

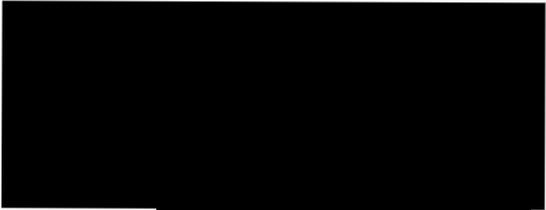
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**U.S. Citizenship  
and Immigration  
Services**

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File: [Redacted]  
SRC-06-039-50868

Office: TEXAS SERVICE CENTER Date: JUN 14 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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (“director”), denied the immigrant visa petition. The petitioner appealed, and the appeal is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is an oil company and seeks to employ the beneficiary permanently in the United States as an electrical engineer (“Design Engineer”). 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 February 16, 2006 decision, the case was denied based on the petitioner’s failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional or skilled worker. 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 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)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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

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

*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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on February 19, 2003. The proffered wage as stated on Form ETA 750 is \$26.06 per hour,<sup>2</sup> based on a 40 hour work week, which is equivalent to \$54,204.80 per year. The labor certification was approved on August 10, 2005, and the petitioner filed the I-140 on the beneficiary's behalf on November 18, 2005. The petitioner listed the following information on the I-140 Petition: date established: January 2, 1987; gross annual income: \$3 million;<sup>3</sup> net annual income: estimated at \$2,168,305; and current number of employees: fifteen.

On December 19, 2005, the director issued a Request for Evidence ("RFE") requesting that the petitioner submit further evidence related to the petitioner's ability to pay in the forms of federal tax returns, audited financial statements, or annual reports, as well as the petitioner's 2003, 2004 federal tax returns, and its 2005 quarterly tax returns. The RFE additionally requested that the petitioner provide a statement outlining the beneficiary's job duties. Further, the RFE requested that the petitioner provide evidence that the beneficiary met the education and experience requirements as listed on the ETA 750.<sup>4</sup> The petitioner responded. On February 16, 2006, the director denied the case finding that the petitioner did not establish its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 24, 2003, the beneficiary listed that she has been employed with the petitioner from May 2002 to the present (January 24, 2003, the date of signature). On appeal, the petitioner submitted the following W-2 statements for the beneficiary:

<u>Year</u>	<u>Wages Paid</u>
2003	\$39,000
2002	\$22,750 <sup>5</sup>

<sup>2</sup> The petitioner initially listed a wage of \$18.00 per hour, but DOL required that the wage be increased to \$26.06 prior to certification.

<sup>3</sup> It is unclear where the petitioner's estimate of gross annual income was taken from. The petitioner's 2004 tax return listed that the petitioner had total gross receipts of \$160,835, and total assets of \$219,628.

<sup>4</sup> The position on Form ETA 750 required a Bachelor's degree in Electrical or Mechanical Electronics Engineering, and that the individual demonstrate 2 years of experience in the position offered, as a design engineer, or 2 years in a related occupation as an electrical or electronic or mechanical engineer. The petitioner provided documentation to evidence that the beneficiary had the required degree, and close to three years of work experience in the related occupation.

<sup>5</sup> As the labor certification was filed on February 19, 2003, wages paid in 2002 would not be used to demonstrate the petitioner's ability to pay from the year 2003 onward. The wages paid for this year will be

The W-2 statement for 2003 exhibits partial payment of the proffered wage to the beneficiary, but alone is insufficient to demonstrate that the petitioner can pay the proffered wage. The petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage in 2003, and demonstrate that it can pay the full proffered wage in 2004 and onward.

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, Citizenship & Immigration Services ("CIS") will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner lists only income from its business so that we will take the income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	-\$30,838
2003	-\$4

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in either year, even if the wages paid to the beneficiary in 2003 were added to the petitioner's available 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.<sup>6</sup> Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6.

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considered generally.

<sup>6</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

In the case at hand, however, we are unable to calculate the petitioner's net current assets. Pursuant to IRS instructions for Form 1120S, a corporation with total receipts (line 1a plus all other income, lines 4 and 5, income reported on Schedule K, lines 3a, 4, 5a, and 6, income or net gain on Schedule K, lines 7, 8a, 9 and 10, and/or income reported on Form 8825, lines 2, 19, and 20a) and total assets at the end of the tax year or less than \$250,000 are not required to complete Schedules L, M-1, and M-2, if the "yes" box is checked on Schedule B, question 9. See <http://www.irs.gov/instructions/i1120s/ch01.html>, accessed as of May 30, 2007. In the case at hand, the petitioner lists that it had total assets and total receipts of under \$250,000 in both tax years, and checked "yes" on Schedule B, question 9. As the petitioner has not completed Schedule L, and we cannot determine the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage through its net current assets.

The petitioner additionally provided Quarterly Federal Tax Returns, Forms 941 for all four quarters in 2005. The Forms 941 reflect that the petitioner paid four employees in the first quarter, and three employees in each quarter thereafter. Wages paid for the year for all employees were approximately \$125,000. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The Quarterly Forms 941 do not demonstrate that the beneficiary was one of the employees paid, and therefore do not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, the petitioner provides that the beneficiary has previously worked for the petitioner from May 2002 to January 2004 and has provided W-2 Forms. We have addressed the beneficiary's W-2 Forms above, which alone are insufficient to demonstrate the petitioner's ability to pay the proffered wage.

The petitioner additionally provides a statement of "net business income," which it asserts reflects "additional information on [the petitioner's] 2003 and 2004 tax returns, reflecting there are/were funds available to hire [the beneficiary]."

First, we note that the statement provided is unaudited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The petitioner has not provided any accountant's report to show that the statement was produced pursuant to an audit, rather than a compilation. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Second, the statement provided lists the net income of the petitioner, combined with the net income of the petitioner's shareholder, [REDACTED]<sup>7</sup> and his "Schedule C" business income in connection with a sole

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<sup>7</sup> We note that the beneficiary's spouse has the same surname as the petitioner's sole shareholder, so that it appears the beneficiary may be related to the owner. We note that under 20 C.F.R. §§ 626.20(c)(8) and 656.3,

proprietorship. Only the petitioner's net income would be relevant to show the petitioner's ability to pay the proffered wage. The petitioner is an S Corporation, and not a sole proprietorship.<sup>8</sup> A corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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 Schedule C business income listed on the shareholder's individual Form 1040 federal tax return would not be relevant to demonstrate the petitioner's ability to pay the proffered wage.

Additionally, the net business income statement determines that the petitioner can demonstrate its ability to pay the proffered wage based on "adjustments for owner compensation," and adds in the total compensation of officers from Form 1120S, page 1, line 7 as income available to pay the proffered wage.

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 1120 U.S. Corporation Income Tax Return. For this reason, officer compensation may be considered as additional financial resources for the petitioner, in addition to the petitioner's net income. However, the petitioner's sole shareholder in the present matter has not provided a signed, notarized statement that he is willing or able to allocate his compensation, past, present, or future to pay the beneficiary's proffered wage.

The petitioner additionally contends that the prices of oil and gas have increased significantly in the past year, and, therefore, the company's profits and present income has also increased. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner has not demonstrated that it can pay the proffered wage in 2003, or 2004, any increase in oil, gas, or the petitioner's net income in 2005 or thereafter, is not relevant to demonstrating that the petitioner can pay the proffered wage in 2003, the year of the priority date.

Based on the foregoing, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage from the priority date onward, and the petition was properly denied. In visa petition proceedings, the

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the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See also *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992), where the petitioner is owned by the person applying for position, it is not a *bona fide* offer (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). If there is a relationship and the petitioner failed to disclose this to DOL during the labor certification process, then the bona fides of the job offer may be in question.

<sup>8</sup> In contrast, a sole proprietor is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay.

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.