



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
SRC 04 020 52255

Office: TEXAS SERVICE CENTER

Date: OCT 19 2006

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

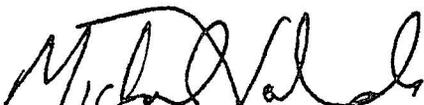
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a legal accounting company. It seeks to employ the beneficiary permanently in the United States as an accountant. 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.

On appeal, counsel states that the petitioner met its burden of proof through the evidence previously submitted to the record. Counsel submits a brief that addresses the financial evidence previously submitted to the record.

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.

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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 24, 2002. The proffered wage as stated on the Form ETA 750 is an annual salary of \$60,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on July 1, 1982, and to have a gross annual income of \$479,035. The petitioner did not indicate the number of its employees on the petition, or its net annual income. In support of the petition, the petitioner submitted evidentiary documentation as to the

beneficiary's qualifications for the position, and the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. This document indicated the petitioner had ordinary income of \$30,190.

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 November 9, 2004, the director requested additional evidence pertinent to that ability. The director indicated that the petitioner had to demonstrate its ability to pay the beneficiary's wage, the wages of other employees and its operating expenses as of September 22, 2002 and continuing until the beneficiary receives lawful permanent residence. The director then requested that the petitioner submit copies of its 2003 federal income tax return with all schedules. Alternatively the director stated the petitioner could provide a copy of its annual report or an audited or reviewed financial statement. The director further requested copies of all the petitioner's employee's W-2 forms for the indicated time frame. The director further requested a copy of Forms 941, Quarterly Tax Report, for the four quarters of 2004, as well as copies of the beneficiary's W-2 forms for tax years 2001, 2002, and 2003.

In response, counsel submitted the petitioner's Form 1120S for tax year 2003. This document indicated the petitioner had ordinary income of \$33,775 in tax year 2003. Counsel noted that Citizenship and Immigration Service (CIS) identified three approaches to establish a petitioner's ability to pay the proffered wage, namely the petitioner's net income and depreciation in the year of filing was equal to or greater than the proffered wage; the petitioner's net current assets in the year of filing were equal to or greater than the proffered; and the petitioner paid the beneficiary a salary equal to or greater than the proffered wage in that year. Counsel stated that CIS had also stated that a combination of these approaches could be used to establish the petitioner's ability to pay the proffered wage. Counsel states that the petitioner's 2003 federal income tax return established the petitioner's ability to pay the proffered wage under a combination of the first and second approaches.

With regard to the petitioner's 2003 tax return, counsel states that the petitioner's net income of \$33,775 and its depreciation expenses totaled \$37,217. Counsel then examined Schedule L of the petitioner's 2003 federal income tax return and noted that the petitioner's net current assets were \$24,963. Counsel then stated that the sum of the petitioner's net income and depreciation, and its net current assets in tax year 2003 was \$62,180, and that the combination of the petitioner's net income including depreciation and its net current assets produced a sum greater than the proffered annual salary of \$60,000.

Counsel also submitted the petitioner's Form 941, Quarterly Tax Reports for the first three quarters of 2004. These documents indicated the petitioner had paid total wages and tips, plus other compensation of \$35,664.80 in the first quarter, \$48,503.50 in the second quarter, and \$60,509.18 for the third quarter. Counsel also submitted a W-3 form for 2003 that indicated the petitioner had paid \$133,973.15 in wages, tips and other compensation in tax year 2003. Counsel also submitted W-2 Forms for the petitioner's five employees. These forms indicated that the petitioner paid the following wages to the following individuals in 2003: [REDACTED], \$15,361.99; Yasmin Gutierrez, \$20,394.60; Michelle Cadavid, \$4,800; [REDACTED] \$54,999.92; and [REDACTED] ro, \$38,416.64. Finally counsel also submitted the beneficiary's W-2 forms for tax years 2002 and 2003. These documents establish that the beneficiary did not work for the petitioner as of the priority date and to the time she signed the Form ETA 750 on August 26, 2002.

On March 22, 2005, the director denied the petition. In his decision, the director discussed the analysis of the petitioner's net current assets, and then examined the petitioner's 2002 and 2003 tax returns. With regard to the petitioner's 2002 tax return, the director stated the petitioner's ordinary income was \$30,190. The director further stated that the petitioner's current assets were \$11,782, while its current liabilities were \$10,624. The director then stated that the petitioner's net current assets in tax year 2002 were \$1,158, and that the petitioner's 2002 tax return did not establish its ability to pay the proffered wage. With regard to the petitioner's 2003 income tax return, the director noted counsel's assertion that the petitioner's net income could be supplemented by the addition of its depreciation expenses. The director stated that depreciation will not be considered in examining the petitioner's taxable income, and that case law held that the CIS had properly relied on the petitioner's net income figure, rather than its gross income and that that no precedent exists that would allow the petitioner to add back the depreciation expenses. The director cited *Chi-Feng Chang v. Thornburgh*, F. Supp. at 537, and also *Elatos Restaurant Corps. v. Sava*, 632 F. Supp at 1054.

The director then stated that although the petitioner's Forms 941 indicates a consistent history of salary payment, they did not establish the petitioner's ability to pay the proffered wage. The director noted that no additional documents were submitted to establish the petitioner's ability to pay the proffered wage and that CIS was not convinced that the petitioner has had, had presently, or would have the ability to pay the beneficiary the proffered wage.

On appeal, counsel states that when it issued the labor certification, the Department of Labor evaluated the petitioner's ability to pay the proffered wage. Counsel cites 20 C.F.R. § 656.20(c)(1). Counsel states that the petitioner has submitted the required evidence to meet the regulatory requirements at 8 C.F.R. § 204.5(g)(2). Counsel states that the director did not properly and adequately analyze the petitioner's income tax returns when he examined the petition.

As an example of the director's lack of proper analysis, counsel states that the petitioner is one hundred per cent owned by [REDACTED] and is classified for tax purposes as an S Corporation. Counsel further states that [REDACTED], a certified public accountant, is the petitioner's principal employee. All net income, after the payment of expenses including wages, is distributed to [REDACTED] himself as an individual. Counsel notes that in 2003, Mr. [REDACTED] was paid wages of \$111,924 and also his one 100 per cent share of the petitioner's \$33,775 net income. Counsel asserts that since Mr. [REDACTED] is the principal employee/manager and the 100 per cent owner of the petitioner, the director should have considered the combination of Mr. [REDACTED] wage and the petitioner's net income when determining the petitioner's ability to pay. Counsel also asserts that in 2003 the petitioner repaid a loan of approximately \$20,000 to its 100 per cent owner and sole shareholder. Counsel states that this repayment of a loan was a discretionary act, and that the payment of the loan to the petitioner's owner should also be considered funds available to pay the proffered salary, as a related party transaction.

Counsel further states that the cases cited by the director as justification for its denial are inapplicable to the petition or misapplied. Counsel states that the ability to pay regulatory requirements was established to determine if businesses such as the petitioner are bona fide. Counsel provides no source or citations for this statement. Counsel states that the director with his cursory financial analysis of the petitioner was essentially

violating the "Business Judgment Rule." Counsel states that under this rule, courts and administrative adjudicatory bodies such as the Texas Service Center must refrain from second guessing business decisions, including hiring an employee, made by bona fide businesses, such as the petitioner, in the absence of a showing of fraud. Counsel cites *Capital Bancshares, Inc. v. FDIC*, 957 F.2nd 203, 207(5th Cir. 1992).

Counsel states that the burden of proof now shifts to the Texas Service Center to demonstrate why the petitioner is not a bona fide company that can make hiring decisions. Counsel states that the record shows the necessary evidence was submitted and, moreover, this evidence reflects a bona fide business with sufficient net income, depreciation, net current assets, and related party transactions between the petitioner and its principal employee/sole shareholder to pay the proffered salary. Counsel states again that the Texas Service Center effectively violated the "Business Judgment Rule" as it failed to provide any meaningful reason why the DOL's evaluation of the petitioner's ability to pay the proffered wage prior to issuing the labor certification should be overturned.

It is noted that, contrary to counsel's assertion, the burden of proof remains, at all times, on the petitioner to show it is eligible for any petition or application it submits to CIS. See Section 291 of the Act, 8 U.S.C. § 1361.

In the response to the director's request for further evidence, counsel advocates combining the petitioner's 2003 net income, including depreciation, with its net current assets to establish the petitioner's ability to pay the proffered wage of \$60,000. However, counsel's statement is not persuasive for two reasons.

First, counsel's analysis path of combining the petitioner's net income with its net current assets is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. 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 counsel 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 who reports taxes pursuant to accrual convention, accounts receivable.

While the AAO does consider the examination of the petitioner's net income during a year of the period of time in question, and the examination of the petitioner's net current assets during another year of the period of time in question to establish the petitioner's ability to pay the proffered wage as of the priority year to the present, it does not consider the combination of two methods of analyzing the petitioner's ability to pay the proffered wage during the same tax year in question.

Second, contrary to counsel's assertion, the AAO does not consider the petitioner's depreciation expenses when evaluating the petitioner's net income. The AAO will discuss this issue more fully further in these proceedings.

In addition, on appeal, counsel states that the repayment of a loan by the petitioner to the petitioner's owner in tax year 2003 should be viewed as discretionary and that these funds are also available to pay the proffered wage. However, loans and their repayment are not necessarily viewed as discretionary. Loans to shareholders listed on Schedule L of the petitioner's tax returns loans from shareholders are not considered as part of the petitioner's net income, after expenses are paid, and, in fact, are identified as long term rather than current liabilities on Schedule L of the Form 1120S. As a long-term liability, such loans would not be considered when calculating the petitioner's net current assets.

On appeal, counsel asserts that the DOL, by certifying the petitioner's labor certification application, evaluated the petitioner's ability to pay the proffered wage, and the director inappropriately reexamined the petitioner's ability to pay the proffered wage. Counsel also states that the director cited case law that is either inapplicable to the instant petition or misapplied. Counsel then states that the director's cursory financial analysis by the director essentially violated the "Business Judgment Rule" which states that courts and administrative adjudicatory bodies such as the Texas Service Center must refrain from second guessing business decisions, such as hiring an employee, made by bona fide businesses like the petitioner in the absence of a showing of fraud. Counsel cites *Capital Bancshares, Inc. V. FDIC*, 957 F. 2nd. 203, 207(5th Cir. 1992).¹ Counsel's reference to the Bancshares decision and his reference to the Business Judgment Rule and its relationship to the present proceedings are found to be without merit.

The AAO notes that the *Bancshares* decision examined a situation in which an insolvent parent bank corporation sought to keep a tax refund produced by the tax return of a subsidiary that was in receivership with the Federal Deposit Insurance Corporation (FDIC.) In the case decision, Bancshares, the parent corporation, argued that in the absence of express federal law, Louisiana state law governed, and that under state law, the court should defer to Bancshare's proposed allocation of the tax refund to itself. The arguments made by Bancshares with regard to the allocation of the tax refund did not prevail in this decision, for various reasons, including the lack of any prior agreement between the parties as to the allocation of the tax refund. The finding of the court was that if Bancshares, the parent corporation, kept the refund generated by the subsidiary, it would have unjustly enriched Bancshares, and that the refund should more appropriately go to the FDIC that oversaw the financial matters of the subsidiary while in receivership. Thus, the *Bancshares* decision involved complicated litigation, involving tax and refund issues in the context of bank receiverships.

The record is not clear as to the relationship between the *Bancshares* findings and the ability of the CIS to examine a petitioner's ability to pay a proffered wage within the context of an I-140 immigrant employment-based petition. Both the Act and immigration regulations provide CIS with the authority to examine such immigration-related issues. The AAO also notes that much precedent case law exists that supports CIS' ability to examine a petitioner's ability to pay a proffered wage within the context of an immigrant employment-based petition. *See, e.g., 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); and *K.C.P. Food Co., Inc. v. Sava*, 623 F.

¹ The actual pertinent part of the *Bancshares* decision to which counsel refers states the following: "Therefore, Bancshares reasons, under state law the Court should defer to Bancshares' proposed allocation of the refund pursuant to the Business Judgment Rule. Under this familiar rule of American jurisprudence, the courts refrain from second guessing business decisions made by corporate directors in the absence of a showing of fraud, unfairness or overreaching".

Supp. 1080 (S.D.N.Y. 1985); Furthermore, the precedent decisions cited by the director in his decision are both applicable and correctly applied in the director's decision.

Furthermore, while counsel is correct in his assertion that DOL certifies the labor certification application, he is mistaken with regard to the extent of the DOL role in labor certifications. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Thus the DOL's role in the examination of the labor certification lies in these two primary areas. Furthermore, 8 C.F.R. § 204.5(g)(2) contains regulatory guidance for CIS adjudicators with regard to how to determine whether a petitioner has the ability to pay the proffered wage. CIS has both the statutory and regulatory authority to examine the petitioner's ability to pay the proffered wage. The roles played by DOL and CIS with regard to the examination of a petitioner's ability to pay a proffered wage are not in conflict.

It is noted that in his request for further evidence, the director asked for evidence as to the petitioner's ability to pay the proffered wage in addition to the number of individuals currently receiving compensation and to the petitioner's operating expenses, and counsel provided further documentation on five employees. On appeal, counsel describes [REDACTED] as the principal employee. Counsel states that when examining the petitioner's 2003 financial resources, CIS should have considered the combination of Mr. [REDACTED] wage of \$111,924 and the petitioner's net income of \$33,775. While noting that the record contains no evidence as to the willingness of Mr. [REDACTED] to contribute part of his officer compensation to pay the proffered wage of \$30,000, the AAO will examine the issue of Mr. [REDACTED] compensation further in these proceedings.

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. The petitioner, in response to the director's request for further evidence, stated that the beneficiary had not worked for the beneficiary in the time period in question. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002 and onward. Thus, the petitioner has the obligation to establish that it can pay the entire proffered wage as of the 2002 priority date and to the present time.

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. Contrary to counsel's assertion, CIS will examine the net income 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 evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2002 and 2003 show the following amounts of ordinary income: \$30,190 and \$33,775. These figures fail to establish the ability of the petitioner to pay the proffered wage of \$60,000.

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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

² 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 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 submitted the following information for tax years 2002 and 2003:

	2002	2003
Ordinary Income	\$ 30,190	\$ 33,775
Current Assets	\$ 11,782	\$ 31,083
Current Liabilities	\$ 10,624	\$ 7,120
Net current assets	\$ 1,158	\$ 24,963

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2002, the petitioner shows a net income of \$30,190, and net current assets of \$1,158, and has not, therefore, demonstrated the ability to pay the proffered wage of \$60,000 out of its net income or net current assets. In 2003, the petitioner shows a net income of \$33,775, and net current assets of \$24,963, and has not, therefore, demonstrated the ability to pay the proffered wage of \$60,000 out of its net income or net current assets. Thus, the petitioner has not demonstrated its ability to pay the proffered wage as of the priority date and onward.

On appeal, counsel raises the issue of the petitioner's sole shareholder who owns 100 per cent of the petitioner and is its principal employee. Counsel notes the compensation of the petitioner's sole shareholder/officer and notes that all net income is also distributed to the petitioner's owner as an individual. Counsel then states that the combination of the petitioner's owner's compensation and the petitioner's net income should have been considered in determining the petitioner's ability to pay the proffered wage. Counsel states that the combined compensation and net income of \$145,699 is greatly in excess of the proffered wage.

Counsel has brought up the issue of owner's compensation as a source of additional funds with which to pay the proffered wage. With regard to the compensation of officers, 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.

To determine whether or not an entity's officer compensation would have been available to the proffered wage, CIS examines many issues, including the flexibility that the shareholders have in setting their own compensation; the profitability of the corporation; whether the officers compensation is discretionary as opposed to wages which are not discretionary; and/or whether the officer compensation is substantially more

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.

than the amount of the proffered wage. In addition, the CIS would examine whether the amount of officer compensation varies over the course of the pertinent years, and whether the officer receiving the compensation is the sole owner/stockholder or majority owner/stockholder.

In addition, the totality of the circumstances (i.e., other information in the record) should support the fact that the petitioner is a viable, profitable enterprise. Such information would include issues examined in *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. In *Matter of Sonogawa*, the courts looked at such issues as the petitioner's longevity, number of employees, and reputation, in examining the totality of the petitioner's circumstances.

The documentation in the record indicates that Mr. _____ the petitioner's owner and principal employee, holds 100 percent of the company's stock. As counsel noted, the tax returns also identify officer compensation. In looking at the officer compensation in relation to the proffered wage, the proffered wage of \$60,000 is more than 50 per cent of the officer compensation for 2002, namely \$118,023 in 2002 and \$111,924 in 2003.³ Nevertheless, the record indicates that the petitioner has been in business since July of 1982, and both tax returns submitted to the record as well as the W-2 forms of other employees, and the Form 941, document that the petitioner employs and pays a five person staff, in addition to the above-described officer compensation. Furthermore, the petitioner's tax returns document profitable years for the petitioner as of the priority date in 2002 and continuing through 2003. The only negative factor in the proceedings with regard to the utilization of the officer compensation to pay the proffered wage is that the sole shareholder/officer has not submitted any documentation that states he would be willing to reduce his compensation to pay the proffered wage.

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, counsel is not suggesting that CIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owner has in setting his salary and using it to pay the proffered wage based on the profitability of the company. In both years the petitioner's salary and wages paid out have remained constant and the compensation of the sole officer has remained high. Furthermore the petitioner's gross profits have remained steady. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owner confirms that the job offer is realistic and that the proffered salary of \$60,000 can be paid by the petitioner.

³ It is noted that since the petitioner's tax returns indicate net income of \$30,190 in 2002 and \$33,775 in 2003, the officer compensation to be provided to pay the proffered wage would be less than \$30,000, or less than a third of the sole officer's compensation in each year.

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 established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present. Upon examination of the issues identified above, and after examining the totality of the petitioner's circumstances, the AAO finds the use of the petitioner's officer compensation to pay part of the proffered wage, beyond the portion already supported by the petitioner's net income in 2002 and 2003, to be reasonable.

The petitioner has therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has 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 met that burden.

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