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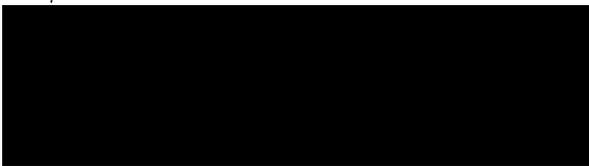
Office: CALIFORNIA SERVICE CENTER

Date: 1/19/2005

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, Director
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 an import-export and freight-forwarding firm. It seeks to employ the beneficiary permanently in the United States as an import-export manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director also found that the petitioner had failed to establish that the beneficiary had the requisite educational credentials required by the position offered.

On appeal, counsel submits additional evidence and contends that the petitioner has established its financial ability to pay the proffered wage and has demonstrated that the beneficiary qualifies for the certified position.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii) also provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) also provides in pertinent part:

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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also establish that alien beneficiary has the required education, training, and experience specified on the ETA 750 as of the priority date. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on February 22, 2000. The proffered wage as stated on the Form ETA 750 is \$1,523.60 per week, which amounts to \$79,227.20 per year. Part B of the ETA 750, signed by the beneficiary on January 6, 2000, indicates that the petitioner has employed him since February 1997.

Part A, item 14 of the ETA-750, reflects that the beneficiary must have a Bachelor of Science degree in Chemical Engineering.

On Part 5 of the visa petition, filed October 7, 2002, the petitioner claims to have been established in February 1993, to earn a gross annual income of \$140,702, a net annual income of \$9,042, and to currently employ three workers.

In support of its ability to pay the proffered salary of \$70,227.20, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1999 and 2000. They indicate that the petitioner files its tax returns using a standard calendar year. They also suggest that "Sino Place Limited H.K." and "Sinotrans Qian Tang Co." are each 25% foreign shareholders. These tax returns contain the following information:

	1999	2000
Net income	-\$ 35,573	\$12,278
Current Assets	\$163,682	\$28,899
Current Liabilities	\$ 44,919	\$ 4,818
Net current assets	\$118,763	\$24,081

As noted above, besides net income, CIS will also review a corporate petitioner's net current assets as an alternative method to examine its continuing ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and readily available resources to pay a certified wage. A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's year-end 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.

As evidence of the beneficiary's academic credentials, the petitioner initially provided a copy of a one-page document in Chinese, dated July 1993. According to the accompanying English translation, the document's narrative reflects that the beneficiary was enrolled in the "Zhejiang Institute of Technology" in the People's Republic of China from September 1988 to July 1993. It states that the beneficiary majored in chemical engineering and industrial management. It also states that "he completed all the required courses in the five years, and graduated with the degree of Bachelor of Science in accordance with the regulations on academic degrees in the Peoples Republic of China." The translation of the Chinese signature indicates that "Hong Qi Chao," "Chairman of Degree Evaluation," "Committee, Zhejiang Institute of Technology" prepared this document.

Along with these submissions, the petitioner supplied an academic evaluation from Roberta Hopkins of the Education Evaluators International, Inc., dated August 6, 1996. She determines that the beneficiary's Chinese degree of "Bachelor of Engineering in the major of Organic Chemical Engineering with a specialization in International Trade from the Department of Chemical and Management Engineering," from the Zhejiang Institute of Technology is the U.S. equivalent of a Bachelor of Science with dual majors in chemical engineering and international business. She does not identify exactly which documents she has examined but affirms that the English translations have been confirmed to be accurate.

On December 18, 2002, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage and the beneficiary's qualifying academic credentials because the initial documentation submitted with the petition was inadequate. The director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage

beginning on the priority date. The director also specifically instructed the petitioner to submit a complete copy of its 2001 federal tax return, as well as copies of the beneficiary's three most recent Wage and Tax Statements (W-2s), and copies of the beneficiary's three most recent earning statements or pay stubs. The director also instructed the petitioner to provide documentation establishing the beneficiary's past qualifying work experience and his educational background. The director required a copy of the beneficiary's official school transcript and a record of the degree or certificate bestowed upon the beneficiary.

In response, the petitioner, through counsel, provided the original of a previous employer's letter affirming that the beneficiary had accrued the requisite prior work experience, as well as duplicates of the Chinese documents and Ms. Hopkins' academic evaluation previously submitted with the petition describing the beneficiary's post-secondary academic credentials. Counsel also submitted a grade transcript, typed in English and bearing an original stamped notation with "Zhejiang Industry University" typed in English across the face of the stamp. No original Chinese document was offered. This transcript contains a heading stating the beneficiary's name, his major as chemical engineering & international trade with attendance between September 1988 to July 1993. At the bottom of the page, it is stated that "this student graduated with the degree of Bachelor of Scientific and was ranked top 2% in the class of 180 students. GPA=3.9" The grades appearing on the transcript support this conclusion as out of the 37 courses listed, this student received 33 "As" and 4 "Bs."

Regarding the petitioner's ability to pay the proffered wage, the petitioner submitted a copy of its 2001 corporate tax return. It shows that the petitioner reported a net income of \$9,042. Schedule L of the tax return shows that the petitioner declared \$100,000 in current assets and \$65,721 in current liabilities, resulting in \$34,279 in net current assets. The petitioner also supplied three copies of the beneficiary's payroll checks from December 2002 and January 2003, as well as copies of the beneficiary's W-2s for 2000, 2001 and 2002. They show that the petitioner paid the alien \$43,853.41 in 2000, \$45,760.08 in 2001, and \$54,126.84 in 2002. Accompanying these documents were copies of three negotiated checks from the petitioner to the beneficiary. Two are marked as payroll checks. They are all in the amount(s) of \$2,190.49 and are dated December 15, 2002, December 31, 2002, and January 15, 2003, respectively.

The director denied the petition on May 15, 2003. He determined, in part, that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. He also cited the discrepancies between the copy of the beneficiary's bachelor's degree issued in Chinese from the Zhejiang Institute of Technology and the school transcript in English from the Zhejiang Industry University, noting the differences in names, fields of study, and the dubious appearance of the transcript.

On appeal, the petitioner, through counsel, provides additional certified copies of the beneficiary's academic credentials reflecting that he was awarded a bachelor's degree in engineering with a specialty in organic chemical engineering in 1993 as shown by the record issued by the Zhejiang University of Technology archives. Another certificate indicates that the Zhejiang University of Technology evolved from the Zhejiang Institute of Technology. It is noted that the grade transcript does not contain the embellishments shown on the earlier transcript submitted to the record and appears consistent with the other credentials provided. Counsel explains on appeal that the first transcript was prepared without a notary but was approved by the school. The additional documents provided on appeal appear to provide sufficient persuasive evidence to demonstrate that the beneficiary obtained the requisite university degree in compliance with the academic requirements set forth on the approved labor certification.

Counsel also submitted a copy of the petitioner's payroll journal, dated May 30, 2003, which itemizes the beneficiary's wages paid during 2002 and from January to May 2003. In 2002, the petitioner's record reflects that the beneficiary's received total earnings from the petitioner of \$54,126.84. For the first five months of 2003, the petitioner paid the beneficiary \$33,011.30. Finally, counsel offers brochures, predominantly in Chinese, describing two companies. One is Sinotrans Qian Tang Company, an international transportation forwarder, and the other is Sino Place Group. Its organizational chart shows that the petitioner is part of its overseas division.

Relevant to the petitioner's ability to pay the proposed wage offer, counsel contends on appeal that the foreign shareholding companies of the petitioner absorbed the petitioner's losses of \$35,573 and \$12,278 in 1999 and 2000, respectively, and that it was significant that the beneficiary continued to be paid his salary. Counsel also states that the petitioner's gross income in 2002 was \$104,115 and its net income was \$28,740. He states that the prevailing wage on the labor certification was amended to the current level in August 2002 and that the beneficiary has been earning the proffered wage since October 2002.

As set forth above, this petitioner is organized as a 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 corporate shareholders 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). In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). 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."

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during a given period. If the petitioner establishes by credible 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 proceedings, while there is no requirement that the proffered wage must actually be paid, unless otherwise required under relevant non-immigrant regulations, the ability to pay the proposed wage offer must be demonstrated under 8 C.F.R. § 204.5(g)(2) beginning on the visa priority date and continuing until the beneficiary obtains permanent residence. In this case, the beneficiary's W-2s indicate that his earnings from the petitioner were \$35,373.79 less than the proffered wage in 2000 and \$33,467.12 less than the proffered wage in 2001. In 2002, he was paid \$25,100.36 less than the proposed salary.

CIS will also 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).). 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.

In this case, in 2000, neither the petitioner's net income of \$12,278, nor its net current assets of \$24,081 was sufficient to pay the additional \$35,373.79 salary needed to meet the proffered wage.

In 2001, the petitioner's tax return indicates that its net current assets of \$34,279 were sufficient to cover the difference of \$33,467.12 resulting from the comparison of the proffered salary of \$79,227.20 and the actual wages of \$45,760.08 paid to the beneficiary during this period.

In 2002, the beneficiary was paid \$54,126.84, or \$25,100.36 less than the certified salary. No tax return, audited financial statement or annual report has been submitted to the record to reveal the petitioner's net income or net current assets. If counsel's representation of the petitioner's net annual income of \$28,740 is accurate as stated on appeal, then that would be sufficient to pay the difference between the proffered salary and the actual wages paid. Counsel's assertions, however, 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).

The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate a *continuing* ability to pay the proffered wage. In this case, the petitioner's financial documentation fails to persuasively establish that the petitioner's ability to pay the proffered wage has been present during all of the relevant period. For this reason, the petition may not be approved. The petitioner must demonstrate that the petition is approvable as of the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on a review of the evidence and argument offered in the underlying record and on appeal, the AAO cannot conclude that the petitioner has submitted sufficient persuasive evidence to show that it has had the continuing financial ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, it is noted that an individual bearing the same name as the beneficiary's father is given as an officer of the petitioning corporation and as president of the petitioner on counsel's G-28 and on the petitioner's 1999 and 2000 federal tax returns. It may be purely coincidental, but future inquiry may be warranted as circumstances may permit.¹

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.

¹ Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000).

