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File: [REDACTED]
WAC-03-146-51129

Office: CALIFORNIA SERVICE CENTER Date: JAN 11 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center (“director”), denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal as the petitioner was unable to demonstrate its ability to pay the proffered wage. The petitioner filed a Motion to Reopen or Reconsider the petition. The AAO rejected the Motion to Reopen or Reconsider as untimely filed. The petitioner submitted the instant Motion to Reconsider. The AAO will grant the petitioner’s Motion to Reopen. The AAO’s decision of May 23, 2005 will be affirmed.

The petitioner operates a business related to furniture manufacturing, and seeks to employ the beneficiary permanently in the United States as an upholsterer (“Slipcover Cutter”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s November 21, 2003 decision, the petition was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence. On May 23, 2005, the AAO dismissed the appeal on the basis that the petitioner failed to demonstrate its ability to pay, as well as failed to adequately document that the beneficiary met the qualifications of the certified labor certification. On June 19, 2007, the AAO rejected the petitioner’s Motion to Reopen or Reconsider on the basis that it was untimely filed.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant, which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on March 23, 2001. The proffered wage as stated on Form ETA 750 is \$18.52 per hour,¹ which is equivalent to \$38,521.60 per year based on a 40-hour work week. The labor certification was approved on September 10, 2002, and the petitioner filed the I-140 Petition on the beneficiary’s behalf on April 9, 2003. The petitioner listed the following information: established: August 6, 1999; gross annual income: \$1,368,295; net annual income: not listed; and current number of employees: twenty-two.

¹ The petitioner initially listed an hourly rate of \$7.25 per hour, but DOL required the wage to be increased to \$18.52 prior to certification.

On June 30, 2003, the director issued a Request for Evidence (“RFE”) for the petitioner to provide evidence of the petitioner’s ability to pay the proffered wage from the date of March 23, 2001 onward, including its federal tax returns for the years 2001, as well as the beneficiary’s Forms W-2. The RFE also requested that the petitioner provide copies of its Quarterly Wage Reports filed with the state. The petitioner responded. On November 21, 2003, the director determined that the evidence submitted was insufficient to demonstrate the petitioner’s ability to pay the proffered wage, and denied the petition. The petitioner appealed to the AAO.

On May 23, 2005, the AAO issued a decision and dismissed the appeal on the basis that the petitioner failed to establish its ability to pay, and beyond the director’s decision, that the petitioner failed to establish that the beneficiary met the qualifications of the certified Form ETA 750. The petitioner filed a Motion to Reopen or Reconsider, which was rejected as untimely filed. The petitioner filed the instant Motion to Reconsider.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (“CIS”) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

As the petitioner submitted new evidence, we will treat the filing as a Motion to Reopen.

We will initially examine the petitioner’s ability to pay based on the evidence in the record, and then examine the petitioner’s additional arguments raised on appeal. First, in determining the petitioner’s ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. On Form ETA 750B, signed by the beneficiary, but undated, the beneficiary listed that she was employed with the petitioner² from November 17, 2000 to the present (date of signature). The petitioner³ submitted the following W-2 statements to document payments to the beneficiary:

² Form ETA 750 lists that the beneficiary was employed with “[REDACTED]”. The petitioner that filed the I-140 petition is “[REDACTED]” with an address of “[REDACTED]”.

The petitioner did not provide any documentation that “[REDACTED]” and “[REDACTED]” share the same tax identification number, or that they were the same employer. The petitioner did not provide any incorporation documentation, certificate of name change, doing business as, or fictitious name documentation, or documentation related to either corporation’s federal tax identification number. Wages paid, and financial information of an unrelated company

<u>Year</u>	<u>W-2 Wages Paid</u>
2002	\$12,216.00
2001	\$6,332.00
2000	\$320.00

The wages paid would exhibit partial payment of the proffered wage, but not the full wage. Accordingly, the petitioner must demonstrate that it can pay the difference between the full wage in 2001 and 2002, and that it can pay the full proffered wage in subsequent years. The petitioner, however, cannot demonstrate its ability to pay the beneficiary the proffered wage based on prior wage payment alone.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected

cannot be used to satisfy the petitioner's need to demonstrate that it can 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.

Further, the petitioner did not submit evidence to establish that the new company would constitute a successor-in-interest to the initial petitioner, which would require documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The petitioner should explain the foregoing discrepancies in any further proceedings.

A search of California Business registration records accessed on January 9, 2008 <http://kepler.sos.ca.gov/corpdata/ShowLlhcAllList?QueryLpllcNumber=199922210026> does reflect a company registered as "[redacted]" located at [redacted]. Based on the company registration, it would appear that [redacted] and [redacted] are the same entity, however, [redacted] corporate registration does not provide that [redacted] does business under any other names, such as [redacted].

³ The Forms W-2 list the paying entity as "[redacted]" with an address of [redacted].

the argument that the Service should have considered income before expenses were paid rather than net income.

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 petitioner is currently formed and operates as a limited liability company (LLC), although was previously incorporated as an S Corporation. Although structured and taxed as a partnership, the owners of an LLC enjoy limited liability similar to corporation owners. An LLC, like a corporation, is a legal entity separate and distinct from its owners. The company's debts and obligations are generally not the owner's debts and obligations.⁴ An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the owners' individual total income and assets cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of the petitioning company's funds.

Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below." Where a partnership has income from sources other than from a trade or business, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1. The petitioner's Form 1065 tax return for 2002 shows that the petitioner's income in 2002 was exclusively from a trade or business, and accordingly, line 22 reflects the following income:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004 ⁵	\$107,048 ⁶
2003 ⁷	not submitted

The record demonstrates that the petitioner previously was incorporated as an S corporation. 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

⁴ This general rule might be altered in some cases by contract or otherwise, however, no evidence appears in the record to indicate that the general rule would not apply in the instant case.

⁵ The petitioner submitted its 2004 federal tax return with its Motion to Reopen or Reconsider the AAO's May 23, 2005 determination.

⁶ We note that the petitioner's 2004 federal tax return reflects an address of: [REDACTED] This address is different than the address listed on its 2001, and 2002 tax returns of: [REDACTED] or the address listed on Form I-

⁷ The petitioner's 2003 federal tax return would not have been available at the time of filing the I-140, or at the time of the petitioner's response to the RFE. Despite submitting its 2004 tax return on appeal, the petitioner did not provide its 2003 return.

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>, (accessed February 15, 2005). The petitioner does not list any additional income so we will take the petitioner's net income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2002	\$22,478
2001	\$ 3,971

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in 2001 or 2002 even if the wages paid to the beneficiary were added to the petitioner's net income. The petitioner's 2004 net income based on its tax return submitted with its Motion to Reopen or Reconsider would demonstrate the petitioner's ability to pay in 2004. The petitioner, however, must demonstrate its ability to pay from the priority date onward, which it has not established.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

In the present matter, however, the petitioner did not submit its Schedule L with its 2001 or 2002 tax filings, and the Schedule L submitted with its 2004 federal tax return was blank.

Pursuant to IRS instructions for Form 1120S, a corporation with total receipts (line 1a plus all other income, lines 4 and 5, income reported on Schedule K, lines 3a, 4, 5a, and 6, income or net gain on Schedule K, lines 7, 8a, 9 and 10, and/or income reported on Form 8825, lines 2, 19, and 20a) and total assets at the end of the tax year or less than \$250,000 are not required to complete Schedules L, M-1, and M-2, if the "yes" box is checked on Schedule B, question 9. *See* <http://www.irs.gov/instructions/i1120s/ch01.html>, accessed as of May 30, 2007. In the case at hand, the petitioner lists that it had total assets of under \$250,000 in 2002, and did not list any assets in 2001. The petitioner further did not answer question 9 on Schedule B. The petitioner did have total receipts greater than \$250,000 in both years. As the petitioner has not completed Schedule L, we cannot determine the petitioner's net current assets. Accordingly, the petitioner cannot demonstrate its ability to pay the proffered wage through its net current assets.

The petitioner also submitted an unaudited profit and loss statement dated July 2003, which covered the time period from January to July 2003. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements submitted with the petition are not

persuasive evidence. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In the petitioner's Motion to Reopen or Reconsider, it asserts that the petitioner's 2004 tax return reflects its ability to pay the proffered wage.

As noted above, the petitioner can demonstrate its ability to pay in based on its net income in 2004, but not in the other years in question. A petitioner must demonstrate its ability to pay from the time of the priority date onward, or in this case, since March 23, 2001. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner did not provide any further evidence related to its ability to pay the proffered wage on appeal.

Based on the foregoing, the petitioner has not overcome the basis for denial related to the petitioner's ability to pay the proffered wage.

The second basis for the petition's denial, was the petitioner's failure to establish that the beneficiary met the qualifications of the certified labor certification.

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

On the Form ETA 750A, the "job offer" for a Slipcover Cutter provides:

Cuts material for slipcovers according to size and shape of furniture to match patterns and ensure economical use of material. Reads order to determine type and amount of material required, and obtains materials from stockroom. Determines from experience and knowledge of material approximate yardage necessary to cover furniture, allowing shrinkage and stitching [sic]. Measures drapes, and and [sic] smooths material, wrong-side out, over section of furniture to ensure most economical use and to serve as guide in matching shades, colores, and designs in cloth. Determines cutting lines by pinning or marking fabric, using shape of furniture as outline. Cuts fabric along marked lines. Pins cut pieces together and fits assembled unit over furniture, making adjustment with pins to attain required fitting. Cuts out slipcover parts from patterns, using rotary knife and scissors [sic].

Further, the job offered listed that the position required:

Education: none required;
Major Field Study: none;
Experience: 2 years in the job offered, Slipcover Cutter;
Other special requirements: Experience required and references required.

On the Form ETA 750B, the beneficiary listed her relevant experience as: (1) the petitioner; from November 2000 to present (date of signature), position: slipcover cutter; (2) Omega Furniture Manufacturing, Los Angeles, CA; October 19, 1999 to November 12, 2000, position: slipcover cutter; and (3) New Trend Furniture Manufacture, Los Angeles, CA, position: slipcover cutter.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(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 occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To document the beneficiary's experience, the petitioner submitted the following letter:

Letter from [REDACTED], Omega Furniture Manufacture, January 24, 2002;
"This is to verify that [the beneficiary] was employed as a full time employee in this company for a period of 1 year." The letter further provides that, "She was employed as a Slipcover Cutter. She was responsible for measure and cut material in order to match partners [sic] and assembled this to units over furniture."

The petitioner additionally submitted Forms W-2 to show that [REDACTED] paid the beneficiary \$2,222.50 in 1999, and that [REDACTED] Furniture paid the beneficiary \$6,382 in 1998.

As the letter only accounts for one year of experience, the letter is deficient in establishing that the beneficiary met the qualifications of the certified ETA 750. Further, based on the amount of the wages paid to the beneficiary in 1999, it would be difficult to conclude that the employment was full time. Similarly, the wages that New Trend Furniture paid in 1998 would not necessarily demonstrate full-time employment. Further, the W-2 statements do not provide the required information pursuant to 8 C.F.R. § 204.5(l)(3).

With its Motion to Reopen or Reconsider, the petitioner submitted the letter that it initially submitted from Omega Furniture, as well as copies of paystubs that New Trend Furniture issued to the beneficiary. The paystubs were dated for the pay periods ending October 2, 1998, and October 23, 1998, the last check which showed year-to-date earnings of \$4,432. As the petitioner already submitted the beneficiary's 1998 W-2 statement from New Trend Furniture, the two additional paystubs would not provide any further information to document that the beneficiary had the two years of experience required to meet the qualifications of the certified labor certification.

The evidence submitted is insufficient to meet the requirements of 8 C.F.R. § 204.5(1)(3) as the paystubs do not provide the beneficiary's title, confirm her job duties, or length of employment. The letter and the wage evidence together would be insufficient to show that the beneficiary had the required two years of prior experience to meet the requirements of the certified Form ETA 750.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner has failed to establish that the beneficiary met the requirements of the certified ETA 750. 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 not been met.

ORDER: The Motion to Reconsider is granted. The AAO's May 23, 2005 decision is affirmed.