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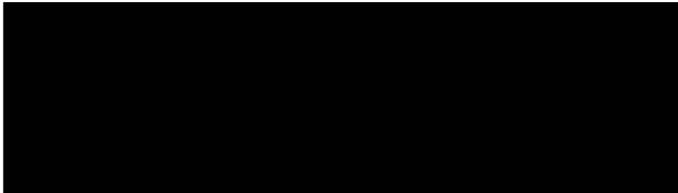
Office: TEXAS SERVICE CENTER Date:

AUG 25 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:



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 employment based 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 petitioner is a medical services firm. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, a 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.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

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:

*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 either be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm.

1971). Here, the ETA 750 was accepted for processing on December 24, 2003. The proffered wage as stated on Part A of the ETA 750 is \$35.00 per hour, which amounts to \$63,700 per year.<sup>1</sup>

On Part B of the ETA 750, signed by the beneficiary on December 20, 2003, the beneficiary claims to have worked for the petitioner since August 2003.

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on February 26, 2007, the petitioner states that it was established in 1999 and employs fifteen workers.

As evidence of its continuing financial ability to pay the proposed wage offer of \$63,700 per annum and in response to the director's request for evidence, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2003, 2004 and 2005. The returns that were submitted indicate that the petitioner files its taxes using a standard calendar year. The returns also contain the following information:

	2003	2004	2005
Net Income <sup>2</sup>	-\$ 120,000	-\$ 95,950	-\$ 30,864
Current Assets	\$ 74,907	-\$ 4,043	-\$ 9,320
Current Liabilities	\$ 413	\$ 425	\$ 564
Net Current Assets	\$ 74,494	-\$ 4,468	-\$ 9,884

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

<sup>1</sup>As stated on the labor certification, this calculation is based on a 35-hour week.

<sup>2</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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1996-2003) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc. In 2003, this petitioner had additional income and/or other adjustments from sources other than a trade or business so its net income is reflected on line 23 on its tax return. Its net income is shown on line 21 of its tax returns for 2004 and 2005.

<sup>3</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.

The petitioner also provided copies of bank statements representing summaries of checking and savings accounts held individually by the petitioner's principal shareholder for 2003, and held in the petitioner's name for 2004 and 2005 through January 31, 2006.

Following a review of the evidence submitted, the director denied the petition on April 9, 2007. The director declined to accept the petitioner's bank statements as probative of its ability to pay the proffered wage of \$63,700 per year and determined that although the petitioner's tax returns reflected that it had demonstrated its financial ability to pay the proffered wage in 2003, it had not established its ability to pay in 2004 or 2005.

On appeal, the petitioner, through counsel asserts that the director erred in not considering the petitioner's bank statements in demonstrating the petitioner's ability to pay the proffered wage. Counsel contends that the fact that they were submitted should be interpreted as a demonstration that the tax returns were an inaccurate reflection of the petitioner's financial profile. Counsel also cites three previous AAO decisions from the 1990s in which bank balances were considered in determining the petitioner's ability to pay the proffered wage, as well as a 1995 liaison meeting between Vermont Service Center and American Immigration Lawyers Association (AILA) in which the ability to pay was said to be established if the petitioner provided a rationale and documentation upon which a reasonable person may be persuaded.

Counsel's contentions are not persuasive. It is noted that while 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions, such as those cited by counsel are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In this matter, although it is noted that the petitioner's bank statements reflected a substantial cash flow, they show only a portion of a petitioner's financial profile and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage such as set forth on an audited financial statement or a corporate tax return. Further, as noted by the director, cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that counsel provided no evidence that demonstrated that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not already have been reflected on the corresponding tax return such as Cash, reflected on line 1 of Schedule L. Any money paid in 2004 would no longer be available in 2005. The bank statements, therefore, cannot show a continuous ability to pay the proffered wage and do not outweigh the evidence reflected on the petitioner's corporate tax returns or should be accepted as probative of the petitioner's ability to pay the proffered wage in lieu of the data set forth on the tax returns as required by 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a

petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, the record indicates that the petitioner paid the beneficiary wages of \$41,538.69 in 2004; \$40,000.22 in 2005 and \$40,000.22 in 2006. This represents \$22,161.311 less than the proffered wage of \$63,700 in 2004 and \$23,699.78 less than the certified salary in 2005 and 2006.

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 (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.)

*Chi-Feng Chang*, 719 F. Supp. at 536. On appeal, counsel submits copies of the majority shareholder's individual tax returns for 2004 and 2005 in support of the petitioner's continuing ability to pay the proposed wage offer. Counsel asserts that the shareholder's personal income in excess of \$200,000 in conjunction with the medical office's organization as a professional corporation filing its tax returns as an S corporation should establish the corporate petitioner's ability to pay the proffered wage because of the principal shareholder's direct and personal

involvement as well as demonstrating that funds reported on the bank statements represent additional available funds not reflected on the tax returns. Counsel also suggests that the principal shareholder's personal financial status is more than sufficient to offset losses by anyone in his business from income derived from other business operations.

It is unclear if counsel is suggesting that the principal shareholder commingled other funds into the corporate petitioner's bank statements. Counsel's assertions are not supported by the record and are not persuasive. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is also no first-hand evidence from the principal shareholder that such income could have been foregone during the relevant period since the priority date. Moreover, CIS (legacy INS) 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. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations will not 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." It is further noted that in the context of contractual liability, not personal malpractice as suggested by counsel, if the professional corporation is the intended party to the contract, signed on its behalf by the principal, the principal is not individually liable. *See Newman v. Berkowitz*, 50 A.D. 3d 479, 857 N.Y.S. 2d 75, 2008 N.Y. Slip Op. 03493; *150 N.Y. Associates, L.P. v. Bodner*, 14 A.D. 3d 1, 784 N.Y.S. 2d 63, 2004 N.Y. Slip Op. 07952. The petitioner who filed the Immigrant Petition for Alien Worker (I-140) in this case is the professional corporation, not the principal shareholder, individually. Therefore, only the corporate petitioner's assets and liabilities will be considered.

Additionally, it must be noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its *continuing* financial ability to pay the certified salary as of the priority date. 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). If the preference petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

In the instant matter, as noted by the director, the petitioner's net current assets of \$74,494 were sufficient to establish its ability to pay the proffered wage in 2003. In 2004, neither its net income of -\$95,950 nor its -\$4,468 in net current assets was enough to demonstrate its ability to pay the \$22,161.31 difference between the actual wages paid and the proffered wage. In 2005, neither the petitioner's net income of -\$30,864 nor its net current assets of -\$9,884 could cover the \$23,699.78 difference between the actual wages paid and the certified wage or establish the ability to pay in that year.

It is further noted that the 2006 W-2 also reflected a \$23,699.78 shortfall between the actual wages paid of \$40,000.22 and the certified salary of \$63,700. Except for the bank statement covering the first month of 2006, no other documentation was provided to establish the ability to pay the proffered salary in 2006. 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)). We acknowledge however that the 2006 return might not have been available when the petitioner submitted its response to the director's request for evidence on March 26, 2007.

As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing financial ability to pay the proffered wage. Based on a review of the underlying record and the arguments and evidence submitted on appeal, it may not be concluded that the petitioner established a continuing ability to pay the proffered wage.

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

**ORDER:** The appeal is dismissed.