

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE:

[Redacted]
EAC-05-056-51801

Office: VERMONT SERVICE CENTER

Date: AUG 28 2006

IN RE:

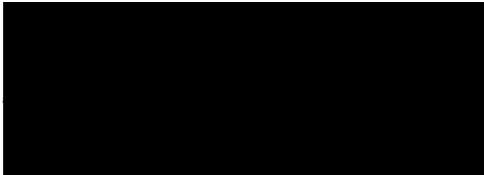
Petitioner:

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, Chief
Administrative Appeals Office

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

The petitioner is an oil and gas industry consultant. It seeks to employ the beneficiary permanently in the United States as a civil engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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 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 December 6, 2005 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. The director pointed out that the petitioner's gross income has never been greater than the amount of wages paid to the beneficiary in any year since its inception and that the petitioner's owner's personal income cannot be considered because the petitioner is a corporation that separates liability between the corporate entity and its owners. The director also questioned whether the petitioner attempted to find eligible United States employees and whether the petitioner tailored the position to the beneficiary's background in violation of DOL regulations.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 U.S. Department of Labor. See 8 CFR § 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 U.S. Department of Labor 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 April 14, 2004. The proffered wage as stated on the Form ETA 750 is \$26.44 per hour (\$50,870.56 per year based on a 37-hour work week). The Form ETA 750 states that

the position requires a four-year bachelor's degree or its foreign equivalent in civil engineering and four years of experience in the proffered position. The Form ETA 750 also sets forth the special requirements of three years of international experience working as a civil engineer in the oil and gas industry, one year of supervisory experience over construction projects, and willingness and ability to travel and spend extended time overseas when necessary to complete projects.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Counsel submits new evidence on appeal.

Relevant evidence in the record includes the petitioner's federal corporate tax returns for 2003² and 2004; unaudited balance sheets dated June 2004, September 2005, and December 2005; paystubs issued by the petitioner to the beneficiary in 2004 and 2005; W-2 forms issued by the petitioner to the beneficiary in 2003 and 2004; the petitioner's owner's individual income tax return for 2004; documentation pertaining to the petitioner's owner's credentials and professional achievements, including correspondence from business acquaintances; a list of American ambassadors who "can attest to the work" of the petitioner's owner and the petitioner; excerpts from a mutual confidential disclosure agreement between the petitioner [REDACTED] dated February 2005; correspondence and a work contract between [REDACTED] the petitioner dated March 2005; a DuPont project description referring to the petitioner's owner's credentials; and a letter [REDACTED] concerning the petitioner's financial status. 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 an S corporation. On the petition, the petitioner claimed to have been established in November 2002 and to currently employ two workers³. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 9, 2004, the beneficiary claimed to have worked for the petitioner since July 2002.

On appeal, counsel asserts that the director erred by failing to consider the totality of circumstances, including the petitioner's alleged owner's reputation in the industry, a description of the petitioner's business, and citation to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), Board of Alien Labor Certification Appeals (BALCA) precedent, minutes between the Vermont Service Center and the American Immigration Lawyers Association (AILA), and unpublished AAO decisions. Counsel states that the petitioner complied with DOL's supervised recruitment for a civil engineer but failed to find anyone qualified for the proffered

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² Evidence and information preceding the priority date in 2004 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

³ An addendum to the petition's question eliciting information about the petitioner's gross and net annual income states that the petitioner's tax return for 2003 shows a loss because it had only done business for five months in 2003. The addendum further states that the loss was attributable to certain deductions that it was entitled to take its year of beginning operations, but that it has paid the beneficiary according to the prevailing wage rate for his H-1B status for the company and that the petitioner's net current assets are greater than the proffered wage.

position⁴. Counsel states that the petitioner's owner's personal income of over \$1 million per year will be used to continue to fund the petitioner as its tax returns reflect in its loans from shareholders itemization on Schedule L. Finally, counsel states that the petitioner's financial information in 2003 is not necessarily relevant since the priority date is in 2004, but that the petitioner's net current assets in 2004, as reflected on its federal corporate tax return, are greater than the difference between wages actually paid to the beneficiary and the proffered wage and therefore demonstrate its ability to pay in accordance with a memorandum by William R. Yates in May 2004⁵.

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, Citizenship and Immigration Services (CIS) 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).

At the outset, counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel also asserts in her brief that reliance upon the petitioner's sole shareholder is reasonable in this case. Contrary to counsel's assertion, CIS 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). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations

⁴ The AAO is loath to review DOL's substantive issues or procedural matters, of which the AAO does not have appellate jurisdiction, and the director did not issue a decision on that issue anyway.

⁵ Counsel is referring to an internal CIS memorandum entitled "USCIS Issues Guidance on Determination of Ability to Pay," by William R. Yates, Associate Director of Operations of CIS, dated May 14, 2005 guiding adjudications of petitioning entities' continuing ability to pay the proffered wage through the following three-tiered analysis:

Adjudicators should make a positive ability to pay determination on an I-140 under the following circumstances:

- The petitioner's net income is equal to or greater than the proffered wage;
- The petitioner's net current assets are equal to or greater than the proffered wage; or
- The employer submits credible, verifiable evidence that the petitioner is both employing the beneficiary and has paid or is currently paying the proffered wage.

cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel cited *Ranchito Coletero*, 2002-INA-104 (2004 BALCA) and *Ohsawa America*, 1988-INA-240 (BALCA 1988) for the premise that businesses that regularly fail to show profits typically rely upon individual or family assets. Counsel does not state how DOL's BALCA precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation. Additionally, counsel does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. In the instant petition, the petitioner showed no revenue in 2003 and gross income equivalent to the proffered wage in 2004 with the same operating costs in each year, and thus it showed sustained losses. Thus, in addition to not being binding precedent, *Ohsawa America* and *Ranchito Coletero* are distinguishable from the facts of the instant petition.

Counsel's reliance on AILA minutes with the Vermont Service Center and unpublished AAO decisions is also misplaced. As already noted above, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 \$48,000 in 2004, which is \$2,870.56 less than the proffered wage. The petitioner is obligated to demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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. 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage of \$2,870.56:

- In 2004, the Form 1120S stated net income⁶ of -\$18,244.

Therefore, in 2004, 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, CIS will review the petitioner's assets. Contrary to counsel's assertions in her response to the director's request for evidence, the petitioner's total assets are not considered. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

⁶ 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). Because the petitioner has income from sources other than from trade or business, its net income is found on Schedule K, line 17e.

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

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 net current assets during 2004 were \$62,803.

Therefore, in 2004, the petitioner's net current assets were sufficient to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

The evidence contained in the record of proceeding demonstrates that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date based on its net current assets.

ORDER: The appeal is sustained. The petition is approved.

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.