U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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File: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 22 2007

SRC-05-230-51096

In re: Petitioner: [redacted]
Beneficiary:

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, Texas Service Center ("director"), denied the immigrant visa petition. The petitioner appealed, and the appeal is now before the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner is a general contractor and seeks to employ the beneficiary permanently in the United States as a superintendent, construction ("Construction Superintendent"). 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 1, 2005 decision, the petition was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

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

[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).

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 September 12, 2002. The proffered wage as stated on Form ETA 750 is $70,408 per year, based on a 40 hour work week.[2] The labor certification was approved on September 17, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on July 12, 2005. The petitioner listed the following information on the I-140 Petition: date established: January 1, 1980; gross annual income: $5,000,000; net annual income: $3,000,000; and current number of employees: ten.

On August 1, 2005, the director issued a Request for Evidence ("RFE"), which requested that the petitioner provide evidence of its ability to pay in the form of federal tax returns, audited financial statements, or annual reports, as well as copies of the beneficiary's W-2 Forms, if applicable. The petitioner responded. On November 1, 2005, the director denied the case finding that the petitioner did not establish its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the beneficiary on June 11, 2002, the beneficiary did list that he has been employed with the petitioner since September 1995. The petitioner submitted the following evidence of prior wage payment to the beneficiary:

Year	**W-2 Wages Paid by the petitioner**
2004	$9,806.50
2003	$79,417.50
2002	$72,429.50

The petitioner can establish its ability to pay the proffered wage in the years 2002, and 2003 based on the prior wage payments, as noted in the director's decision. However, the petitioner cannot establish its ability to pay in 2004 based on prior wage payments alone.

The petitioner additionally submitted copies of four checks issued to "Trinline Construction" in 2004, which the petitioner provided were "made payable to the Beneficiary Company (Trinline Construction) by the Petitioners [sic] Company." The petitioner additionally submitted business bank account statements for Trinline Construction.

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[2] We note that the petitioner previously filed an I-140 Petition on behalf of the beneficiary, but failed to provide a certified Form ETA 750. The prior ETA 750 submitted, which was uncertified, listed a wage of $1,000 per week, and listed that ten years of experience was required for the position. We note that both the wage and the number of years of prior experience required on the certified Form ETA 750 are different. Further, both the wage and required number of years of experience on the certified Form ETA 750 contain "white out." It is unclear when these changes were made, whether they were done prior to submission, or at a later date. The changes do not contain the petitioner's initials or any DOL stamp that the changes have been accepted, which a certified Form ETA 750 would typically contain.

Wages paid, and financial information related to one company, 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. Therefore, payments made to Trinline would not be accepted to show the petitioner's ability to pay the proffered wage, or that the petitioner has paid the beneficiary. Trinline financial information would not establish that the petitioner can pay the proffered wage, or that the petitioner has paid the individual beneficiary the proffered wage.

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, Citizenship & Immigration Services ("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).

The petitioner here, however, did not submit its federal tax returns,[3] so that we cannot determine the petitioner's net income, or net current assets.[4]

On appeal, the petitioner provides that it can pay the proffered wage for 2004 and 2005. The petitioner provides that it paid the beneficiary $73,162.68 in 2004 and $86,750.00 in 2005 through payments made directly to the beneficiary's company "Trinline Construction." In support, the petitioner submitted evidence that the beneficiary owned Trinline Construction evidenced by a corporate registration filing,[5] and IRS tax record registration. The petitioner additionally submitted bank statements for Trinline Construction.

As noted above, 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass.

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[3] In the prior filing, the petitioner submitted its 1996 federal tax return, which demonstrates that the petitioner is a C corporation.

[4] 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, or, if filed on Form 1120-A, on Part III. 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, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

[5] We note that the corporate registration filing provided lists the beneficiary as the "registered agent," and not as the owner. Further, it is possible that the registered agent of a company may be different than the owner of a company.

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."

Wages paid to Trinline, would not evidence the petitioner's ability to pay the beneficiary the proffered wage, as the statements do not list that the amounts paid were paid in the form of wages directly to the beneficiary for performance of the proffered position, but rather to a company, which the petitioner asserts that the beneficiary owns. Similarly, wages paid to Trinline, a separate corporation, with a separate tax identification number, would not evidence that the petitioner has employed the beneficiary and paid the beneficiary for work with the petitioner. Rather, based on the payments made to Trinline, it would appear that the beneficiary is employed by his own company, Trinline. In turn, it would appear that the petitioner may subcontract work to the beneficiary's company. We note that it would be acceptable to pay the beneficiary as a subcontractor, if the petitioner specifically showed that the wages the petitioner paid to Trinline were paid directly to the beneficiary in performance of the specific position offered and job duties as listed on the certified Form ETA 750. The petitioner, however, did not do so, and the evidence presented is accordingly deficient.

Further, although not raised in the director's denial, as the beneficiary appears to be working for his own company, it would appear that the petitioner does not intend to employ the beneficiary in accordance with the terms of the certified Form ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[6]

The Form ETA 750 job offer provides that the beneficiary will work for S.M. Bishop Company, Inc. and will be employed at [redacted] Lithonia, Georgia. Further, the Form ETA 750 shows that the beneficiary will work for S.M. Bishop Company, Inc. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). As the petitioner was once employing the beneficiary but is now making payments to Trinline, the beneficiary's company, and not directly to the beneficiary, it casts doubt that the petitioner would employ the beneficiary in accordance with the terms of the certified ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (R.C. 1979).

Based on the foregoing, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage from the priority date onward, and the petition was properly denied. Further, it is unclear that the petitioner intends to employ the beneficiary in accordance with the certified Form ETA 750.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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[6] 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

ORDER: The appeal is dismissed.