

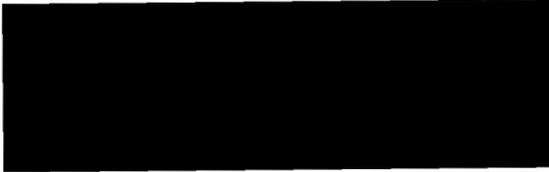
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**U.S. Citizenship  
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FILE: LIN-04-125-53955 Office: NEBRASKA SERVICE CENTER Date: **MAY 19 2006**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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: SELF-REPRESENTED

**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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a roofing-waterproof firm. It seeks to employ the beneficiary permanently in the United States as an electrical design engineer. 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 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 30, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is September 24, 2001. The proffered wage as stated on the Form ETA 750 is \$23.40 per hour, which amounts to \$48,672.00 annually.<sup>1</sup>

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<sup>1</sup> The proffered wage, as calculated, is based on the assumption that the beneficiary is employed for 40 hours per week and for 52 weeks. No evidence in the record contradicts this assumption, and the Form ETA 750 corroborates that the beneficiary is to be employed for 40 hours per week. Thus, the director erred in stating that the proffered wage is

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>2</sup> Relevant evidence submitted on appeal includes copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000 and 2001.<sup>3</sup> Other relevant evidence in the record includes a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The petitioner states on appeal that it has the ability to pay the proffered wage based on a correct analysis of its tax returns, its assets, its profitability, the fact that it paid salaries and wages, the fact that the beneficiary was already working for the petitioner at the time of the labor certification, and the fact that the petitioner would not have offered a job to the beneficiary without the ability to pay.<sup>4</sup>

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, CIS requires the petitioner to demonstrate financial resources sufficient

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approximately \$50,672.00. The petitioner also erred in stating that the proffered wage is \$44,928.00 because the petitioner's calculation is based on the assumption that the beneficiary is to be employed for 48 weeks per year.

<sup>2</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).

<sup>3</sup> According to the record, the petitioner submitted a copy of its Form 1120 U.S. Corporation Income Tax Return for 2002 on April 29, 2004. In a request for evidence (RFE) dated May 14, 2004, the director specifically requested the petitioner's federal tax returns for 2001, 2002, 2003. In response to the RFE, the petitioner stated that the director has the petitioner's federal tax returns for 2001, 2002, and 2003 because they were already submitted, and it submitted its federal tax return for 2002 again. On appeal, the petitioner submits copies of its federal tax returns for 2000, 2001, and 2002. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO generally will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted its federal tax returns for 2000 and 2001 to be considered, it should have submitted the document in response to the director's request for evidence. *Id.* However, the AAO will exercise its discretion and accept the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000 and 2001 because the petitioner appears to believe that it already submitted the requested evidence earlier. The AAO will not preclude consideration of the petitioner's federal tax returns for 2000 and 2001.

<sup>4</sup> The record contains a Form G-28 Notice of Entry of Appearance as Attorney or Representative, and [REDACTED] is listed as a law school graduate acting as the petitioner's representative. According to 8 C.F.R. § 292.1(1)(2)(iii), (iv), a law graduate not yet admitted to the bar may be a representative where "he or she has filed a statement that he or she is appearing under the supervision of a licensed attorney or accredited representative and that he or she is appearing without direct or indirect remuneration from the alien he or she represents," and his or her "appearance is permitted by the official before whom he or she wishes to appear." [REDACTED] has not filed the above-mentioned statement, and the AAO does not permit law graduates to act as counsels. Thus, the AAO will treat the petitioner in this case as self-represented and [REDACTED]'s brief will be treated as the petitioner's brief.

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).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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 July 3, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner states on appeal that "[t]he alien was already working for the employer at the time that the labor certification was filed and was able to meet the [alien's] salary at that time, this fact is important and demonstrates the ability to pay." The petitioner points to its Form 1120 U.S. Corporation Income Tax Return for 2002 and states that the beneficiary's wage is included in the amount listed as salaries and wages.

Evidence that CIS will look at in determining whether the petitioner paid the beneficiary includes Form W-2's, Form 1099's, or other evidence of compensation from the petitioner. The petitioner's statement alone, 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)). In addition, the petitioner's statement seems to contradict the information on the Form ETA 750B that the beneficiary was not working for the petitioner at the time of the Form ETA 750 was filed, and *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Even if the beneficiary was in fact employed by the petitioner, the record does not indicate the exact amount the beneficiary received in wages.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000, 2001, and 2002. The record before the director closed on July 19, 2004 with the receipt by the director of the petitioner's submissions in response to the request for

evidence (RFE). As of that date the petitioner's federal tax return for 2004 was not yet due. Therefore the petitioner's tax return for 2003 is the most recent return available. A close look of the petitioner's tax returns reveals that they are based on fiscal years lasting from November 1 to October 31. Thus, the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2000 is for fiscal year 2001, its Form 1120 for 2001 is for fiscal year 2002, and its Form 1120 for 2002 is for fiscal year 2003.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	-\$78,692.00	\$48,672.00*	-\$127,364.00
2002	-\$215,767.00	\$48,672.00*	-\$264,439.00
2003	-\$215,720.00	\$48,672.00*	-\$264,392.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002, and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. 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. 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. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
2001	\$1,245,002.00	\$48,672.00*
2002	\$864,355.00	\$48,672.00*
2003	\$1,377,613.00	\$48,672.00*

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002, and 2003.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

The petitioner states that the director "made obvious mistakes, confused the employer's ID [n]umber [on the tax return for fiscal year 2003] with the preparer's EIN [number]." The director did err in stating that the petitioner's ID number is 91-1415469. However, this error is immaterial to the petitioner's ability to pay the proffered wage.

The petitioner states that the director erred in only looking at one number on the tax return. The director, in his decision, looked at the petitioner's net income loss, cash on hand, inventory, other current assets, accounts payable, mortgages, notes, bonds payable, and other current liabilities. Thus, the petitioner's statement is without merit.

The petitioner states that "the net income test is not applicable, it is an onerous one, particularly given the propensity of most businesses to try to minimize net income for tax purposes." As stated above, 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court specifically 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. 623 F. Supp. at 1084.

The petitioner calculates the amount of money it has by combining gross receipts of sales, total assets, inventory, cash, and retained earnings. The AAO does not look at the figure for gross receipts of sales because that figure does not take liabilities into consideration. The AAO does not look at total assets because 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.

The AAO also does not look at retained earnings because retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, the AAO looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

The AAO does look at the petitioner's inventory and cash when it calculates the petitioner's net current assets. However, the AAO will not consider the petitioner's inventory and cash without also considering the petitioner's liabilities. In addition, the petitioner seems to advocate combining inventory and cash, as listed under its current assets, with the petitioner's income, and this is unacceptable. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining

after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective “snapshot” of the net total of petitioner’s assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with the petitioner that the two figures can be combined in a meaningful way to illustrate the petitioner’s ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer such as the petitioner who reports taxes pursuant to the accrual convention, accounts receivable.

The petitioner states that “[t]he net income loss of \$215,720.00 was deducted from the petitioner’s cash on hand by mistake.” The AAO examines the petitioner’s net income, and in the alternative the petitioner’s net current assets, which includes cash on hand, in determining whether the petitioner has the ability to pay the proffered wage. Thus, the director should not have combined the petitioner’s net income with other incomes listed as the petitioner’s current assets.

The petitioner states that the director “erroneously offsets the liabilities with the current assets, alleging that the current liabilities offset most of the current assets.” As stated above, CIS looks to a corporation’s current assets and current liabilities to determine the corporation’s net current assets, and 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. Thus, CIS will not look at the petitioner’s current assets without also looking at its current liabilities.

The petitioner states that it “DISPOSED of important assets, money, income, things of value . . . that demonstrate that [it] has [the] ability to pay the minor salary.” The AAO is unclear whether the petitioner is referring to assets listed in the petitioner’s tax returns or other assets not documented in the record. If it is assets listed in the tax returns, the AAO has considered all relevant figures, as shown above. If it is assets not documented in the record, the assertions of the petitioner alone 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 states that “the petitioner is a millionaire,” “he is absolute owner of a huge asset,” and “the petitioner’s business is profitable.” It is unclear whether the petitioner is referring to its owner or to the petitioning corporation. If the petitioner is referring to the petitioning corporation, statements alone are insufficient to show ability to pay. Instead, the AAO, as it did above, examines the evidence in the record to determine whether the petitioner has the ability to pay. If the petitioner is referring to its owner, 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). 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.

The petitioner states that “[t]he petitioner is owner, has a fee simple absolute, he has the largest estate recognized by law.” Again, if the petitioner is referring to the petitioning corporation’s estate, documentary evidence is needed 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)). If the petitioner is referring to the petitioner’s owner, then the AAO, as stated above, will not “pierce the corporate veil.”

The petitioner states that “[i]t is obvious that the petitioner does not offer a position to an alien or any other employee without the ability to meet the salary.” Noting in the record supports this statement, and 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)).

After a review of the federal tax returns, it is concluded that the petitioner has established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the evidence submitted on appeal has overcome the decision of the director.

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 met that burden.

**ORDER:** The appeal is sustained.