has not demonstrated any outstanding circumstances analogous to the petitioner in *Sonegawa.* 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.