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U.S. Citizenship
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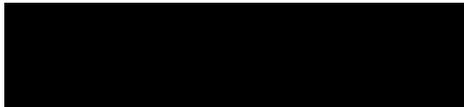
Office: VERMONT SERVICE CENTER

Date: APR 06 2006

EAC-02-153-53526

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.

Robert P. Wiemann, Director
Administrative Appeals Office

CC:

DISCUSSION: The Director, Vermont Service Center, denied the petition and a subsequent motion to reconsider. The Administrative Appeals Office (AAO) dismissed an appeal. Subsequently, the petitioner initiated litigation in the United States District Court of the District of Connecticut upon which the parties to the litigation stipulated to remanding the matter to the AAO to issue another decision. Accordingly, the AAO is reopening the matter on its own motion, replacing its former decision with the foregoing. The appeal will remain dismissed. The petition will remain denied.

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 priority date of the visa petition and denied the petition accordingly. The AAO affirmed the director's decision.

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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$79,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of September 1997.

On the petition, the petitioner claimed to have been established in 1976 and to currently employ eight workers. In support of the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2000.¹ The record of proceeding reflects that the petitioner's fiscal year is based upon a calendar year. The petitioner also submitted a Form W-2, Wage and Tax Statement, reflecting that the petitioner paid \$56,732.22 in wages to the beneficiary in 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 10, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested

¹ Because 2000 precedes the priority date of 2001, the petitioner's financial situation as reflected in its 2000 federal tax return is not necessarily dispositive of its continuing ability to pay the proffered wage as of the priority date.

that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's 2001 federal tax return.

In response, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. Counsel also submitted copies of the petitioner's Merrill Lynch WCMA investment account statements for the entire year of 2001 and a listing of aged receivables. Counsel stated that the petitioner's revenues were adversely impacted by declining travel after September 11, 2001, but recovered thereafter, without a statement from the petitioner or corroborating evidence. Counsel also stated that its clients pay slowly, which is evidenced by aged receivables of \$488,910 towards the end of 2001. Finally, counsel pointed out the petitioner's \$200,000 substantially unused line of credit. The supporting statements reflect that the petitioner had only used \$192 of the line of credit in April 2001 and by December 2001 had used most of the line of credit leaving a balance of approximately \$8,000.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on February 20, 2003, denied the petition. In addition to noting its reported loss in 2001 and negative assets, the director stated that the documents provided in response to his request for evidence showed that the petitioner's "purchasing power" of its line of credit was reduced to \$10,119. Also, the director stated that no supporting evidence illustrates that the "aged receivables" were collected in 2002 as counsel asserted.

On a motion to reconsider, counsel submitted a letter, dated March 19, 2003, from [REDACTED] the petitioner's accountant, who stated in pertinent part, the following:

I can attest to the fact that [the petitioner] had sufficient resources in their line of credit, as of [the priority] date, and that any downturn occurred only in the fourth quarter of 2001 and has since been reversed. At the end of 2001 the [petitioner] claimed \$488,910 in receivables. With the exception of \$20,000, the entire amount had been collected by the first quarter of 2002. Additionally, the total line of credit was repaid and became available again.

Counsel asserted that "the [credit line] funds were fully available in April 2001 when the petition was filed," and both she [REDACTED] stated that the petitioner's only financial troubles were isolated to the end of 2001. Counsel also submitted a Form W-2, Wage and Tax Statement, showing that the beneficiary was paid \$74,276.77 in 2002; copies of the petitioner's bank account statements for a few months in 2002 and 2003; and a print-out from the petitioner's account with Merrill Lynch WCMA showing a line of credit of \$200,000 with a zero balance as of March 2003.

The director denied the motion to reconsider on June 12, 2003 stating that the motion failed to provide evidence connected to the 2001 priority date.

On appeal, counsel asserted that the director erred and failed to correctly consider evidence provided with her motion to reconsider. Counsel apparently filed an additional brief, dated August 8, 2003, that was not collated into the record of proceeding. The AAO issued its decision on November 6, 2004 based on the record of proceeding at the time of adjudication that did not include counsel's brief.

The AAO's decision determined that the petitioner's net income and net current assets were insufficient to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The AAO also determined that there was insufficient evidence that the petitioner's line of credit was an asset and not a liability

and that the petitioner's aged receivables could only be attributed to 2002 and not 2001, the date of the priority date.

Counsel's August 8, 2003 brief is now incorporated into the record of proceeding.² In her brief, counsel reiterated past arguments. She asserted that the petitioner's accountant supported the assertion that aged receivables were collected early in 2002 and that the entire line of credit of \$200,000 was available then as well. She further elaborated on the petitioner's continuing ability to pay the proffered wage beginning on the priority date by, in pertinent part, stating the following:

The petitioner argued that since they were in the business of computer support for hotel reservations, that their business was temporarily affected by the events of September 11, 2001, and that these conditions did not exist at the time that the petition was filed, and never existed again after the last quarter of 2001.

* * *

Nowhere in the case law or the statutes does it state that if [the ability to pay] exists at the time of filing, at the present time, and continues until the time that permanent residence is granted, that a temporary downturn, followed by a rapid recovery will be fatal to the ability to pay the wage offered.

* * *

In April of 2001, when the priority date was established, the petitioner clearly had the ability to pay the wage. Business was running as usual, in a profitable manner, clients were paying on time (hence, no aged receivables at that time), and almost all of the \$200,000 line of credit was available.

[CIS'] approach is flawed, in that it looks at the year of 2001 as a whole, and does not focus on the time of the filing of the petition. The entire loss and use of the credit line stems from the last quarter of 2001, which was entirely due to an unanticipated and tragic outside event, and not from any inherent financial weakness in the company. Indeed, the company "bounced back" almost immediately in 2002, collected the receivables, repaying the entire credit line and running at a greater profit than prior to 2001. Additionally, evidence was submitted that the beneficiary was paid \$77,723, in 2002, as a result of the petitioner's misunderstanding of the actual wage to be paid, which they thought was \$77,000, and were under the impression that they were actually overpaying.

submits the following documents: evidence of wages paid by the petitioner to the beneficiary from 2003 through 2005; the petitioner's federal corporate income tax returns from 2002 through 2004; and copies of previously submitted evidence such as the petitioner's Merrill Lynch WCMA investment account statements for the entire year of 2001, a listing of aged receivables from 2001, and bank statements for

² A properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative (Form G-28), is included in the record of proceeding signed by the petitioner's representative. Separate counsel, did not submit a properly executed G-28 into the record of proceeding, but initiated litigation and negotiated a remand. Thus, both being provided a copy of this decision as noted on the front of the decision.

one month in 2002 and 2003. The tax returns submitted on remand reflect that the petitioner switched from an S corporation to a C corporation in 2004 and thus filed on 1120S from 2001 through 2003 and 1120 for 2004³. Counsel indicated that the petitioner's 2005 tax return had not yet been prepared.

The W-2 Wage and Tax statements reflect that the beneficiary was paid the following wages from the petitioner from 2001 through 2005:

	<u>Wages Paid</u>	<u>Difference between wage paid and proffered wage</u>
2001	\$56,732.22	\$22,267.78
2002	\$74,276.77	\$4,723.23
2003	\$72,138.04	\$6,861.96
2004	\$64,362.70	\$14,637.30
2005	\$70,659.54	\$8,340.46

The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>	<u>2003</u>
Gross receipts	\$1,136,170	\$1,118,697	\$1,035,749
Officer compensation	\$0	\$0	\$0
Costs of labor	\$585,080	\$595,048	\$595,966
Net income ⁴	-\$97,450	\$28,137	\$27,730
Current Assets	\$443,403	\$29,238	\$115,794
Current Liabilities	\$857,285	\$454,821	\$354,965
Net current assets	-\$413,882	-\$425,583	-\$239,171
	<u>2004</u>		

³ The record reflects that the petitioner now files as "Optims America, Inc. formerly Hotel Data Systems, Inc." with the same address and employer identification number as the petitioner represented on the visa petition. No evidence was submitted to confirm that Optims America, Inc. is a successor-in-interest to the petitioner. In any future proceedings, this matter should be addressed. This status requires documentary evidence that the Optims America, Inc. has assumed all of the rights, duties, and obligations of the predecessor company, the petitioner. The fact that Optims America, Inc. is doing business at the same location as the predecessor does not establish that it is a successor-in-interest. The financial ability of the predecessor enterprise to pay the proffered wage at the priority date must be established. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

⁴ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). Since the petitioner reports income from sources other than a trade or business, on motion, the AAO edits its initial determination of the petitioner's net income and derives that figure from Line 23 of Schedule K.

Gross receipts	\$763,753
Officer compensation	\$0
Salaries and wages	\$697,364
Net income ⁵	-\$478,949
Current Assets	\$304,012
Current Liabilities	\$821,172
Net current assets	-\$517,160

As properly noted by the AAO at the outset of its decision, counsel's reliance on the balances in the petitioner's bank and investment accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. No evidence or argument on remand was submitted to rebut the AAO's stance on the petitioner's bank and investment funds.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 established that it employed and paid the beneficiary partial wages in each year. In each year, the petitioner must demonstrate that it can pay the difference between the wages it actually paid the beneficiary and the proffered wage in each year. Thus, the petitioner is obligated to demonstrate that it can pay \$22,267.78 in 2001, \$4,723.23 in 2002, \$6,861.96 in 2003, \$14,637.30 in 2004, and \$8,340.46 in 2005.

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). 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.

⁵ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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.

The petitioner's net income in 2001 was -\$97,779 and it could not pay the \$22,267.78 of remaining wages out of negative net income. The petitioner's net income of \$28,137 in 2002 is greater than \$4,723.23, and its net income of \$27,730 in 2003 is also greater than \$6,861.96, and thus it has demonstrated its ability to pay the proffered wage in 2002 and 2003. The petitioner's net income in 2004 was -\$478,949 and it could not pay the \$14,637.30 of remaining wages out of negative net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. 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, 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.⁶ 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 a corporation's end-of-year 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. The petitioner's net current assets were negative from 2001 through 2004 and thus the petitioner could not pay the difference between the wages it actually paid to the beneficiary and the proffered wage in those years out of its net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel asserts that the petitioner is aided by its line of credit. However, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's

⁶ 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.

credit limits, bank lines, or lines of credit. A “bank line” or “line of credit” is a bank’s unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron’s Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner established that its line of credit was available at the priority date; however, those funds were unavailable six months later.⁷ The petitioner’s line of credit will not be considered because its existent loans would have been reflected in the balance sheet provided in the tax return and was thus fully considered in the evaluation of the corporation’s net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, and as discussed in the AAO’s initial decision, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position.⁸ Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm’s liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel cites to *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) for support of his assertion that the petitioner’s credit line should be considered as an asset. The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church’s ability to pay a wage. Here, counsel’s assertion is that CIS should treat its line of credit as evidence of its ability to pay even though a line of credit creates an expense and a debt, whereas a parishioner’s pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the line of credit.

Additionally, the AAO concurs with the director that the evidence submitted on motion to reconsider does not demonstrate that the petitioner has the ability to pay the proffered wage as of the priority date in [REDACTED] that the petitioner’s aged receivables were received in 2002, not 2001. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N at 49. Thus, contrary to counsel’s assertion, these additional funds were not available to the petitioner in 2001⁹. The petitioner’s tax return in 2001 does not reflect additional funds available to it in 2001 aside from what is reported¹⁰.

⁷ A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

⁸ The petitioner did not submit any additional evidence on remand.

⁹ In this case, the petitioner’s accountant asserts that the petitioner claimed \$488,910 in receivables at the end of 2001. According to the petitioner’s tax return, the petitioner claimed \$455,048 in receivables at the end of 2001. The AAO notes that the claimed \$455,048 in receivables was taken into account in the analysis of the petitioner’s net current assets for 2001. It is unclear whether or not counsel is stating that the petitioner had an additional \$488,910 in receivables in 2001 not reported on the petitioner’s return.

¹⁰ Accounts receivable are a line item of the petitioner’s current assets. Additionally, the petitioner’s choice of tax accounting methods accords income either to the year during which it was earned or the year during which it was

Counsel asserts that the petitioner's financial status was temporarily adversely impacted by the events of September 11, 2001. However, no evidence was submitted into the record of proceeding to support that assertion. 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). 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)). The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. The AAO also notes that the petitioner's tax returns suggest that 2001 was one of its best years in the context of its gross receipts, net income, and net current assets reported from 2001 through 2004.

Although CIS has set forth several quantitative approaches to analyzing a petitioning entity's continuing ability to pay the proffered wage, such as the payment of actual wages, the amount of net income or net current assets, and/or the number of employees, etc., the agency and its adjudicators do assess the totality of circumstances in every individual case. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967)¹¹. In the present case, the petitioner had been in business for 25 years at the time the Form

received. Apparently the petitioner reports income when it is received, consistent with cash convention, but counsel urges that the amount on the 2001 tax return consider income earned during 2002 but not received during that year, which would be consistent with accrual. The petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purpose. The amount received during 2002 will not be counted as having been available to pay wages during 2001.

¹¹ *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner since the petitioner did not submit evidence of its financial situation in any other year.

ETA 750 was filed.¹² Although not necessarily dispositive since it involves a year preceding the priority date, the petitioner reported \$1.5 million in gross receipts and paid out \$706,197 in wages and salaries, \$65,769 in officer's compensation, net income of -\$18,779, and net current assets of -\$113,979 in 2000. The petitioner reported approximately \$1.1 million in gross receipts, and did not report paying any officer compensation in 2001, the year of the priority date, in addition to also reporting a net loss and negative net current assets. In 2004, the petitioner's gross receipts fell by 30% and its net income and net current assets were negative. These are factors that do not weigh in the petitioner's favor.

The petitioner's totality of circumstances in this case, in which the petitioner was structured as an S corporation until 2004, also includes an analysis of its officer's compensation. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates [REDACTED] holds 100% percent of the company's stock. According to the petitioner's 2000 IRS Form 1120, Line 7, Compensation of [REDACTED] to pay himself \$65,769. CIS (legacy INS) has long held that it 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.

In the present case, however, CIS is not examining the personal assets of the petitioner's owners per se, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their corporation. In 2001, no officer's compensation was paid [REDACTED] suggesting that there were no additional funds to distribute differently. Even if there were officer's compensation funds, there is no evidence contained in the record of proceeding that demonstrates the credibility of the premise – [REDACTED] has the ability or willingness to forego any portion of his officer's compensation in order to have the funds to pay the proffered wage. In 2000, he was paid \$65,769 in officer's compensation. The proffered wage is \$79,000 per year, which is greater than the [REDACTED] received in that year. Again, without evidence in the record of proceeding that demonstrates the credibility of this premise, the AAO finds it highly unlikely [REDACTED] forego all of his officer's compensation in order to pay a portion of an employee's salary.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has failed to demonstrate that it has the ability to pay the salary offered for the entirety of the period beginning on the priority date of the petition and continuing to present.

¹² The petitioner claimed on the visa petition that it began business in 1976. Its tax return for 2001 reflects that it was incorporated in 1980 and elected to form as an S corporation in 1998.

Despite showing that it could pay the proffered wage in 2002 and 2003, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2004. Therefore, the petitioner has not established that it 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 AAO's decision, dated November 6, 2004, is withdrawn and replaced with the foregoing. The appeal remains dismissed and the petition remains denied.