

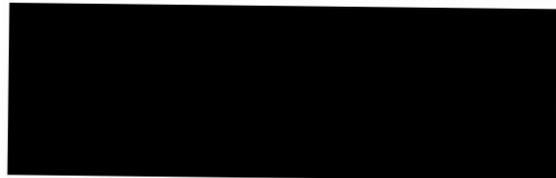
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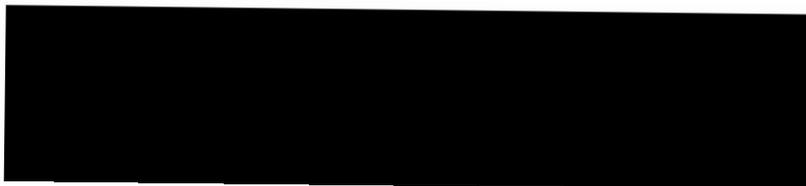
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FILE: WAC-05-248-52935 Office: CALIFORNIA SERVICE CENTER Date: **MAY 12 2008**

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.

Kevin S. Porlos for

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 dismissed.

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as a first line supervisor/manager of office and administrative support worker (office manager). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner did not establish that the beneficiary possessed the requisite degree in the intended field of employment, and therefore, he was ineligible for classification sought, and that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date. The director denied the petition accordingly.

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

As set forth in the director's June 1, 2006 decision, the primary issues on appeal are whether the beneficiary is qualified to perform the duties of the proffered position and whether the petitioner established its continuing ability to pay the proffered wage.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petitioner must 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 April 30, 2001.

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.¹ On appeal, counsel submits a brief and copies of correspondence from and to DOL.

The record contains the beneficiary's bachelor of science degree in civil aviation majoring in flying issued by Air Link International Aviation School (ALIAS) in the Philippines on April 7, 1992, and transcripts from the aviation school and De La Salle University College of Engineering in Philippines. These documents show that the beneficiary attended De La Salle University for two years from 1986 to 1988 majoring in engineering, and then continued his studies at ALIAS majoring in flying for four years from 1988 to 1992 and obtained a

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).

bachelor of science degree in civil aviation from ALIAS in April 1992. The petitioner submitted two experience letters from Interpacific Transit Inc. and Kilayko Express Services, Inc., which verify that the beneficiary worked as an office manager/technical support specialist for Interpacific Transit Inc. from April 1997 to May 5, 2005 and as an office manager for Manila District from August 1992 to July 1996.

The record also contains an evaluation report dated May 27, 2003 from [REDACTED] of Foundation for International Services, Inc. (FIS) and an evaluation of education and professional work experience dated May 23, 2003 from [REDACTED], Professor of Management, School of Business & Economics, Seattle Pacific University (Prof. [REDACTED]). In his evaluation, Prof. [REDACTED] states that the beneficiary's bachelor of science degree in civil aviation from ALIAS, completion of six trimesters in engineering at De Le Salle University plus his 7 3/4 years of professional experience in responsible business positions (1 year of study equivalent to 3 years of experience) is equivalent to a U.S. Bachelor's degree in Business Administration.

On appeal, counsel submits correspondence between DOL and the petitioner in the relevant labor certification process and asserts that the petitioner defined the word "equivalent" listed at item 14 of Form ETA 750 as "any degree or education and training" and therefore, the beneficiary meets the educational requirements set forth on the Form ETA 750 based on the evaluations.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of office manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|----------------------------|
| 14. | Education | |
| | Grade School | X |
| | High School | X |
| | College | X |
| | College Degree Required | Bachelor of Science |
| | Major Field of Study | Business or the equivalent |

The applicant must also have two years of experience in the job offered. The duties of the proffered position are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A did not state any further special requirements. Item 17 indicates that the beneficiary will supervise 15 employees in the proffered position.

The proffered position requires a bachelor's degree in business or the equivalent and two years of experience in the job offered. DOL assigned the occupational code of 43-1011, First Line Supervisor/Manager of Office and Administrative Support Worker, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter>.

org/find/result?s=43-1011&g=Go (accessed April 24, 2008) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Three requiring "medium preparation" for the occupation type closest to the office manager position. According to DOL, previous work-related skill, knowledge or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 6-7 to the occupation, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Some may require a bachelor's degree." See <http://online.onetcenter.org/link/summary/43-1011.00#JobZone> (accessed April 24, 2008). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job. Employees in these occupations usually need one or two years of training involving both on-the-job experience and informal training with experienced workers.

See id.

Therefore, generally a first line supervisor/manager of office and administrative support worker position could be properly analyzed either as a professional,² skilled or unskilled worker. However, in the instant case, the approved labor certification requires a bachelor's degree and two years of experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C). The proffered position is a supervisory position since the beneficiary will supervise 15 employees. Further, although the petitioner checked the box "e" in Part 2 of the I-140 form, which is for either a professional or a skilled worker, the petitioner expressly and consistently indicated that the instant petition for the proffered position of office manager was filed to seek classification under the professional category pursuant to section 203(b)(3)(A)(ii) of the Act.³ In addition, the director evaluated and denied the petition under the professional category. On appeal, counsel consistently argues that the beneficiary qualifies for the professional position. The AAO finds that the professional category is the most appropriate category for the proffered position based on its educational and experience requirements, and that the director properly evaluated the petition under the professional category. Accordingly, the AAO will examine the instant appeal and the petition under the professional category and determine whether or not the petitioner establish the beneficiary's qualifications for the professional proffered position.

For the professional category, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate

² A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." It is noted that office manager positions are not included in this section.

³ In the letter dated September 6, 2005 submitted with the initial filing, counsel stated that the petitioner was submitting a petition on behalf of the beneficiary seeking classification as a professional. On appeal from the denial of the petition by the director under the professional category, counsel repeats that "[the] [p]etitioner, ... , filed an I-140 Immigration for Alien Worker (Petition) with the California Service Center on September 14, 2005, seeking to classify the [b]eneficiary, ... , as a Professional Worker."

degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The beneficiary's degree and transcripts in the record show that the beneficiary completed two years of studies in engineering at De Le Salle University and four years in civil aviation at ALIAS, and was awarded a bachelor of science degree in civil aviation in April 1992. A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In determining whether the beneficiary possessed a single U.S. bachelor's degree or a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, <http://www.aacrao.org>, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." EDGE provides a great deal of information about the educational system in Philippines. It confirms that a bachelor of science degree from the Philippines is awarded upon completion of four to five years beyond the high school diploma, and represents attainment of a level of education comparable to a bachelor's degree in the United States. Therefore, the beneficiary holds a foreign equivalent degree to a U.S. baccalaureate degree.

However, to determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. The approved labor certification requires a bachelor of science degree in business or the equivalent, however, the transcripts and degree certificate in the record show that the beneficiary studied two years majoring in engineering at De Le Salle University without receiving any degree and obtained a bachelor of science degree in civil aviation from ALIAS. The record does not contain any evidence showing that the beneficiary holds a degree in business or in a related field, nor does the record contain documentation indicating that the beneficiary has an educational background in business or related field. Counsel argues that the beneficiary has the equivalent of a U.S. bachelor's degree in business based on the evaluations from FIS and Prof. [REDACTED]

Prof. [REDACTED] states in pertinent part of his evaluation report:

In my opinion, [the beneficiary]'s education and professional work experience is equivalent to a U.S. Bachelor's degree in Business Administration. [The beneficiary] is qualified for the specialty occupation position of Office Manger for the dental office of [REDACTED] DDS. In arriving at my opinion I have used 5 years of [the beneficiary]'s 7-3/4+ years of professional experience.

Based on Prof. [REDACTED]'s opinion, [REDACTED], the evaluator of FIS, also concludes in the evaluation that:

In summary, it is the judgment of the Foundation that [the beneficiary] has the equivalent of a bachelor's degree in aviation from an accredited college or university in the United States and has, through the expert opinion letter from Dr. [REDACTED] of Seattle Pacific University, as a result of his education and professional work experience, an educational background the equivalent of an individual with a bachelor's degree in business administration in the United States.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. In the instant case, the Form ETA-750 requires a bachelor's degree in business or the equivalent as the minimum educational requirement for the proffered position. The ETA 750 specifically requests business as the major field of study instead of any other related fields as alternatives. However, as quoted above the evaluations from Prof. [REDACTED] and FIS conclude that the beneficiary has achieved the equivalent of a U.S. Bachelor degree in business administration using a combination of formal education and work experience. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). The evaluations in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor's degree in business or an equivalent field of study on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by DOL. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a professional position. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree in business or an equivalent field of study to be qualified for the proffered position as a professional for third preference visa category purposes. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree" in business or an equivalent field of study as set forth by the Form ETA 750, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(ii) of the Act as he does not have the minimum education required by the ETA 750. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the director's ground for denying the petition under professional category must be affirmed.

On appeal, counsel argues that the petitioner defined the term equivalent as "any degree or education and training," and therefore, according to Prof. [REDACTED], "as a result of his education and professional work experience, [the beneficiary has] an educational background the equivalent of an individual with a bachelor's degree in business administration in the United States." Counsel submits correspondence between the petitioner and DOL. The record shows that on April 30, 2001, the employer, now the petitioner, filed a labor certification application with the California Employment Development Department (EDD) on behalf of the beneficiary in the proffered position. The Form ETA 750 requires "Bachelor of Science" as the college

degree required and “Business or the equivalent” as the major field of study. On April 18, 2003, EDD issued an assessment notice requesting the petitioner to define and quantify the term “equivalent” used in Item 14 on the ETA 750A. In response to the assessment notice from EDD, the petitioner stated in pertinent part that:

We used the term “equivalent” in item 14 of the ETA 750A for the understanding that any degree or education and training must be equivalent to a Bachelor Degree awarded by an accredited college or university in the United States.

The petitioner’s definition did not clear up the ambiguity concerning the actual minimum requirements of the proffered position. According to the petitioner’s definition, it appears that the petitioner meant to use the term of “the equivalent” for the college degree requirement instead for the major field of study on the ETA 750, however, the petitioner did not indicate whether the term of “the equivalent” was misused for “major field of study” instead for the space of “college degree required” in item 14. Nor did the petitioner explain how the meaning of “the equivalent” for major field study could be defined as “any degree or education and training.” Even if it were the petitioner’s intent to define “the equivalent” as part of the college degree requirement, the definition of “any degree or education and training which is equivalent to a U.S. bachelor degree” in the response to EDD’s assessment notice could not establish that the petitioner intended to accept the equivalent of a bachelor of science degree in business through a combination of education and work experience and thus classification under the skilled worker category. First, the petitioner did not indicate such intent on the Form ETA 750A by adding, editing, amending, or changing the requirements on the form. Second, the petitioner did not submit any evidence such as newspaper advertisements, internal postings, results of recruitment, or other forms of evidence relevant and probative to illustrating the petitioner’s intent about the actual minimum requirements of the proffered position and that those minimum requirements were clear to potential qualified candidates during the labor market test. 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)). Third, the petitioner’s response itself expressly indicated that the petitioner intended to file the underlying labor certification application for a professional position instead of a skilled worker. In the assessment notice, EDD questioned that the petitioner’s requirements of a bachelor’s degree and two years of experience in the job offer was excessive, and therefore, considered restrictive. However, the petitioner requested that the application be forwarded to DOL without any changes or amendment because it insisted on that the requirement of a bachelor degree in combination with two years of supervisory experience is a business necessity in this case. Furthermore, the petitioner expressly and repeatedly requested CIS to analyze and adjudicate the instant petition under the professional category with the initial filing and on appeal.

The AAO finds that the petitioner has not provided sufficient evidence to the record to establish that the proffered position required either a baccalaureate degree in civil aviation or a combination of academic studies and work experience that would suffice as the equivalent of a baccalaureate degree in business. Counsel’s assertions on appeal cannot overcome the director’s ground of denial that the beneficiary did not possess a U.S. bachelor’s degree or a foreign equivalent degree in business or an equivalent field of study to qualify for the proffered position under the professional category.

The second issue to be discussed is whether the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence as required by regulations.

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.

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 DOL. 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 DOL 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$23.11 per hour (\$48,068.80 per year). On the Form ETA 750B, signed by the beneficiary on April 2, 2001, the beneficiary claimed to have worked for the petitioner since September 2000.⁴ On the petition, the petitioner claimed to have been established in 1973,⁵ and to currently employ 32 workers. The petitioner did not provide information on its gross annual income and net annual income on the form.

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).

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 submitted the beneficiary's W-2 forms for 2001 through 2005 and paystubs for 2006. These W-2 forms indicate that the petitioner paid the beneficiary \$31,698.30 in 2001, \$33,672.00 in

⁴ It is noted that on the Form ETA 750B the beneficiary claimed to have worked for Garden Grove Dental Care since September 2000 and the petitioner in the instant case is ██████████ D.D.S., Inc. However, the AAO assumes that Garden Grove Dental Care used by the beneficiary on the Form ETA 750B is the same as the petitioner because both of them are located at the same address, and the petitioner provided W-2 forms it issued to the beneficiary since 2000.

⁵ However, the petitioner's tax return indicates that the petitioner was incorporated on August 1, 1978.

2002, \$34,721.93 in 2003, \$32,831.84 in 2004 and \$32,114.54 in 2005. Therefore, the petitioner failed to establish that it paid the beneficiary the full proffered wage from the priority date in 2001 through 2005, however, it demonstrated that it paid partial wages to the beneficiary. The petitioner is obligated to demonstrate that it could pay the difference of \$16,370.50 in 2001, \$14,396.80 in 2002, \$13,346.87 in 2003, \$15,236.96 in 2004 and \$15,954.26 in 2005 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets. Counsel asserts on appeal that the petitioner is paying the beneficiary \$24.75 per hour, which is in excess of the proffered wage of \$23.11 per hour; and that this is clear evidence that the petitioner has the ability to pay the proffered wage. The three paystubs for early 2006 show that the petitioner paid the beneficiary at rate of \$15.00 per hour, totaling \$4,192.35 year-to-date as of February 13, 2006. One paystub for the period from May 30, 2006 to June 13, 2006 shows that the petitioner paid \$2,115.88 for the period at the rate of \$24.75 per hour, totaling \$17,110.22 year-to-date as of June 13, 2006. Therefore, the petitioner is obligated to demonstrate that it could pay the difference between wages actually paid to the beneficiary and the proffered wage through June 13, 2006 with its net income or net current assets.

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 contrary to counsel's assertions. 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 total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 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 Chang* at 537.

The record contains copies of the petitioner's corporate tax returns for its fiscal years 2000 through 2004. According to the petitioner's tax returns, the petitioner is structured as a C corporation.⁶ Since the priority

⁶ Counsel's assertion on appeal that the petitioner is an S corporation is misplaced.

date in the instant case is April 1, 2001, the petitioner's tax return for its fiscal year of 2000 (August 1, 2000-July 31, 2001) is the tax return covering the priority date, and thus the tax return for the year of the priority date. Therefore, the AAO will review and consider the petitioner's tax returns for 2000 through 2004 in determining the petitioner's ability to pay the proffered wage.

The petitioner's fiscal year runs from August 1 to July 31 of each year, and the beneficiary's IRS Form W-2 cover the period from January 1 to December 31 of each year. Regardless of whether the petitioner is credited with paying the beneficiary's wages during the fiscal year or calendar year, the petitioner has not paid the beneficiary the full proffered wage during any relevant period. However, for this appeal, we will credit the petitioner with having paid the beneficiary the wages listed on her 2001 Form W-2 in the petitioner's 2000 fiscal year, the wages listed on her 2002 Form W-2 in the petitioner's 2001 fiscal year, the wages listed on her 2003 Form W-2 in the petitioner's 2002 fiscal year, the wages listed on her 2004 Form W-2 in the petitioner's 2003 fiscal year, and the wages listed on her 2005 Form W-2 in the petitioner's 2004 fiscal year.

The tax returns for its fiscal years 2000 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage beginning on the priority date:

- In the fiscal year of 2000 (8/1/00-7/31/01), the Form 1120 stated a net income⁷ of \$0.
- In the fiscal year of 2001 (8/1/01-7/31/02), the Form 1120 stated a net income of \$1,100.
- In the fiscal year of 2002 (8/1/02-7/31/03), the Form 1120 stated a net income of \$0.
- In the fiscal year of 2003 (8/1/03-7/31/04), the Form 1120 stated a net income of \$830.
- In the fiscal year of 2004 (8/1/04-7/31/05), the Form 1120 stated a net income of \$(51,016).

Therefore, the petitioner did not have sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage in its fiscal years 2000 through 2004, and thus failed to establish its ability to pay the proffered wage with its net income for these relevant years.

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 including real estates 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.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

⁷ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁸ 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 accounts

liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during its fiscal year of 2000 were \$(130,583).
- The petitioner's net current assets during its fiscal year of 2001 were \$(132,248).
- The petitioner's net current assets during its fiscal year of 2002 were \$23,171.
- The petitioner's net current assets during its fiscal year of 2003 were \$10,399.
- The petitioner's net current assets during its fiscal year of 2004 were \$29,368.

Although for the fiscal years 2002 and 2004 the petitioner had sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage, the petitioner did not have sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage for its fiscal years of 2000, 2001 and 2003, and thus, the petitioner failed to establish the ability to pay the proffered wage with its net current assets for these years.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL except for 2002 and 2004, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income or its net current assets.

On appeal, citing to a DOL's Board of Alien Labor Certification Appeals (BALCA) case, *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that this case stands for the proposition that the personal assets of the petitioner's corporate owner were sufficient and should have been considered in determining the ability to pay the proffered wage. In the present situation, counsel asserts that the petitioner's sole shareholder maintains more than \$9 million in personal assets. Counsel does not state how DOL precedent is binding in these proceedings. 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, BALCA 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).

On appeal counsel submits a letter dated June 21, 2006 from _____ of Life Planning Advisors, LLC verifying that Dr. _____ has saved in excess of \$109,000 in his retirement plan and other saving sources as additional funds to establish the petitioner's ability to pay the proffered wage. However, contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

However, in the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the AAO notes that the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay despite counsel not setting forth this argument. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code

(IRC) defines “personal services” as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation’s taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner’s personal service corporation status as a relevant factor to be considered in determining its ability to pay.

The documentation presented here indicates that Dr. █████ holds 100 percent of his company’s stock and performs the personal services of the dental office. According to the petitioner’s IRS Forms 1120 Schedule E (Compensation of Officers), Dr. █████ elected to pay himself \$286,100 in the fiscal year 2000, \$120,000 in the fiscal year 2001, \$120,000 in the fiscal year 2002, \$50,000 in the fiscal year 2003, and \$21,000 in the fiscal year 2004. We note here that the compensation received by the company’s owner during these years was not a fixed salary.

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. In the present case, CIS would not be examining the personal assets of Dr. █████, but, rather, the financial flexibility that he as the sole owner has in setting his salary based on the profitability of his personal service corporation architectural firm. A review of the petitioner’s amount of general wages paid to its employees \$1,399,794 in the fiscal year 2000, \$1,475,032 in the fiscal year 2001, \$1,454,993 in the fiscal year 2002, \$1,405,236 in the fiscal year 2003 and \$1,375,010 in the fiscal year 2004. Within an historical perspective, the petitioner’s fiscal years 2000 through 2004 also reflect \$21,000 to \$286,100 in owner compensation. The officer’s compensation for the fiscal years of 2000, 2001 and 2003 alone were sufficient to cover the difference between wages actually paid to the beneficiary plus the petitioner’s net current assets and the proffered wage for these fiscal years respectively.

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. Counsel’s assertions on appeal have overcome the ground of denial in the director’s decision that the petitioner failed to demonstrate that it could pay the proffered wages from the day the Form ETA 750 was accepted for processing by DOL. This portion of the decision is hereby withdrawn.

However, for the reasons discussed above and based on the evidence submitted, we concur with the director that the petitioner has failed to demonstrate that the beneficiary possessed a U.S. bachelor’s degree or foreign equivalent degree in business or an equivalent field to qualify for the proffered position under the professional category.

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

ORDER: The appeal is dismissed. The decision of the director is partially withdrawn, however, the petition remains denied.