U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

BC

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: **MAR 19 2007**

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IN RE: Petitioner:
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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting corporation. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. 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, the petitioner has not shown that it had sufficient income to pay all the wages of all its pending employment based petitions. The director denied the petition accordingly.

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

As set forth in the director's denial dated August 25, 2005, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and also, in addition, whether or not the petitioner has filed other immigrant petitions for alien worker (Form I-140), as well as other employment based petitions, that are currently pending.[1]

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 granting 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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[1] According to the director the petitioner has filed 13 I-140 petitions since January 1, 2003, and 39 I-129 H-1B petitions since January 1, 2003.

Here, the Form ETA 750 was accepted on May 11, 2001.[2] The proffered wage as stated on the Form ETA 750 is $55,000.00 per year.

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.[3]

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from the petitioner dated April 20, 2004; U.S. Internal Revenue Service Form 1120 tax returns for 2001, 2002, 2003 and 2004; seven pay statements from the petitioner to the beneficiary from February 14, 2005 to May 25, 2005 stating year-to-date earnings of $18,060.00 ($1,500.00 weekly); Form 941 Employer's Quarterly Federal Tax Report statements; a letter dated June 9, 2005 from counsel; W-2 Wage and Tax Statements for the years 2001, 2002, 2003 and 2004 stating wages paid to the beneficiary by the petitioner of $59,673.85, $37,987.46, $5,050.00,[4] and $41,388.00 respectively; approximately 11 business banking checking statements from January 1, 2005 to April 30, 2005; State of California DE-7 reports; State of Kansas KW-3 reports; Quarterly Earnings Reports; State of California DE-6 reports, among other similar State reports; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. In the petition, the petitioner claimed to have been established in 1998 and to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 4, 2001, the beneficiary claimed to have worked for the petitioner since September 2000 to date (i.e. April 4, 2001).

On appeal, counsel asserts that the presented financial data demonstrates that the petitioner has evidenced "steady growth," and, that the tax returns submitted in this matter "did not reflect the accounting policies chosen by the petitioner," and therefore, the tax returns were amended from the cash to accrual basis. Counsel asserts that under the amended returns for 2003 and 2004, there is sufficient net income and net current assets to support "the three applications pending for I-140 adjudication."

Further, counsel asserts that not all the beneficiaries, for which the petitioner's has pending petitions, " ... [they] did not even make it to the US [sic] .... " Counsel states that it has cancelled seven of the beneficiary nonimmigrant worker candidates.

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[2] It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

[3] The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

[4] According to a letter from the beneficiary, notarized on June 3, 2005, the beneficiary took compassionate leave due to a family illness that affected his earnings in 2003.

As a preface to the following discussion, the petitioner's tax returns were prepared pursuant to the cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. The amended returns were prepared on an accrual basis.

Accompanying the appeal, counsel submits an explanatory statement dated September 20, 2005, and additional evidence that includes copies of the following documents: the director's decision; the petitioner's U.S. Internal Revenue Service Form 1120X amended tax returns for 2003 and 2004; the U.S. Internal Revenue Service Form 1120 tax returns for 2001 and 2002; seven letters stating that approved beneficiaries of I-129 non-immigrant workers have left the petitioner's employ; an "unaudited" compiled financial statement dated September 18, 2005; a "Limited Guaranty –Letter of Credit" dated September 16, 2005, that states that the owner of the petitioner personally guarantees the petitioner's bank debt; the petitioner's Quarterly Earnings Reports, 1st quarter of 2005, stating that the beneficiary received year-to-date earnings of $9,660.00; various State and federal wage reports that are confirmatory of the W-2 statements submitted for the beneficiary; and, approximately 167 Bank of America business advantage checking statements from March 1, 2001 to August 31, 2005.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 CFR § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage in 2002, 2003 or 2004. In 2001, it paid wages greater than the proffered wage and established the ability to pay the proffered wage in that year.

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, 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).

Counsel asserts that the income stated in the petitioner's tax returns is evidence of the petitioner's ability to pay the proffered wage. Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120 stated net income[5] of $8,419.00.
- In 2002, the Form 1120 stated a loss of <$21,371.00>.[6]
- In 2003, the Form 1120 stated net income of $8,117.00.
- In 2004, the Form 1120 stated net income of $8,678.00.

The amended tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- For tax year 2003, the Form 1120X (stamped as received by the U.S. Internal Revenue Service on July 29, 2005) stated net income of $8,117.00.
- For tax year 2004, the Form 1120X (stamped as received by the U.S. Internal Revenue Service on July 29, 2005) stated net income of $8,678.00.

In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage or the difference between wages actually paid (2002-$17,012.54; 2003-$4,995.00; and, 2004-$13,612.00) and the proffered wage, for the years 2002, 2003, and 2004 by either its original or amended tax returns.

Further, examining additional factors, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of 2002 through 2004 through an examination of wages paid to the beneficiary, its net income, and, the additional wage expense of beneficiaries now pending for which the petitioner has filed I-140 petitions (stated by counsel as three pending cases totaling $82,126.00 in proffered wages). According to the records of CIS as discussed below, there are many more cases pending than three visa petitions.

If the net income the petitioner demonstrates it had available during the 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.[7] A

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[5] Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

[6] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

[7] According 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 as accounts

corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- According to the petitioner's tax returns initially submitted with the petition, the petitioner's net current assets during 2002, 2003, and 2004 were $30,964.00, $12,931.00, and, $13,127.00 respectively.

Therefore for 2002, 2003 and 2004 the petitioner did not have sufficient net current assets to pay the proffered wage of $55,000.00 per year considering wages paid to the beneficiary and taking into consideration the additional wage expense of beneficiaries now pending for which the petitioner has filed I-140 petitions (stated by counsel as three, totaling $82,126.00 in wages).

The petitioner's amended tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- The petitioner's net current assets during 2003 and 2004 were $338,627.00 and $227,931.00.

Therefore for 2003 and 2004 the petitioner did have sufficient net current assets to pay the proffered wage of $55,000.00 per year considering wages paid to the beneficiary and taking into consideration the additional wage expense of beneficiaries now pending for which counsel states the petitioner has filed I-140 petitions (stated by counsel as three totaling $82,126.00 in wages).

Counsel asserts on appeal that there are other ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date.

Counsel's reliance on the balances in the petitioner's bank account statements submitted is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Further, it has been two years since the petitioner has filed its appeal and its 2005 federal tax return should have been filed and made available as evidence since counsel has submitted financial data such as bank statements and pay records for 2005 but not the petitioner's federal tax return. According to regulation,[8] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel has submitted a "Limited Guaranty –Letter of Credit" dated September 16, 2005, that states that the owner of the petitioner personally guarantees the petitioner's bank debt. The credit line is to the owner of the petitioner, and it is not to the petitioner. Contrary to counsel's assertion, CIS may not "pierce the corporate

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

[8] 8 C.F.R. § 204.5(g)(2).

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 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."

However, notwithstanding anything above stated, the CIS electronic database records show that the petitioner filed I-140 petitions[9] on behalf of 26 other beneficiaries at about the same time as the instant petition was filed. It is necessary for the petitioner to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. While counsel has submitted a statement concerning three of the immigrant petitions, he has not mentioned the remaining petitions. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The record in the instant case does not reflect that the petitioner can pay the proffered wage and all other wages it is obligated to pay to other potential beneficiaries of I-140 petitions filed by the petitioner. The record in the instant petition fails to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary and all other beneficiaries their proffered wages from the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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.

ORDER: The appeal is dismissed.

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[9] According to the records of CIS, the petitioner has filed a total of 457 cases, 27 immigrant petitions and the rest non-immigrant visa requests.