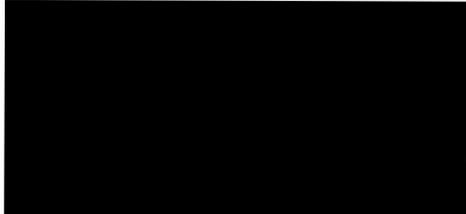




U.S. Citizenship
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Services

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **MAR 17 2008**
SRC 06 081 50634

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 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 a convenience store. It seeks to employ the beneficiary permanently in the United States as a manager. 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. 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 May 31, 2006, the single 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.

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.

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 October 27, 2003.¹ The proffered wage as stated on the Form ETA 750 \$20.00 per hour (\$41,600.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

¹ It has been approximately four years since the Application for Alien Employment Certification has been

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.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2003, 2004 and 2005; a cover letter from counsel dated April 24, 2006; a letter from the petitioner dated December 1, 2005; a letter from the petitioner's accountant dated December 1, 2005; approximately 13 Wage and Tax Statements for the employees of petitioner; approximately 49 commercial bank checking statements from September 30, 2005 to December 30, 2005, and January 31, 2006 to February 28, 2006; and copies of documentation concerning the beneficiary's qualifications.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2000 and to currently employ 2 to 3 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were respectively \$59,000.00 and \$1.7 million. On the Form ETA 750, signed by the beneficiary on October 6, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that based upon the "Yates" memo³ that petitioner "has three ways to prove the ability to pay wages."

Accompanying the appeal, counsel submits a legal brief, resubmits evidence noted above and additional evidence that includes the following documents: a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; a letter from the petitioner's accountant dated July 12, 2006; a letter from the petitioner dated July 12, 2006; and an affidavit from [REDACTED] dated June 27, 2006.

Counsel asserts that the petitioner's accountant's letter and the opinion given in that letter dated December 1, 2005 follows the Yates memo criteria and that the accountant's opinion is evidence of the ability to pay the proffered wage. According to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined. The accountant stated in the

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."

² 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).

³ CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004.

⁴ 8 C.F.R. § 204.5(g)(2).

letter that compensation of officers paid to the petitioner's officers in 2003 and 2004 "must be added back to net income." However no officers' compensation is noted on the petitioner's tax returns. Assuming that consideration of officers' compensation is appropriate under these circumstances, officer's compensation can not be considered. The petitioner's accountant construes this compensation as profit, although it is stated as an expense item on a tax return. Once paid over, the compensation becomes the corporation's employees' to retain and it is not a cash asset of the corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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).⁵ 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." The petitioner's accountant's opinion is not persuasive.

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, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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.

⁵ The accountant also stated in the letter dated December 1, 2005, that she was familiar with the shareholder owners' personal finances and the "substantial net worth assets" of these individuals of \$411,017.00 and \$424,672.00 respectively may be used to support the company's obligations. Again this is incorrect. See *Matter of Aphrodite Investments, Ltd., Id.*

The petitioner's appellate argument that its depreciation expenses (and amortization)⁶ should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. 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.

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

Counsel states on appeal that the net income of the petitioner is sufficient to pay the proffered wage. The petitioner's Form 1120 tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2003 the Form 1120 stated a loss (Line 28) of <\$2,135.00>⁷.
- In 2004 the form 1120 stated net income of \$11,164.00.⁸
- In 2005 the form 1120 stated net income of \$15,306.00.

Since the proffered wage is \$41,600.00 per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2003, 2004 and 2005.

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.⁹ A

⁶ Intangible assets on a balance sheet that is developed and utilized in accounting financial statements are included as "other assets" and they are amortized over a term of years. Amortization is the equivalent of depreciation for those intangibles.

⁷ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁸ The director's error in calculation does not affect the ultimate outcome of the appeal. As stated, the AAO maintains plenary power to review each appeal on a de novo basis.

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.

Counsel states on appeal that Schedule L (showing the net current assets of the petitioner) is sufficient to pay the proffered wage.

- The petitioner's net current assets during 2003, 2004 and 2005 were <\$156,499.00>, <\$145,325.00>¹⁰ and <\$137,903.00>.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage.

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 through its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date.

Counsel states on appeal that the salary taken in the three years (2003, 2004 and 2005) by [REDACTED] and his spouse, are evidence of the ability to pay. Counsel states that the amount of the spouses' salary (\$24,000 per year) "would be available to pay the alien as the officer of the company and his wife would ... prefer to be replaced by a competent employee." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Proof of ability to pay begins on the priority date October 27, 2003, that is when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner's net income is examined from the priority date. It is not examined contingent upon some event in the future.

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.

⁹ 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.

¹⁰ The director's error in calculation does not affect the ultimate outcome of the appeal. As stated, the AAO maintains plenary power to review each appeal on a de novo basis.



ORDER: The appeal is dismissed.