

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B1



File: [Redacted]
EAC-04-233-51309

Office: VERMONT SERVICE CENTER

Date: JAN 04 2007

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 a technology consulting company that seeks to employ the beneficiary permanently in the United States as a software engineer (“Senior Systems Engineer/Senior Consultant”). 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 May 9, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate that it can pay the beneficiary the proffered wage.

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.¹

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 professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

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 (“DOL”). *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

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

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on May 13, 2002. The proffered wage as stated on Form ETA 750 is \$95,222 per year, 40 hours per week.² The labor certification was approved on April 28, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on July 28, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: December 31, 1993; gross annual income: \$400,000.00; net annual income: not listed; current number of employees: 3.

On November 2, 2004, the director issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay for the years 2002 and 2003, including federal tax returns or audited financial statements, along with copies of the beneficiary's Forms W-2 for the years 2002 and 2003. Counsel responded, but the director determined that the response was insufficient, and denied the petition on May 9, 2005. Counsel 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. Regarding the petitioner's ability to pay, first, Citizenship & Immigration Services (CIS) will 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. On Form ETA 750B, signed by the beneficiary on April 5, 2002, the beneficiary listed that he has been employed with the petitioner from September 2001 to the present. The petitioner submitted the following W-2 Forms for the beneficiary:

| <u>Year</u> | <u>W-2 Income</u> |
|-------------|--------------------------|
| 2003 | \$31,600.00 |
| 2002 | \$42,000.00 ³ |

The petitioner also submitted eleven pay stubs for dates between May 1, 2004 and November 13, 2004 exhibiting income paid to the beneficiary in the amount of \$15,400. Based on the foregoing, the petitioner cannot establish its ability to pay the beneficiary based on prior wage payment alone. The petitioner must demonstrate that it can pay the difference between the wages paid to the beneficiary and the proffered wage.

² The petitioner initially listed an annual wage of \$60,000 per year on the ETA 750, but based on the level of experience the position required, the DOL required that the wage be raised to \$95,222 prior to certification.

³ The petitioner additionally provides that it paid the beneficiary other income. The beneficiary's 2002 Form 1040 individual tax return exhibits other income from ██████████ the petitioner's president, in the amount of \$16,073. Since the income was paid by the petitioner's president in his individual capacity, and not from the petitioner directly, the amount cannot be used to demonstrate the petitioner's ability to pay. In the case of a corporation, CIS may not "pierce the corporate veil" and look to the assets of the owner to satisfy the petitioner'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.

Next, we will examine the net income figure reflected on the petitioner’s federal income tax returns. 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 petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of 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. Line 28 of the tax returns demonstrates the following concerning the petitioner’s ability to pay the proffered wage of \$95,222 per year:

| <u>Tax year</u> | <u>Net income or (loss)</u> |
|-----------------|-----------------------------|
| 2003 | \$88 |
| 2002 | -\$544 |

Based on the above, the petitioner’s net income would not allow for payment of the beneficiary’s proffered wage, even if the wages paid to the beneficiary were added to the petitioner’s net income.

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.⁴ 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, and, thus, would evidence the petitioner’s ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

| <u>Tax year</u> | <u>Net current assets</u> |
|-----------------|---------------------------|
| 2003 | \$0 |
| 2002 | \$999 |

The petitioner also lacked sufficient net current assets to pay the beneficiary the proffered wage.

On appeal, the petitioner provides that he is the sole shareholder and his policy has been to “pay the income of the business out in the form of management fees.” Further, the petitioner’s president provides “with my sole discretion I authorized payment of management fees of \$53,659 in 2002 and \$86,500 in 2003, which could have been used for other purposes like paying Mr. [REDACTED]. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The

⁴According to *Barron’s Dictionary of Accounting Terms* 117 (3rd 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.

petitioner cannot “look back” and assert that assets already used for other purposes might have been available to pay the proffered wage. Additionally, we note that the petitioner has failed to indicate that he would cut management fees in the future to pay the proffered wage.

The petitioner’s president asserts that he has personal assets and home equity that could be used to support the business if required, theoretically including the proffered wage. The petitioner here is structured as a C corporation, and therefore, personal assets would not be considered. In the case of a corporation, CIS may not “pierce the corporate veil” and look to the assets of the owner to satisfy the petitioner’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. Therefore, while the petitioner’s president may have substantial individual assets, those assets are not relevant in the case at hand. Assets of the shareholders (or of other enterprises or corporations) cannot be considered in determining the petitioner’s ability to pay the proffered wage.

The petitioner asserts that they paid the beneficiary other benefits, including health insurance, and partial payment of dental benefits, which amounts to over \$10,000 per year. The petitioner is obligated to pay the proffered wage designated, \$95,222; the wage cannot be reduced by benefits paid.

The petitioner argues that as a small business that sells consulting services, net income is not the best indicator of ability to pay, but rather an individual consultant’s sales figures. Further, in a four year time period, the petitioner billed the beneficiary’s work out at \$513,148 and paid the beneficiary \$297,592 in wages and benefits. First, the documentation that the petitioner submitted demonstrates that the petitioner has paid the beneficiary \$89,000 in wages. As noted above, payments that the president made individually to the beneficiary in the form of a 1099, that the petitioner did not issue, are not counted as wages paid to meet the proffered wage. Second, 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, or, in the case at hand sales figures.

The petitioner further asserts that the business lost one of its senior consultants, which would allow the petitioner to pay the beneficiary more. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position.

Further, the petitioner contends that the business will suffer greatly with the loss of the beneficiary. The beneficiary also provided an individual statement that he is happy working for the petitioner and would like to remain employed with the petitioner. Without discounting the beneficiary’s value to the business, or his desire to remain employed by the petitioner, the petitioner has not demonstrated that it can pay the beneficiary the proffered wage in order to meet petition requirements for approval.

Additionally, the petitioner provides that they did not know that the company would have to pay the beneficiary \$95,222 until the DOL notified them of the need to pay the higher wage. The petitioner relied on

the \$62,000 prevailing wage that it paid the beneficiary for the H-1B position.⁵ The petitioner listed on the Form ETA 750 that the position required a Bachelor's degree and five years of experience. The DOL would have assessed and assigned the wage level based on the experience that the position required. While the petitioner might have been surprised by the higher assessment, the petitioner's lack of prior knowledge does not negate the need to show the ability to pay the proffered wage once the DOL has assessed the wage and certified the ETA 750.

Finally, the petitioner provides that "pending the approval of this work certificate we are planning to provide Mr. [REDACTED] with the opportunity for compensation and benefits in excess of the prevailing wage requirements." A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Future payments to the beneficiary, which might exceed the proffered wage cannot be used to demonstrate that the petitioner can pay the proffered wage.

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.

⁵ We note that the beneficiary's documented W-2 wages are substantially below the required prevailing wage in the H-1B context.