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U.S. Citizenship
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Services

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FILE: WAC 02 264 52805 Office: CALIFORNIA SERVICE CENTER Date: **FEB 19 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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.

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a wholesale fabric business. It seeks to employ the beneficiary permanently in the United States as a sales representative of textiles. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 that the beneficiary met the experience requirements of the labor certification at the time of filing the labor certification. The director denied the petition accordingly.

On appeal, counsel requests oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original November 8, 2003 decision, the issues in this case are 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 whether or not the beneficiary met the experience requirements of the labor certification as of the priority date, July 16, 1999.

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 or seasonal 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 either 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 [CIS].

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is July 16, 1999. The proffered wage as stated on the Form ETA 750 is \$2,500 per month or \$30,000 annually.

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 appeal¹. Relevant evidence submitted on appeal includes counsel's brief; an unaudited sales balance sheet as of December 31, 2002 and October 31, 2003; an unaudited sales profit and loss comparison as of December 31, 2002 and October 31, 2003²; a letter dated December 18, 2003 from Union Bank of California; a sales analysis as of December 17, 2003 from [REDACTED]; a sales comparison report for November 2002 and November 2003 from Specialty Textiles; purchase orders generated by the petitioner with [REDACTED] for the week of November 16, 2003; purchase orders generated by the petitioner with Specialty Textiles from November 4, 2003 to December 11, 2003; purchase orders generated by the petitioner with [REDACTED] from November 4, 2003 to December 11, 2003; a summary of the petitioner's financial strength for the years 1999 through 2002; a copy of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967); a letter dated September 16, 2003 from [REDACTED] President, of [REDACTED]; a letter dated September 16, 2003 from the petitioner's owner; a copy of the beneficiary's high school diploma; a letter dated December 31, 2003 from [REDACTED] Executive Vice President of [REDACTED] a letter dated December 31, 2003 from [REDACTED] Director of Sales and Marketing – Home Textiles/Specialty, [REDACTED]; a letter dated December 19, 2003 from [REDACTED] Vice President of [REDACTED]; a letter dated December 19, 2003 from [REDACTED] of [REDACTED] a copy of the beneficiary's MS Excel 5.0 Introduction certification; and a letter dated February 20, 2004 from the petitioner's owner. Other relevant evidence includes copies of the petitioner's 1999 through 2002 Forms 1120S, copies of the 1998 and 1999 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary, copies of the petitioner's Forms DE-6, California Employment Development Department (EDD) Quarterly Wage Reports, for the quarters ended June 30, 2002, September 30, 2002, December 31, 2002, and March 31, 2003, copies the petitioner's 1999 through 2002 Forms W-3, Transmittal of Wage and Tax Statements, and a copy of the petitioner's city business license for the period September 26, 2003 through September 30, 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The letter dated December 18, 2003 from Union Bank of California states that the petitioner has maintained a banking relationship with Union Bank of California since March 2001, and the owners of the petitioner have maintained a banking relationship with the bank since June 1996. The letter further states that the petitioner

¹ 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).

² The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

maintains a checking account with an average balance of a medium five figure and an unsecured line of credit in the amount of \$50,000.00. "All accounts and loans have been maintained in a highly satisfactory manor."³ The sales analysis as of December 17, 2003 from [REDACTED] shows an increase in commissions over 2002 of \$62,391.45.

The sales comparison report for November 2002 to November 2003 from Specialty Textiles shows an increase in commissions of \$152,855.00.

The purchase orders generated by the petitioner with [REDACTED] for the week of November 16, 2003 show a value of \$207,499.00.

The purchase orders generated by the petitioner with [REDACTED] for November 4, 2003 to December 11, 2003 show a value of \$332,641.00.

The purchase orders generated by the petitioner with [REDACTED] for November 4, 2003 through December 11, 2003 show a value of \$24,587.00.

The letter dated September 16, 2003 from [REDACTED], of [REDACTED] states that Sales & Marketing, Inc. employed the beneficiary in a fulltime position from November 1994 to March 1997 as a showroom manager.

The letter dated September 16, 2003 from the owner of the petitioner states that the petitioner employed the beneficiary from March 1997 to June 1999.

The letter dated December 31, 2003 from [REDACTED], Executive Vice President of Sales, [REDACTED] confirms that the petitioner has represented [REDACTED] since 1997, and "barring any unforeseen market changes, we anticipate a long and mutually profitable relationship with [the petitioner]."

The letter dated December 31, 2003 from [REDACTED], Director of Sales and Marketing – Home Textiles/Specialty, Valdese Weavers, maintains that the beneficiary was first employed by [REDACTED] Sales and later by the petitioner. [REDACTED] states:

[The beneficiary] interfaced with my staff daily, and her activities included: entering design work requests and tracking development projects through the initial design phase through to the finished product state. She also came to the mill for advanced training, which was coordinated through the Marketing Services department. She worked with my staff on marketing issues and received communication from design and marketing on constructions, pricing and development.

³ Counsel's reliance on the balance in the petitioner's bank account 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 returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that is considered when determining the petitioner's net current assets.

[The beneficiary] also toured our facility and was trained in virtually every department including customer service and computer training. While at Valdese Weavers facility, she was trained on using the AS400 computer system, and was later trained on and used the SAP system.

Someone of her caliber would be considered a valuable employee for [the petitioner] and certainly well thought of at [redacted]

The letter dated December 19, 2003 from [redacted], Vice President, of [redacted] International claims that the petitioner is one of [redacted] largest suppliers in the industry and that [redacted] International has been doing business with the petitioner since 1998 and with [redacted] Sales before that. "The prospect of our continuing our business with [the petitioner] is very high, as we are always in need of the most competitive product in the marketplace."

The letter dated December 19, 2003 from [redacted] of [redacted] states that this company has been doing business with the petitioner since 1998, preceded by [redacted] Sales. "We continue our relationship with [the petitioner] because of the service that they provide and the quality of their product. This is a company that understands what the work RUSH means. We have always received our orders before they were due."

The letter dated February 20, 2004 from the petitioner's owner states that the beneficiary was employed by the petitioner for over two years, from March 1997 to June 1999.

The petitioner's 1999 through 2002 Forms 1120S reflect ordinary incomes or net incomes from Schedule K of \$56,047, \$36,478, -\$42,550, and -\$21,806, respectively. The petitioner's 1999 through 2002 Forms 1120S also reflect net current assets of -\$79,875, -\$132,956, -\$68,435, and -\$106,447, respectively.

The petitioner's Forms DE-6 for the quarters ended June 30, 2002, September 30, 2002, December 31, 2002, and March 31, 2003 show that the petitioner employed three workers during those quarters which did not include the beneficiary.

The petitioner's 1999 through 2002 Forms W-3 show that the beneficiary was employed in 1999 and received a salary of \$13,258.34, but was not employed in 2000 through 2002.

The 1998 and 1999 Forms W-2 issued by the petitioner on behalf of the beneficiary reflect wages paid to the beneficiary of \$29,700 and \$13,258, respectively.⁴

The summary of the petitioner's financial strength for the years 1999 through 2002 as reported by [redacted] and [redacted], Enrolled Agents, states:

I am the tax preparer of the [petitioner's] tax returns. My office performs all bookkeeping for the company.

* * *

⁴ Please note that the wages paid to the beneficiary in 1998 were for the year prior to the priority date of July 16, 1999, and, therefore, have little evidentiary value when determining the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. Therefore, the wages paid to the beneficiary in 1998 will not be considered except when reviewing the totality of the circumstances affecting the petitioning business, if the evidence warrants such consideration.

[The petitioner] prepares cash basis tax returns omitting accounts receivable whereas accrual basis adjustments would clearly show adequate current assets vs. current liabilities for the years 1999, 2000, 2001, and 2002.

Officer wages paid to (the 100% owners of WSI) are variable and are set each year so as to pay out of profits remaining after all other expenses have been paid.

- ❖ Both [the owners] state they are ready to and will immediately reduce their wages and figure their wages only after all expenses of WSI and proffered beneficiary wage of \$39,000 are paid. Further, they have been ready to so reduce their wages in all prior years.
- ❖ [The owners] state this is good business and economic policy. They state they strongly believe the positive sales and economic impact by beneficiary on WSI will eventually lead to greater sales and profits and that reducing their wage is well worth doing.

Pension contribution by WSI is optional and made only out of available funds and profits, if any, after all expenses of WSI are paid.

- ❖ Both [owners] state they will figure the annual WSI pension contribution only after all WSI expenses are paid including proffered beneficiary wage of \$39,000. Further they have been ready to so reduce the WSI pension contribution in all prior years

* * *

WSI files returns on a cash basis. A cash basis tax return does not fairly report the operating income or the financial position of a business. Material items are omitted that would significantly affect accrual basis financial reporting under “Generally Accepted Accounting Principles.” Examples are accounts receivable, accounts payable, year-end accruals and adjustments, and conversion of tax basis rapid depreciation to straight-line depreciation over the estimated useful life. Such adjustments would dramatically improve current assets and current liabilities.⁵

⁵ The petitioner’s tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner’s present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner’s tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant’s adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial

Officer wages are paid only after all WSI expenses are paid. WSI is owned 100% by husband and wife (Form 1120S, attachment to return, "Schedule of S Corporation Officers"), their wages are entirely self-directed and set by themselves so as to first properly pay all expenses and employee(s) and then compensate themselves out of estimated remaining profits. Owner wages are not fixed but entirely variable and self directed from year to year. If profits are low, they simply pay themselves less or, if necessary, nothing at all. They pay themselves only after all other debts and expenses are paid.

Accounts payable at year-end are reasonably estimated to approximate \$-0-. As a cash basis corporation, [the owner] makes it a point to pay in full all possible bills at year-end so as to capture all possible tax deductions for the business. Because WSI is cash basis, accrual of expenses applying to the current tax return but remaining unpaid at year-end is not permitted.

Accounts receivable at year-end are reasonable estimated to approximate 30 to 45 days of revenue. WSI collections on accounts receivable occur an average 30 to 45 days after the revenue is earned. Because WSI is cash basis, such receivables are not recorded on the tax return.

WSI pension contribution is optional and is paid only after all other expenses. WSI has a SEP-IRA (Simplified Employee Pension – IRA). Such plan has no mandatory contributions. Each year, contributions are entirely optional and [the owners] can contribute nothing or up to the maximum as they see fit. Such contribution is permitted to be accrued under tax rules even if not paid until after the tax return year-end. The amount selected each year is based on available cash accumulated after tax year-end by the tax return filing deadline. If no cash is accumulated, no pension is deducted or made.

On appeal, counsel reiterates the statements made by [REDACTED] and [REDACTED] and claims that the petitioner has established its ability to pay the proffered wage based on its longevity, its relationship as sales representative for [REDACTED] and its officer compensation. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *Matter of Quintero-Martinez*, A 29-928-923 (AAU August 4, 1992) in support of his contention.

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 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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).

statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on July 2, 1999, the beneficiary claims to have been employed by the petitioner from March 1998 through June 1999. In addition, counsel has submitted 1998 and 1999 Forms W-2 issued by the petitioner on behalf of the beneficiary showing that the beneficiary earned wages of \$29,700 in 1998 and \$13,258 in 1999. Therefore, the petitioner has established that it employed the beneficiary in 1998 and 1999.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$30,000 and the actual wages paid to the beneficiary of \$13,258 in 1999. That difference is \$16,742. See footnote 4 with regard to the beneficiary's 1998 wages.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng* at 537.

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 from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. 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).

In the instant case, the petitioner's 1999 through 2002 net incomes from Schedule K were \$56,047, \$36,478, -\$42,550 and -\$21,806, respectively. The petitioner could not have paid the proffered wage of \$30,000 from its net incomes in 2001 and 2002, but could have paid the proffered wage of \$30,000 from its net income in 2000. In addition, the petitioner could have paid the difference of \$16,742 between the proffered wage of \$30,000 and the actual wages paid to the beneficiary of \$13,258 from its net income in 1999.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that 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.⁶ 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 a corporation's end-of-year 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 petitioner's net current assets in 2001 and 2002 were -\$68,435, and -\$106,447, respectively. (The petitioner has already established its ability to pay the proffered wage in 1999 and 2000 from its net incomes. Therefore, it is not necessary to review the petitioner's net current assets in 1999 and 2000.) The petitioner could not have paid the proffered wage of \$30,000 from its net current assets in 2001 and 2002.

On appeal, counsel alleges that the petitioner has established its ability to pay the proffered wage based on its longevity, its relationship as sales representative for Valdese Weavers, Specialty Textiles, and Phoenix Trim Mills, and its officer compensation. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *Matter of Quintero-Martinez*, A 29-928-923 (AAU August 4, 1992)⁷ in support of his contention.

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 1120S U.S. Income Tax Return

⁶ 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 payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷ Counsel refers to a decision issued by the AAO concerning the ability to pay, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions 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).

for an S Corporation. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that the owners (husband and wife) hold 100 percent of the company's stock. According to the petitioner's 1999 IRS Form 1120S, the owners elected to pay themselves \$210,000. According to the Form 1120S for 2000, the owners paid themselves \$216,000. According to the Form 1120S for 2001, the owners paid themselves \$189,000, and according to the Form 1120S for 2002, the owners paid themselves \$180,000. These figures are supported by the owners' W-2 Forms for 1999, 2000, and 2002, which were submitted for the record. We note here that the compensation received by the company's two owners during these years was not a fixed salary and amounted to an average of \$198,750 per year.

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. 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 the present case, however, counsel is not suggesting that CIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their corporation. The quarterly tax returns for this period show not only that the petitioner exercises a large degree of financial flexibility in setting employee salaries, but that the petitioner easily fulfills its salary obligations (the two owners and one employee). Clearly, the petitioning entity is a profitable enterprise for its owners. Counsel asserts that the amount paid to the owners, into profit sharing, and into employee benefit programs is determined by the profitability of the corporation. None of these numbers represent fixed expenses. We concur with the arguments presented by counsel on appeal. A review of the petitioner's gross receipts and the amount of compensation paid out to the employee-owners confirms that the job offer is realistic and that the proffered salary of \$30,000 can be paid by the petitioner.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

The second issue in this case is whether the beneficiary met the experience requirements at the priority date of July 16, 1999.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

- (ii) *Other documentation* – (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is July 16, 1999.

CIS must look to the job offer portion of the 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 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess eight years of grade school, four years of high school, and two years of experience in the job offered as a sales representative in textiles or three years of experience in the related occupation of office manager in textile sales. Block 15 requires that the beneficiary have customer service skills and be bilingual in English and Spanish.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of sales representative in textiles must have eight years of grade school, four years of high school, two years of experience in the job offered as a sales representative in textiles or three years of experience in the related occupation of office manager in textile sales, have customer service skills, and be bilingual in English and Spanish.

In the instant case on July 2, 1999, the beneficiary signed the Form ETA 750 under penalty of perjury claiming to have been employed by the petitioner from March 1998 through June 1999 (one year and three months). The beneficiary also claimed to have been employed with [REDACTED] from December 1994 through March 1998 (three years and three months). However, letters submitted by the petitioner's owner and by [REDACTED] President of [REDACTED], dated September 16, 2003, state that the beneficiary was employed by [REDACTED] from November 1994 through March 1997 and with the petitioner from March 1997 until June 1999. The director pointed out this discrepancy and cited *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) in his determination that the beneficiary had not met the experience requirements of the labor certification at the priority date. The director denied the visa petition on November 8, 2003.

On appeal, counsel submits letters from [REDACTED] and the petitioner. The letters from [REDACTED] and [REDACTED] all praise the petitioner for its quantity and quality of sales and customer service relationship. These companies state that they have been doing business with the petitioner for a minimum of ten years and with [REDACTED] before the petitioner took over [REDACTED]. They are looking forward to continuing business with the petitioner. In addition, one letter from [REDACTED] Director of Sales and Marketing – Home Textiles/Specialty) states with regard to the beneficiary that the beneficiary was employed

by both [REDACTED] and the petitioner, making the transition when the president of [REDACTED] left to pursue other opportunities. The letter from [REDACTED] listed the beneficiary's activities while interacting with her company, [REDACTED]

The letter from the petitioner states that it employed the beneficiary from March 1997 to June 1999 and that the beneficiary came to the petitioner when it bought out [REDACTED] a similar company.⁸ The letter continues with a description of the beneficiary's duties and training.

As there is nothing in the record of proceeding that leads the AAO to doubt the validity of the letters from the petitioner, [REDACTED], and [REDACTED] and since a review of the California Business Portal shows that the petitioner was incorporated in 1997, the AAO must conclude that the petitioner has established that the beneficiary met the experience requirements at the priority date of July 16, 1999 and that the dates provided on the ETA 750 were simply typographical errors (appears to be one year off). If the director deems it necessary, he may request additional evidence or an investigation of the beneficiary's experience requirements before the Form I-485, Application to Register Permanent Resident or Adjust Status, is adjudicated.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The director's decision of November 8, 2003 is withdrawn. The petition is approved.

⁸ A review of the California Business Portal at <http://kepler.ss.ca.gov/corpdata> (accessed on January 24, 2008) revealed that the petitioner was incorporated on March 20, 1997.