U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

B6

FEB 01 2007

File: [redacted] Office: VERMONT SERVICE CENTER Date:

EAC-03-206-53957

In re: Petitioner:
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:

[redacted]

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, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a commercial and residential landscaping business and seeks to employ the beneficiary permanently in the United States as a maintenance mechanic ("Supervisor/Maintenance Mechanic"). 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 June 23, 2005 denial, the case 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. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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

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

---

[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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 20, 2001. The proffered wage as stated on Form ETA 750 $32.97 per hour based on a 40 hour work week, which is equivalent to $68,577.60 per year.[2] The petitioner listed an overtime rate of $49.46 per hour. The labor certification was approved on May 20, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on June 26, 2003. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: 1983; gross annual income: $380,377.00; net annual income: $6,651; and current number of employees: not listed.

On August 15, 2003, the director issued a Request for Additional Evidence ("RFE"), requesting that the petitioner submit additional evidence, specifically: related to the petitioner's ability to pay, including the petitioner's federal tax returns for the years 2001, and 2002, as well as the beneficiary's W-2 statements. The RFE also requested that the petitioner submit evidence that the beneficiary had the required two years of experience to meet the listed requirements of the certified Form ETA 750. Counsel responded to the RFE. On June 23, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the 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 April 7, 2001, the beneficiary listed that he has been employed with the petitioner since April 1998. The petitioner submitted the following W-2 statements for the beneficiary:

Year	Wages Paid
2002	$20,858.16
2001	$19,698.00

The petitioner also submitted paystubs on the beneficiary's behalf for pay dates ending September 6, 13, 20, and 27, 2003, as well as pay for October 11, 18, and 25, 2003, and November 1, 2003. The paystubs show payment to the beneficiary in the amount of $1,320 for each weekly time period. We note, however, that the paystubs reflect that [redacted]t issued payment to the beneficiary, and not the petitioner. The record of proceeding contains no information that the [redacted] operates as the successor-in-interest to the petitioner, or that it has the same tax identification number as the petitioner. The W-2 Forms were issued by the petitioner listed on Form ETA 750, and the Form I-140 and will be considered; the paystubs, however, were not issued by the petitioner, and, therefore, will not be considered.

While the W-2 statements exhibit partial payment of the proffered wage to the beneficiary, the petitioner's prior wage payments to the beneficiary alone are insufficient to document the petitioner's ability to pay the proffered wage. The petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage.

---

[2] The petitioner initially listed the wage as $12.00 per hour, and DOL required that the wage be raised based on the job description to $32.97 prior to certification. Similarly, the petitioner initially listed the overtime pay rate as $18.00 per hour, but the petitioner was required to change this to $49.46 prior to certification.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005). The petitioner lists only income from its business so that we will take the income from line 21:

Tax year	Net income or (loss)
2002	-$2,128
2001	$6,651

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in either year, even if the wages paid to the beneficiary were added to the petitioner's available net income.

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.[3] Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

[3]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 payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Tax year	Net current assets
2002	-$62,258
2001	-$68,795

Following this analysis, the petitioner's Federal Tax Returns shows that the petitioner would lack the ability to pay the proffered wage under the net current asset test as well. Further, we note that the petitioner's net current assets reflect negative numbers for both years.

On appeal, counsel provides that the petitioner can pay the proffered wage and references the W-2 statements, that the petitioner had gross receipts of $380,377 in 2001 and gross receipts of $381,422 in 2002, and that the petitioner paid salaries of $126,384 in 2002.

As noted above, net income rather than gross income or gross receipts is the proper number for CIS consideration. *See K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, CIS properly relied on the petitioner's net income figure rather than the petitioner's gross income. We have examined the petitioner's net income above, which is insufficient to show the petitioner's ability to pay the proffered wage. Further, wages paid to others are not available for the petitiioner to prove the ability to pay the wage proffered to the beneficiary from the priority date of the petition onward.

Counsel further notes that DOL certified the labor certification on May 20, 2003, and "that is the date upon which the beneficiary began receiving the $68,578 salary set forth in your letter." The petitioner is obligated to show its ability to pay the proffered wage from the priority date, the time that the labor certification was filed, until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, as discussed above, the paystubs provided were not issued by the petitioner, but by another entity apparently unrelated to the petitioner, and therefore, would not demonstrate the petitioner's ability to pay the proffered wage.[4] Additionally, the paystubs provided begin in September 2003. The petitioner has not demonstrated that it can pay the proffered wage in 2001, 2002, or 2003.

In addition, the petitioner's president provided a statement that the beneficiary is valuable to the business, hardworking, and the loss of such an employee would have negative results on the petitioner's business.

While the petitioner's statement may be accurate regarding the beneficiary's value, the petitioner has not demonstrated its ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) to meet the regulatory requirements for approval, and we are unable to sustain the appeal.

Based on the evidence submitted, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage from May 2001 to the time that the beneficiary obtains permanent residence. In visa petition proceedings,

---

[4] The petitioner has not forwarded information to demonstrate that the two companies operate on a "d/b/a" basis, or that the two businesses have a successor-in-interest relationship. 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. 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 burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.