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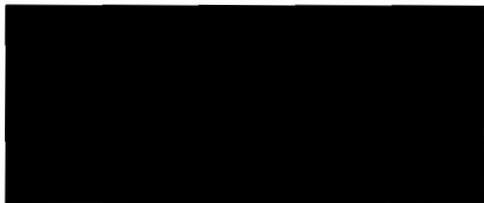
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship and Immigration Services

**PUBLIC COPY**

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FILE: [Redacted]  
SRC 06 274 51954

Office: TEXAS SERVICE CENTER Date: NOV 06 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, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a recruitment and contract staffing firm. It seeks to employ the beneficiary permanently in the United States as a SAS programmer. As required by statute, 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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.

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 either 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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 14, 2003. The proffered wage as stated on the Form ETA 750 is \$40 per hour, which equals \$83,200 per year.

The Form I-140 petition in this matter was submitted on September 20, 2006. On the petition, the petitioner stated that it was established during 1976 and that it employs 75 workers. The petition states that the

petitioner's gross annual income is \$4,494,954 and that its net annual income is \$11,522.<sup>1</sup> On the Form ETA 750, Part B, signed by the beneficiary on February 28, 2003, the beneficiary claimed to have worked for the petitioner since December 2002. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Wilmington, Delaware.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup> In the instant case the record contains (1) the 2003, 2004, and 2005 Form 1120, U.S. Corporation Income Tax Returns of the petitioner, [REDACTED] LTD, (2) the 2003 and 2005 Form 1120, U.S. Corporation Income Tax Returns of [REDACTED] Contract Staffing Group Incorporated, (3) 2003 and 2005 Form W-2 Wage and Tax Statements showing wages that [REDACTED] Contract Staffing Group Incorporated paid to the beneficiary during those years, (4) unaudited spreadsheets showing the petitioner's receivables, segregated according to age, as of March 31, 2004 and March 31, 2006, (5) a letter from the petitioner's accountant dated January 8, 2007, (6) a letter from the petitioner's insurance company dated February 8, 2007, (7) a February 13, 2007 letter from a CPA, (8) a February 20, 2007 letter from an MBA at an investment counseling firm, (9) a letter dated February 22, 2007 from another CPA, (10) a letter dated February 24, 2007 from a professor at the University of Montevallo, [REDACTED]'s College of Business, and (11) an undated letter from a certified financial planner. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on April 15, 1976, and that it reports taxes pursuant to cash basis accounting and a fiscal year that runs from April 1 of the nominal year to March 31 of the following year.

During its 2003 fiscal year, which ran from April 1, 2003 to March 31, 2004, the petitioner declared taxable income before net operating loss deduction and special deductions of \$38,862. At the end of that fiscal year, the petitioner had current assets of \$56,293 and current liabilities of \$17,490, which yields net current assets of \$38,803.

During its 2004 fiscal year, which ran from April 1, 2004 to March 31, 2005, the petitioner declared a loss of \$8,809 as its taxable income before net operating loss deduction and special deductions. At the end of that fiscal year, the petitioner had current assets of \$139,204 and current liabilities of \$7,879, which yields net current assets of \$131,325.

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<sup>1</sup> The petitioner's tax returns do not confirm those amounts.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

During its 2005 fiscal year, which ran from April 1, 2005 to March 31, 2006, the petitioner declared taxable income before net operating loss deduction and special deductions of \$20,331. At the end of that fiscal year, the petitioner had current assets of \$49,509 and current liabilities of \$6,495, which yields net current assets of \$43,014.

The 2003 and 2005 W-2 forms show that [REDACTED] Contract Staffing Group Incorporated paid the beneficiary wages of \$83,056.16 and \$67,695 during those years, respectively.

In his January 8, 2007 letter the petitioner's accountant observed that the cash surrender value of the life insurance policies the petitioner carries on its officers might be obtained within a few weeks of the surrender of those policies. The accountant also stated that the cash value of those policies was not listed on the petitioner's tax returns as a current asset because the petitioner did not expect to realize that amount within the coming year.

The accountant also stated that the spreadsheets of the petitioner's aged receivables were prepared pursuant to accrual convention, rather than cash convention, as the its tax returns were. The accountant noted that, in this instance, this resulted in higher computed net current assets. Further, the accountant noted that the petitioner could have reduced the compensation it paid to its officers during the salient years.

As to the W-2 forms submitted, the accountant stated that the petitioner "had undergone a restructuring and formed a related Company, [REDACTED] Contract Staffing Group, Inc., and the beneficiary was on the payroll of [REDACTED] Contract Staffing, Inc. in the years 2003 and 2005." Counsel noted that the two companies are under common ownership and stated that the funds of [REDACTED] Contract Staffing, Inc. were, therefore, available to the petitioner.

The February 8, 2007 letter from the petitioner's insurance company confirms that had the petitioner surrendered its insurance policies the insurance company would have tendered the cash value of those policies within a few weeks.

The February 13, 2007 accountant's letter indicates that the cash surrender value of its life insurance policies, among other assets, is correctly excluded from a company's current assets unless the company contemplates surrendering the policy within its normal operating cycle.<sup>3</sup>

The MBA's February 20, 2007 letter indicates that, based on the insurance company's letter the surrender value of the insurance policies under discussion is an asset of the petitioner, that the petitioner could obtain that surrender value if it chose to surrender the policies, and that whether the surrender value is a current asset or a non-current asset depends upon whether the policy owner intends to surrender the policy or policies within the fiscal year.

The second CPA's February 22, 2007 letter confirms that the surrender value of an insurance policy is available to the policy owner in exchange for surrendering the policy, and that the surrender value would be a current asset if the petitioner intended to do so within a given operating cycle.

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<sup>3</sup> A company's operating cycle is typically either a calendar year or a fiscal year.

The February 24, 2007 letter from the professor indicates that she is a Chartered Life Underwriter and holds a PhD specializing in Risk Management and Insurance. In that letter the professor confirmed that the surrender value of the life insurance policies in question were available to the petitioner in the event it chose to surrender the policies.

The certified financial planner's undated letter states that the surrender values of insurance policies "are treated as current assets of the Owner of the policy," but does not state in what context they are so treated.

The director denied the petition on February 1, 2007.

On appeal, counsel asserted that, consistent with the accountant's opinion explained in his January 8, 2007, that the cash surrender value of the insurance policies the petitioner carries should be included in its net current assets, and the petitioner therefore had the ability to pay the proffered wage during the salient years.

An asset is a current asset if it will be converted into cash in the normal operation of business at an early date, usually within one year. Black's Law Dictionary Fifth Edition 1979 P. 345. The various letters provided demonstrate clearly that the surrender values of the petitioner's life insurance policies on its officers are its own asset.<sup>4</sup>

The accountant argues that the surrender value of life insurance policies held by the petitioner represents a current asset, notwithstanding that it does not conform to the accepted definition, as the petitioner does not anticipate realizing it in cash during the near term. The accountant's opinion is apparently based on the fact that the petitioner could, in fact, if it wished, liquidate this asset and use the cash. The undated letter from the certified financial planner indicates that the surrender value is treated as a current asset in some unspecified context.

The remainder of the evidence stipulates that the surrender value of the insurance policies in question is not a current asset unless the petitioner anticipated surrendering them during the fiscal year or other business cycle under discussion, which the petitioner has indicated that it did not. Based on this office's understanding of the term "current asset," this office finds that stipulation to be well founded. This office finds that the surrender value of the insurance policies was not a current asset.

The policy of this office is to consider current assets, but not other assets, in the determination of a petitioner's continuing ability to pay the proffered wage beginning on the priority date. The rationale for considering them and the manner in which they are considered is explained in detail below. This office will consider the petitioner's assets as shown on its tax returns,<sup>5</sup> and will not consider a reshuffling of assets in

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<sup>4</sup> In addition to misstating certain figures from the petitioner's tax returns, the decision of denial incorrectly implied that the surrender value of the insurance policies in question is an asset of some entity other than the petitioner. Because this office reviews the evidence *de novo*, however, the issue is not whether there was error below, but whether the record as currently constituted demonstrates that the instant petition should be approved.

<sup>5</sup> In the alternative, this office will consider the petitioner's current assets as shown on audited financial

order to demonstrate the ability to pay the proffered wage. The petitioner has stated, apparently correctly, on its tax returns that the surrender value of its insurance policies is not a current asset. This office will not include that surrender value in its calculations pertinent to current assets and net current assets.

The argument that the income and assets of another related company under common ownership are available to the petitioner at its discretion is unconvincing. The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), 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 with no legal obligation to pay the wage."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts, the income and assets of the owners, stockholders, and others, and of the other corporations they own, and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds. Similarly, wages paid by a related company are not evidence of the ability of the petitioner itself, The [REDACTED] Group, LTD, to pay wages.

The petitioner's accountant urged that the petitioner's Form 1120, Line 12 Compensation of Officers need not have been paid to its officers, but could have been retained by the petitioner to pay the proffered wage. Counsel provided no evidence, however, to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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). 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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, although the record contains W-2 forms issued by a related company, the petitioner did not establish that it employed and paid the beneficiary.

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statements or annual reports.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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); *Ubada v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>6</sup> shown on lines 16(d) through 18(d). 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$83,200 per year. The priority date is March 14, 2003, which fell within the petitioner's 2002 fiscal year.

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<sup>6</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner did not submit annual reports, federal tax returns, audited financial statements, or any other reliable evidence pertinent to its 2002 fiscal year. The petitioner has not demonstrated its ability to pay the proffered wage during its 2002 fiscal year.

During its 2003 fiscal year, which ran from April 1, 2003 to March 31, 2004, the petitioner declared taxable income before net operating loss deduction and special deductions of \$38,862. That amount is insufficient to pay the proffered wage. At the end of that fiscal year, the petitioner had net current assets of \$38,803. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2003 fiscal year.

During its 2004 fiscal year, which ran from April 1, 2004 to March 31, 2005, the petitioner declared a loss of \$8,809. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that fiscal year, however, the petitioner had net current assets of \$131,325. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2004 fiscal year.

During its 2005 fiscal year, which ran from April 1, 2005 to March 31, 2006, the petitioner declared taxable income before net operating loss deduction and special deductions of \$20,331. That amount is insufficient to pay the proffered wage. At the end of that fiscal year, the petitioner had net current assets of \$43,014. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during that fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2005 fiscal year.

The petition in this matter was submitted on September 20, 2006. On that date the petitioner's 2006 tax return was unavailable. On December 21, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. CIS received counsel's response to that request on January 16, 2007, and the record is deemed to have closed on that date. On that date the petitioner's 2006 fiscal year had not yet ended and its 2006 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2002, 2003, and 2005 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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

**ORDER:** The appeal is dismissed.