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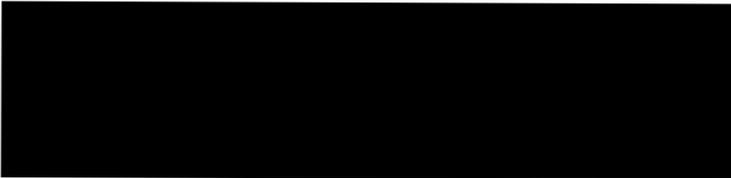


File: EAC-05-039-50268 Office: VERMONT SERVICE CENTER Date: DEC 07 2006

In re: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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 Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electrical contractor and seeks to employ the beneficiary permanently in the United States as an electrician. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's June 3, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

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 appeal.<sup>1</sup>

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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.

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

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on Form ETA 750 for the position of an electrician is \$34.69 per hour, based on a 40 hour work week, which is equivalent to \$72,155.20.<sup>2</sup> The labor certification was approved on September 24, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on November 24, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: April 6, 1998; gross annual income: \$146,945; net annual income: \$8,801; and current number of employees: not listed.

On January 7, 2005, the director issued a Request for Additional Evidence ("RFE"), requesting that the petitioner submit additional evidence, specifically related to the petitioner's ability to pay, including the petitioner's federal tax returns, annual reports, or audited financial statements for the years 2001, and 2002, as well as the beneficiary's W-2 Forms. Further, the RFE requested that the petitioner provide evidence that the beneficiary met the requirements as set forth in the ETA 750. Counsel responded to the RFE and submitted the petitioner's 2001, 2002, and 2003 federal tax returns, along with the company president's 2002 and 2003 individual Forms 1040 and the petitioner's bank statements. Additionally, the petitioner submitted a letter regarding the beneficiary's prior experience.

On June 3, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary did not list that he has been employed with the petitioner. The petitioner did not submit any evidence of wage payment, and did not claim to have employed the beneficiary.

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. 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).

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 petitioner is structured as an S corporation. 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

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<sup>2</sup> The petitioner initially listed an hourly rate of \$13.85, but the DOL required that the wage be changed to \$34.69 prior to DOL certification.

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). The petitioner's tax returns do not reflect additional income from sources other than trade or business. Line 21 reflects the following income:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	\$5,048
2003	\$8,801
2002	\$3,675
2001	-\$787

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the forgoing years.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	\$620
2003	\$3,634
2002	\$1,778
2001	-\$326

Following this analysis, the petitioner's federal tax returns show that the petitioner would lack the ability to pay the proffered wage in all of the above years under the net current asset test as well.

On appeal, counsel contends that since the petitioner is an S corporation, examining the tax returns alone is insufficient to determine the petitioner's ability to pay. Counsel provides that since the goal of an S corporation is to minimize taxes, the petitioner's gross receipts would be a better indicator of its financial strength. The petitioner's tax returns show the following gross receipts: in 2004 the company had \$72,555 in gross receipts; in 2003, \$146,945; in 2002, \$118,802; and in 2001, \$128,822. First, we note that *K.C.P. Food*

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<sup>3</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

*Co., Inc. v. Sava*, 623 F. Supp. at 1084, provides that it is proper to rely on the petitioner's net income figure, 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. Second, we note that the proffered wage is \$72,155.20. The petitioner's 2004 gross receipts would just barely cover this wage, and in the other years, the petitioner's tax returns did not reflect significant gross receipts, total income, wages paid, or other factors to allow us to conclude that the petitioner would have the ability to pay the proffered wage.

Counsel further provides that the petitioner's president has guaranteed that it will pay the beneficiary's salary from the owner's personal assets if required. Counsel has submitted the petitioning company owner's individual Form 1040 federal tax returns in support. Further, counsel cites to *Matter of Ranchito Coletero*, 02-INA-105 (BALCA, January 8, 2004), and asserts that the owner's personal resources should be considered in determining the petitioner's ability to pay. *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the case before us where the petitioner is structured as an S corporation. We do not dispute that in the case of a sole proprietorship, CIS may consider the proprietor's personal assets and liabilities. However, in the case of a corporation, CIS may not pierce the corporate veil and look to the assets of the corporation's owner or shareholders. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Therefore, while the petitioner's owner may have substantial individual assets or income, those assets or income are not relevant in the case at hand.

Further, the Department of Labor, Board of Alien Labor Certification Appeals (BALCA) decided *Ranchito Coletero*. Counsel does not explain how a BALCA case 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).

Counsel next contends that the petitioner's bank returns exhibit the company's ability to pay and are a better source to reflect the company's financial viability than the company's federal tax returns. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Further, if we were to examine the bank statements submitted, nothing contained therein leads us to conclude that the petitioner can demonstrate its ability to pay the proffered wage. The petitioner submitted bank statements for the time period January 2004 through January 2005. The bank account balances exhibit that the petitioner had under \$100 in its account for three months out of the twelve months submitted, and for an additional four months had funds under \$1,000. The statements reflect a high balance of \$2,161.13 as of December 24, 2004, and a low balance of \$26.74 as of March 25, 2004. Nothing contained within the bank statements would allow us to determine that the petitioner had sufficient assets to pay the proffered wage in the year 2004. Additionally, those funds should already have been accounted for as cash on the petitioner's Schedule L and included in net current assets analysis above.

Counsel additionally cites to *Matter of X*, EAC-01-018-50413 and notes that the AAO should consider the petitioner's normal accounting practices. If we were to accept that the goal of an S corporation is to reduce to

tax liability as a “normal accounting practice,” then the question would be can the petitioner demonstrate that it has funds available to pay the proffered wage. A review of the petitioner’s bank statements does not show that the petitioner has sufficient funds available to pay the proffered wage.

Counsel has also attached two invoices from February 2005, which exhibit that the petitioner’s business was able to generate almost \$60,000 in a two week time period. According to counsel, these invoices would demonstrate the petitioner’s reasonable expectation of growth. We note again that the petitioner must demonstrate its ability to pay the proffered wage from the priority date of 2001 until the beneficiary obtains permanent residence. See 8 CFR § 204.5(g)(2). Further, 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). While the invoices may exhibit growth in the beginning of 2005, we note that the petitioner’s gross receipts had dropped off substantially in 2004, and the 2005 receipts when viewed in light of the petitioner’s entire business over the course of four years would not provide compelling evidence of the petitioner’s ability to pay the proffered wage from the priority date in April 2001 until the time that the beneficiary obtains permanent residence.

Counsel further cites to *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), relying on *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), for the proposition that all relevant factors and sources of financial support should be considered related to the petitioner’s ability to pay, and quotes, “because the petitioner has shown a reasonable expectation of increased business, the [immigrant] visa should be approved.” 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). The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church’s ability to pay the wages. We have considered all evidence the petitioner has submitted, none of which, viewed separately, or as a whole, provide evidence that the petitioner is able to pay the beneficiary the full proffered wage of \$72,155.20

Looking to *Matter of Sonogawa*, in that case, the petitioner provided evidence to show that the petitioner had sustained significant expenses in one year related to the relocation of the business, and an increase in rent, which accounted for the petitioner’s decrease in ability to pay the required wages. The petitioner in *Sonogawa* also provided magazine articles, which helped to establish the petitioner’s reputation, and potential future growth. Counsel, here, has not provided any evidence to show any large one-time incident impacting the business’ finances, or other factor, which previously impacted its ability to pay the prevailing wage. Additionally, by reviewing the petitioner’s net income, as well as the petitioner’s net current assets, and bank statements the petitioner’s financial status has been fairly considered.

Counsel further notes that the beneficiary’s proposed employment will increase the petitioner’s revenue, and cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in support of this assertion. 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). Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds, and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. All formulas used to determine the ability to pay the proffered wage are set forth above. Further, the petitioner has provided no details or documentation to explain or estimate how the beneficiary’s employment as an electrician will significantly increase profits for the business. Projected hypothetical income does not outweigh the documented evidence presented in the corporate tax returns.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.