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U.S. Citizenship and Immigration Services

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[redacted]

MAR 11 2004

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

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[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, Director
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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Chinese food. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states 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.

Eligibility in this matter turns in part on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is May 23, 2000. The beneficiary's salary as stated on the labor certification is $11.00 per hour or $22,880.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The evidence submitted consisted of identity documents for the beneficiary and his spouse and child, the beneficiary's cook certificate from Guangdong Province, China, a certificate of the beneficiary's experience as a cook from the Yindu Restaurant, Taishan City, Guangdong Province, China, a Form 1120 corporate tax return in the corporate name of the petitioner Joy Fong, Inc., and a copy of a menu from the petitioner restaurant.

The director did not issue a request for evidence (RFE), but proceeded directly to issue a decision, which was dated January 31, 2003. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the present because its taxable income is less than the proffered wage, and denied the petition.

On appeal, counsel submits a brief in the form of a letter dated March 10, 2003 and additional evidence consisting of an unaudited financial statement for the petitioner for the ten months ending January 31, 2003, a bank statement for the petitioner's corporate entity dated February 24, 2003, a bank statement for Ted C. Leung dated February 26, 2003, W-2 forms for Ted C. Leung and for Jian Yu Kuang Leung for 2001, a Form 1040 individual tax return with a Form 8453 income tax declaration for Ted C. Leung and his wife Jian Yu Kuang Leung for 2001, an affidavit dated March 7, 2003 by Ted Choi Leung stating that he is a principal shareholder of the petitioner and that he desires to guarantee the payment of the wages of the beneficiary, and an additional copy of page one of the Form 1120 tax return for the petitioner's corporate entity.

Counsel states on appeal that the evidence establishes the ability of the petitioner to pay the proffered wage.

Since no RFE was issued in by the director in the proceedings below, we find that the evidence submitted for the first time on appeal is not precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988).

The director found that the corporate tax return of the petitioner for 2001 showed taxable income of $5,340, and that this amount did not equal or exceed the proffered annual wage of $22,880. The director's analysis on this point was correct. The director made no analysis of the assets and liabilities of the petitioner, but Schedule L for the petitioner for 2001 shows current assets of $11,643 and current liabilities of $5,575, for net current assets of $6,068. The net current assets that year were therefore less than the proffered wage.

Counsel asserts that a depreciation expense on Line 20 of the Form 1120 "artificially" reduced the petitioner's profit by $5,520. In determining the petitioner's ability to pay the proffered wage, CIS [formerly the Service or INS] will 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. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc., supra,* 623 F. Supp. at 1084, the court held that 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. Finally, there is no precedent that would allow the petitioner to add back to net income the depreciation expense charged for the year. *See also Elatos Restaurant Corp., supra,* 632 F.Supp. at 1054.

Counsel also states that a portion of the "Compensation of officers" expense and of the "Salaries and wages" expense shown on Lines 12 and 13 of the petitioner's 2001 corporate income tax return represent funds which would be available to pay the proffered wage to the beneficiary, since a corporate officer and a part-time cook have been performing cook duties temporarily pending the hiring of the beneficiary. Counsel's assertions on the latter point are not supported by any documentary evidence. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner's evidence in the record before the director pertained only to the year 2001, with no evidence on its financial situation in the year 2000, which was the year of the priority date. Therefore even if the petitioner's evidence for the year 2001 established its ability to pay the proffered wage that year, the lack of evidence for the year 2000 would still fail to establish the ability of the petitioner to pay the proffered wage as of the priority date.

For the foregoing reasons, the decision of the director to deny the petition was correct based on the evidence then in the record.

The additional evidence submitted on appeal fails to cure the evidentiary deficiencies noted by the director. The financial statement submitted by the petitioner is unaudited and covers only a ten-month period ending January 31, 2003. An unaudited financial statement is not a probative and competent form of evidence as prescribed under 8 C.F.R. § 204.5(g)(2). Furthermore, the financial statement fails to cover the period from the May 23, 2000 priority date through April 2002.

Financial information about the sole shareholder of the petitioner, Ted C. Leung, and his wife does not establish the ability of the petitioner to pay the proffered wage since the petitioner is a corporation. Mr. Leung and his wife are not legally liable for the financial obligations of the corporation. Citizenship and Immigration Services (CIS), formerly the Service or INS, 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.

Although Mr. Leung submitted an affidavit stating his desire to guarantee the payment of the wages of the beneficiary that affidavit does not appear to be legally enforceable as a guarantee. The affidavit lacks the amount of salary to be guaranteed, the period of the purported guarantee, the conditions under which the guarantee would take effect, and the consideration received by the affiant in return for the guarantee. In fact the affidavit states only, "I personally *desire* to guarantee the payment of [the beneficiary's] wages." (emphasis added). A legally enforceable guarantee would require an explicit commitment of a guarantee, not merely an expression of a desire to make a guarantee. *See generally* 38 Am. Jur. 2d, Guaranty, §§ 1, 5, available on Westlaw database (updated May, 2003). Aside from its legal deficiencies, the affidavit is dated March 7, 2003, nearly three years after the priority date. Even if enforceable as a guarantee of the future wages of the beneficiary, the affidavit of Mr. Leung could not help to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the present.

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.