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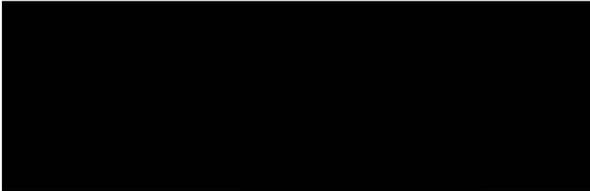
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
EAC 06 115 53894

Office: TEXAS SERVICE CENTER Date: **APR 07 2008**

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 "R. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is ornamental ironworks. It seeks to employ the beneficiary<sup>1</sup> permanently in the United States as an ironworker. 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 (DOL). 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 July 25, 2006, the primary 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. Specifically, the director stated that the W-2 statements submitted the petitioner in response to the director's request for evidence were issued by two different corporations under common ownership. The director noted that the Wage and Tax Statements (W-2) submitted from 2001 and 2002 were issued by Pacific Ornamental Inc. that is not the petitioner and therefore cannot be evidence of the petitioner's ability to pay the proffered wage.<sup>2</sup>

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 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.

<sup>1</sup> Since [REDACTED] signed the ETA Form 750, Part B prepared by the beneficiary, [REDACTED] may be an alias for the beneficiary. If this matter is pursued, this question of identity should be pursued.

<sup>2</sup> The director cited the case precedents of *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).

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).

Here, the Form ETA 750 was accepted on July 23, 2001.<sup>3</sup> The proffered wage as stated on the Form ETA 750 \$33.65 per hour (\$69,992.00 per year).

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>4</sup>

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; a cover letter from the petitioner dated June 22, 2006; W-2 Wage and Tax Statements issued by Pacific Ornamental Inc.<sup>5</sup> to [REDACTED] in 2001 and 2002; W-2 Statements issued by the petitioner to the beneficiary in 2003 in the amount of \$32,250.00, in 2004 in the amount of \$70,191.52 and in 2005 in the amount of \$64,773.06; the petitioner's New York State "Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return" for the first and

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<sup>3</sup> It has been approximately six years since the Application for Alien Employment Certification 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."

<sup>4</sup> 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).

<sup>5</sup> According to the record of proceeding, Pacific Ornamental Inc. is a separate corporate entity established in 2000 with a separate federal employer identification number from the petitioner. Contrary to counsel's assertion, Citizenship and Immigration Services (CIS) 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. 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. *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."

second quarters of 2006, and, the first, second and third quarters of 2005; the petitioner's federal Employer's Annual Federal Unemployment Tax Return (FUTA) Form 940-EZ for 2005 as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on November 1, 2002 and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The gross annual income stated on the petition was \$2,556,773.00. On the Form ETA 750, signed by the beneficiary on March 12, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that new evidence is submitted in the case (which is evidence of its ability to pay the proffered wage).

Accompanying the appeal, the petitioner submits additional relevant evidence<sup>6</sup> that includes the following documents: a cover letter from the petitioner dated August 23, 2006; the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2002, 2003, 2004, and 2005; the petitioner's federal FUTA Forms 940 and 940-EZ for 2002, 2003 and 2004; Pacific Ornamental, Inc.'s federal FUTA Form 940-EZ for 2002, 2003; the petitioner's New York State Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Returns<sup>7</sup> for 2004, 2003 and 2002( 4<sup>th</sup> Qtr.) ; Pacific Ornamental, Inc.'s New York State Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return for 2002; Pacific Ornamental, Inc.'s U.S. Internal Revenue Service Form 1120S tax returns for 2001 and 2002; Pacific Ornamental, Inc.'s federal FUTA Form 940-EZ for 2001; Pacific Ornamental, Inc.'s New York State Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return for 2001 and 2002; and an owner's (of the petitioner) U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002, 2003, 2004 and 2005.

The director requested the petitioner's tax returns in a request for evidence. The petitioner failed to provide them. The petitioner now submits them on appeal. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

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

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<sup>6</sup> Contemporaneously filed state tax returns and tax reporting schedules are not noted.

<sup>7</sup> Forms NYS-45-ATT and NYS-45.

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 (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.

W-2 statements were submitted demonstrating that the petitioner paid the beneficiary wages in 2003, of \$32,250.00; in 2004, wages of \$70,191.52; and in 2005, wages of \$64,773.06. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage in 2001, 2002 or 2003. The petitioner paid the proffered wage in 2004, but not in 2005.

The petitioner must establish that it can pay the beneficiary the *difference* between wages actually paid and the proffered wage for those years in which the beneficiary did not receive at least the proffered wage or by consideration of its net income or net current assets. As will be demonstrated, the petitioner had ample net current assets to pay the beneficiary the proffered wage in 2003, 2004 and 2005. Therefore, the petitioner had demonstrated by wages paid in 2004, its net current assets in 2003, 2004, and its net income in 2005, its ability to pay the proffered wage for those years.

Examining years 2003 and 2005, since the proffered wage is \$69,992.00 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is \$37,742.00 and \$5,219.00 respectively.<sup>8</sup>

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). Reliance on the petitioner's gross sales and profits that 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 petitioner's Form 1120S<sup>9</sup> tax returns demonstrate the following financial information concerning the petitioner's ability to pay (no return was submitted for year 2004):

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<sup>8</sup> No W-2 statements showing wages paid to the beneficiary by the petitioner were submitted by the petitioner for 2001 and 2002.

- In 2002, the Form 1120S stated net income (Schedule K, line 23) of \$20,421.00.
- In 2003, the Form 1120S stated net income (Schedule K, line 23) of \$30,602.00
- In 2005, the Form 1120S stated net income (Schedule K, line 17.e) of \$12,811.00

Since the proffered wage is \$69,992.00 per year, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2002 and 2003. In 2005, the petitioner had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage.

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.<sup>10</sup> A 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.

- The petitioner's net current assets during 2002 were \$20,676.00 and during 2003 were \$128,792.00.

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<sup>9</sup> 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, credits, deductions or other adjustments from sources other than from a trade or business, net income is found on Schedule K. As is found here, if the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, then in that case net income is found on line 23 of Schedule K for tax years 2002 and 2003. For tax year 2005, net income is found on Line 17e of the Schedule K. 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).

<sup>10</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 the proffered wage as of the priority date in 2001 and in 2002 through an examination of wages paid to the beneficiary, or its net income or net current assets. However the petitioner has established its ability to pay the proffered wage in 2003, 2004 and 2005.

Further, the petitioner has failed to present any financial evidence concerning its ability to pay the proffered wage in 2001. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Beyond the decision of the director, this office notes that the petitioner was not incorporated at the time the labor certification application was filed.

On the date that the Application for Alien Employment Certification Form ETA 750 was signed by [REDACTED] on March 12, 2001, and on the date of the application's acceptance by DOL on July 23, 2001, the petitioner had not been incorporated in the State of New York. According to information found in the record of proceeding and on the website of the New York State, Department of State,<sup>11</sup> the petitioner was incorporated on November 1, 2002. If the petitioner further pursues this matter, it must provide evidence of its corporate existence as of the priority date.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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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<sup>11</sup> See <<http://appsext8.dos.state.ny.us>> accessed December 12, 2007.