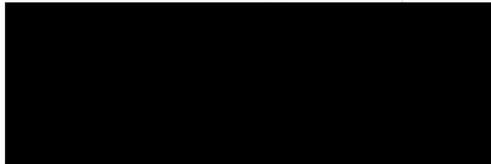




U.S. Citizenship  
and Immigration  
Services

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



RG

FILE: [REDACTED]  
SRC 05 116 50804

Office: TEXAS SERVICE CENTER Date:

APR 06 2007

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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

**PUBLIC COPY**

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

The petitioner is an office maintenance company. It seeks to employ the beneficiary permanently in the United States as a custodial worker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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, the petitioner submits additional evidence and asserts that it has demonstrated its ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 13, 2001.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$7.35 per hour, which amounts to \$15,288 annually. The ETA 750B, signed by the alien beneficiary on April 9, 2001, does not indicate that the alien has worked for the petitioner.

On Part 5 of the visa petition, filed March 17, 2005, it is claimed that the petitioner was established in 1991, has a gross annual income of \$139,252 and currently employs five workers.

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<sup>1</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

As evidence of its continuing financial ability to pay the certified wage of \$15,288 per year, and in response to the director's request for additional evidence, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, 2003 and 2004. The returns indicate that the petitioner uses a standard calendar year to file its taxes. They also contain the following information:

	2001	2002	2003	2004
Ordinary Income <sup>2</sup>	\$3,261	\$ 549	-\$9,660	\$5,980
Current Assets (Sched. L)	\$3,881	\$3,526	\$3,846	\$9,693
Current Liabilities (Sched. L)	\$ 913	\$ -0-	\$ -0-	\$ -0-
Net Current Assets	\$2,968	\$3,526	\$3,846	\$9,693

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The returns also showed that no salaries and wages or officer's compensation was reported on the 2001-2004 returns, except for 2003 when \$12,050 was shown for officer's compensation and 2004, when \$58,838 is shown as officer's compensation. The returns also indicate that the corporate petitioner reported one shareholder until 2004, which shows when two shareholders with each holding 50%. Copies of Form 1099, Miscellaneous Income, were also provided for the petitioner's workers who were paid as outside contractors. They do not indicate that the petitioner employed the beneficiary. The petitioner's president, who is one of the two shareholders, is shown to have been paid \$16,879 in 2001; \$9,630 in 2002; \$12,050 in 2003; and \$9,000 in 2004. A letter signed by the petitioner's president, which accompanied the petitioner's response to the director's request for evidence, claims that the petitioner sub-contracts the work because of the difficulty finding workers. The president stated that if workers could not be found, then the corporate officers also perform cleaning services. The president also stated that she would prefer to do administrative work.

The director denied the petition on July 28, 2005, concluding that the petitioner had failed to establish its continuing ability to pay the proffered wage based on the information contained in the documents submitted.

<sup>2</sup> For the purpose of this review, ordinary income will be treated as net income.

<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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, the petitioner's president submits documents showing her individually held assets, including an August 2004 bank statement; a June 2001 quarterly annuity statement from [REDACTED]; an April 2001 shareholder statement from PFS Shareholder Services; a March 2004 mutual fund statement from Transamerica; a September 2002 quarterly statement from [REDACTED]; a June 2003 annuity statement from [REDACTED]; and a December 2002 annuity statement from [REDACTED]. The petitioner also provided a copy of a five-year contract between the petitioner and the Florida Department of Environmental Protection for the provision of janitorial and cleaning services at the Bahia Honda State Park to commence August 1, 2005 with the maximum compensation of the first year of the contract to be \$24,160.

The petitioner's president states on appeal that she is working on this contract because it is difficult to find workers. She further asserts that she assumed that the beneficiary would be available to perform these services when she contracted with the state of Florida and that it is physically impossible for her to do the work.

In this case it is noted that the petitioner is a corporation. The petitioner cites no legal authority in support of its position that the value of a shareholder's individually held assets may be considered when evaluating a corporate petitioner's ability to pay the proffered wage. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court 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."

The petitioner's president appears to be asserting that the beneficiary as her replacement would assume her portion of the officer's compensation. It is observed that officer compensation of \$12,050, and \$9,000 was expensed as officer's compensation in 2003 and 2004, respectively. In 2001 and 2002 no officer's compensation is shown as having been paid, but the petitioner's president was paid \$16,879 in 2001 and \$9,630 in 2002, as reported on her Form 1099(s). It is noted that officer's compensation is paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. Further, the proffered wage of \$15,288 exceeds the petitioner's president's compensation in every year but 2001. In that year it represents 90 percent of the petitioner's president's compensation. Aside from selected financial statements from various institutions indicating her individual holdings on a given date, there is also no first-hand evidence from this officer that any portion of her compensation could have been foregone during any of the periods discussed. 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)). We further note that the contract with the state of Florida was not executed until 2005. As set forth above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish its continuing financial ability to pay the proffered wage beginning at the priority date. The priority date in this case was April 13, 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record contains no evidence that the petitioner has 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 (or net current assets) as 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). 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.

Similarly, the fact that a petitioner may have paid other wages to other employees in a given year is not indicative of its ability to pay the proffered salary to a beneficiary. As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage

offer, CIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources.

In this matter, in 2001, neither the petitioner's net income of \$3,261, nor its net current assets of \$2,968 were sufficient to pay the certified wage of \$15,288 and demonstrate the petitioner's ability to pay in that year. Similarly, in 2002, neither the petitioner's net income of \$549, nor its net current assets of \$3,526 were enough to cover the proposed wage offer. In 2003, neither the petitioner's net income of -\$9,660, nor its net current assets of \$3,846 could cover the proffered salary. Finally, in 2004, neither the petitioner's \$5,980 in net income, nor the net current assets of \$9,693 was sufficient to meet the certified salary of \$15,288. Based on a review of the evidence contained in the record and submitted on appeal, the petitioner has not demonstrated its continuing ability to pay the proffered wage in any of the relevant years.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.