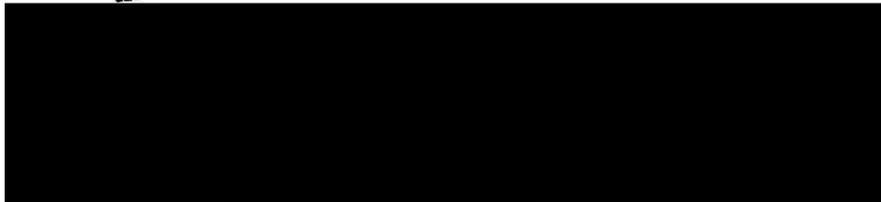




U.S. Citizenship  
and Immigration  
Services

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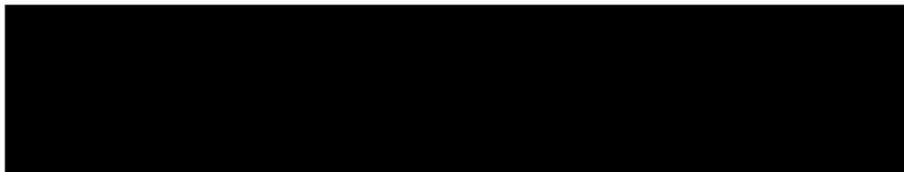
Office: NEBRASKA SERVICE CENTER

Date: **MAY 24 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 Acting Director, Nebraska Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The AAO will remand the decision back to the director for further consideration in accordance with the instructions below.

The petitioner operates a gas station and convenience store, and seeks to employ the beneficiary permanently in the United States as a manager, gas station (“Manager –Night Shift”). 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 November 8, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification 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 an immigrant visa and classify the beneficiary as a skilled worker. 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.

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:

*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

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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).

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 April 27, 2001. The proffered wage as stated on Form ETA 750 is \$11.00 per hour for an annual salary of \$22,880.00 per year. The labor certification was approved on February 2, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on May 23, 2005. The petitioner represented the following information on the I-140 Petition related to the petitioning entity: established: **November 22, 1999**; **gross annual income: \$253,401**; **net annual income: \$26,900**; and current number of employees: 3.

On June 16, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to submit additional documentation to demonstrate that it could pay the proffered wage. The petitioner responded. On November 8, 2005, the director determined that the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and denied the petition. The petitioner appealed and the matter is now before the AAO.<sup>2</sup>

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, 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 24, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner did not claim that it previously employed the beneficiary, and has not submitted any W-2 Forms to show that he was employed. Therefore, the petitioner cannot establish its ability to pay based on prior wage payment to 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 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.

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<sup>2</sup> The director notes in his decision that the petitioner's response to the RFE was late, however, the late response was accepted in an exercise of discretion as the RFE improperly indicated that petitioner's net current assets were zero, and not as set forth in the discussion below.

The petitioner's tax returns reflect that it is structured as a subchapter C corporation. For a subchapter 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. The tax returns submitted state amounts for taxable income on line 28 as shown below:

| <u>Tax year</u> <sup>3</sup> | <u>Net income or (loss)</u> |
|------------------------------|-----------------------------|
| 2003                         | \$260                       |
| 2002                         | \$1,544                     |
| 2001                         | \$1,988                     |
| 2000                         | -\$3,873                    |

From the above net income, the petitioner did not have sufficient net income in any year to demonstrate its ability to pay the beneficiary the proffered wage.

Next, we will examine the petitioner's continuing ability to pay the required wage under a second test based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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.

The net current assets were as follows:

| <u>Year</u> | <u>Net Current Assets</u> |
|-------------|---------------------------|
| 2003        | \$11,528                  |
| 2002        | \$21,998                  |
| 2001        | \$27,707                  |
| 2000        | \$27,240                  |

Based on the foregoing, the petitioner would be able to pay the beneficiary's wage of \$22,880.00 from the net current assets in the tax years of 2000, and 2001, representing the time periods of October 1, 2000 to September 30, 2001, and October 1, 2001 to September 30, 2002. The petitioner's net current assets in tax year 2002 would be \$882 less than the proffered wage for the time period October 1, 2002 to September 30, 2003, and would be \$11,352 less than the proffered wage for the tax year 2003, covering October 1, 2003 to

<sup>3</sup> The petitioner files its tax returns based on a tax year rather than a calendar year. The petitioner's tax year represents the time period from October 1 to September 30, so that, for example, the petitioner's 2003 tax return would represent filing for the time period of October 1, 2003 to September 30, 2004. The petitioner did not submit its 2004 federal tax return, which would have represented the time period of October 1, 2004 to September 30, 2005, and, therefore, would not have been available at the time of filing, or at the time that the petitioner responded to the RFE. It is unclear whether the petitioner's 2004 federal tax return was available at the time that the petitioner filed its appeal.

<sup>4</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.

September 30, 2004. Accordingly, the petitioner cannot demonstrate its ability to pay the proffered wage in tax years 2002 and 2003.

On appeal, counsel provides that the director's decision was in error, and the petitioner can pay the proffered wage. In support of the appeal, counsel provides a statement signed by the petitioner's president that he is willing to forego part of his compensation to pay the proffered wage.<sup>5</sup>

I . . . president of [the petitioner] as stated in our response to a previous request for evidence, dated June 16, 2005, do again personally attest that it has been and continues to be my intention as officer of the company, to forego if necessary my compensation as an officer of [the petitioner] to pay the offered wages in our I-140 petition. This attestation is to be in effect from the date of the company's initial Labor Certification filing to the present.

CIS 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, as 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.

However, in the present case, while CIS would not consider the petitioner's owner's personal assets, CIS does acknowledge the financial flexibility that the employee-owners have in setting their salaries. 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.

The documentation presented here indicates that [redacted], the company's president holds 100% percent of the company's stock, and devotes 16% of his time to the business. According to the petitioner's IRS Forms 1120 Schedule E (Compensation of Officers), [redacted] elected to pay himself the following amounts respectively: 2000: \$15,000; 2001: \$17,000; 2002: \$10,000; and 2003: \$18,000. If the president's wages were combined with the petitioner's net current assets, the petitioner would be able to demonstrate its ability to pay in 2002, and 2003. However, since the petitioner would rely on wages paid to the president, Forms W-2 would be required to evidence past wages paid. Here, Forms W-2 were not submitted to evidence wages paid. As the petitioner can demonstrate that it is able to pay the proffered wage in other years, the petitioner

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<sup>5</sup> In response to the RFE, counsel stated that "it is the intention [of the petitioner] to pay the beneficiary from funds which were paid previously to the owner . . . as his compensation . . . [the owner] will continue drawing compensation from his other businesses which he manages. Counsel, did not however, provide a statement from the petitioner's officer to verify the foregoing. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

should be provided an opportunity to provide W-2 documentation of the sole shareholder's wages. Further, the petitioner's shareholder should demonstrate that he is able to forego officer compensation. In support of this assertion, he should provide individual federal tax returns, Forms 1040, as well as his individual estimated living expenses with supporting documentation to verify his expenses.

Further, although not raised in the director's denial, we do, however, question the validity of the job description. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" position for Manager – Night Shift, working 12:00 a.m. to 8:00 a.m., provides:

Supervise and coordinate sales, cashier and stock personnel. Perform budgeting, accounting, sales and merchandising functions. Prepare daily, weekly, and monthly reports detailing business activity for company review. Perform AAMOCO price surveys and vapor tests on equipment.

Further, the job offered indicated that the individual in the position oversees three individuals. Form I-140 indicates that the petitioner only employs three individuals. It is unlikely that all three individuals work 12:00 a.m. to 8:00 a.m., so that it would appear unlikely that the beneficiary would manage anyone. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). A petitioner must employ the beneficiary in accordance with the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283. The petitioner should be allowed to address the issue of whether it intends to employ the beneficiary in accordance with the job description as well on remand, as this issue was not previously raised.

In accordance with the foregoing, we will remand the petition to the director to issue an RFE related to the above points regarding submission of the sole shareholder's W-2 statements. Further, the RFE should request evidence that the shareholder is able to forego officer compensation documented by his individual federal tax returns, Forms 1040, as well as his individual estimated living expenses with supporting documentation to verify his expenses. Additionally, the RFE should request information related to the issue of employing the beneficiary in conformance with the terms of the certified ETA 750. The petitioner may provide additional

evidence within a reasonable period of time to be determined by the director. Following issuance of the RFE and upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.