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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2007

WAC-04-249-53497

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 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 veterinary office and seeks to employ the beneficiary permanently in the United States as a secretary. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). As set forth in the July 15, 2005 denial, the director denied the case on the basis that the petitioner had not established its ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful 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 and timely filed, 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 25, 2001. The proffered wage as stated on the Form ETA 750 is $11.80 per hour, 40 hours per week, for an

[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).

annual salary of $24,544 per year. The labor certification was approved on June 15, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on September 14, 2004. On the I-140, counsel listed the following information related to the petitioning entity: date established: 1990; gross annual income: $100,000; net annual income: $50,000; and current number of employees: 75.

On March 28, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide additional evidence related to the petitioner's ability to pay, and specifically requested: evidence of the relationship between the petitioner, California Animal Hospital, and [redacted], the entity that submitted its tax returns; evidence of the petitioner's ability to pay in the form of annual reports, tax returns, or audited financial statements; Form DE-6 Quarterly Wage Reports; and copies of the beneficiary's tax returns along with W-2 statements.

On July 15, 2005, the director denied the case based on the petitioner's inability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed to the AAO.

We will examine the petitioner's ability to pay and then consider the petitioner's additional arguments on appeal. The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services ("CIS") requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages.

First, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will 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 case at hand, on Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary listed that she was employed with the petitioner but did not list a start date. Counsel provided the following W-2 statements for the beneficiary:

Year	Employer	FEIN number	W-2 Amount Paid
2004	[redacted]		$30,250
2003			$3,655.86
2003			$253.50
2003			$112.50
2002			$1,041.18
2002			$4,545.00
2001			$1,136.91

None of the W-2 statements exhibit that the petitioner employed or paid the beneficiary. Amounts paid by other employers or entities would not demonstrate the petitioner's ability to pay the proffered wage. 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." Therefore, the petitioner cannot establish its ability to pay the proffered wage based on prior wage payment to the beneficiary.

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 petitioner listed on the Form ETA 750 and Form I-140 is "California Animal Hospital" with a Federal Tax Identification Number (FEIN) of: [redacted] **The petitioner submitted tax returns, which list "[redacted]" with a FEIN of** [redacted] The connection between the two entities is unclear. 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). *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), "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 tax returns for "[redacted]" show that the entity is structured as 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). Line 21 indicates ordinary income as follows:

Tax year	Net income or (loss)
2003	$78,096
2002	$47,260
2001	$52,510

While the net income above would be sufficient in each year to pay the proffered wage, the relationship of "[redacted]" the entity, which submitted the tax returns, to the **petitioner,** [redacted] is unclear.

Related to this issue, the petitioner submitted a letter from the Administrator of the California Animal Hospital, which provides:

> [redacted] is the employer of [the beneficiary]. California Animal Hospital, Inc., FIN [redacted], is the umbrella corporation that is responsible for general expenses, and then passes them through to the separate practice corporations. California Animal Hospital generates no outside income. Dr. [redacted] is a 25% shareholder in California Animal Hospital, Inc. and his corporation, as well as all the other owners, use California Animal Hospital on stationery and advertising . . . it is not uncommon for employees to think they work for California Animal Hospital, instead of the respective practice corporations.

Based on above, the beneficiary will be employed for the individual practice and veterinarian rather than the petitioner listed on the Form ETA 750. Accordingly, the individual practice should have been listed as the petitioner on the ETA 750 and Form I-140. While Dr. [redacted] owns 25% of the petitioner, the remainder 75% of the "umbrella" would not employ the beneficiary, and would have no obligation to pay the beneficiary. The petitioner itself, as noted above, has no individual income to show its ability to pay the beneficiary.[2]

On appeal, counsel contends that there is no basis for CIS to conclude that [redacted]. and California Animal Hospital are two separate entities. In support, he cites that the individual practice is located at the address listed for the petitioner as exhibited by the veterinary premise and veterinarian license. Further, counsel cites the following reasons: (1) that the name California Animal Hospital is jointly used by several veterinarians; (2) that the "effective name of the practice is, for practical purposes, [redacted] Inc. doing business as California Animal Hospital;" (3) clients know Dr. [redacted] practice by this name; (4) Dr. [redacted] uses the name on his stationery and in his advertising; (5) that Dr. [redacted] is a 25% owner of the umbrella corporation; and (6) Dr. [redacted] individual practice leases its premises from the umbrella corporation.

Counsel did submit a license, which shows that the veterinarian premises are at the [redacted] However, the petitioner did not submit information that his individual corporation "does business as" California Animal Hospital; it is not enough to assert "that the effective name of the practice is" a d/b/a relationship. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). The information submitted shows that the petitioner may do business "at" California Animal Hospital, but as the name and location is shared with other veterinarians, California Animal Hospital would not be solely associated with Dr. [redacted] or his individual practice. Therefore, submission of tax returns for [redacted], is insufficient to demonstrate that the petitioner, California Animal Hospital, can pay the proffered wage.

Further, we note that the beneficiary's prior represented work experience is inconsistent, which raises questions regarding her veracity, as well as her qualifications to perform the duties of the proffered position. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which provides, "Doubt cast on any aspect of the

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[2] We note that the individual practice itself filed a subsequent labor certification on behalf of the beneficiary, which was approved. Further, the individual practice then filed an I-140 on behalf of the beneficiary, which has also been approved.

petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." On the Form ETA 750B initially submitted, signed by the beneficiary on April 17, 2001, the beneficiary listed her experience as: (1) California Animal Hospital, no dates of employment listed; (2) Best Sound, Milano, Italy, November 1997 to April 1998; (3) CIAM International Artist Management, Milano, Italy, January 1995 to September 1997; and (4) [redacted], Vasto Chieti, Italy, January 1993 to July 1995. On the subsequent labor certification filed on her behalf, Form ETA 9089, the beneficiary listed her experience as: (1) [redacted], Los Angeles, California, October 20, 2003 to present; (2) MRP USA, Los Angeles, California, April 2000 to September 2003. On Form G-325 submitted with her I-485 Adjustment of Status application, signed on October 8, 2004, she listed her experience as: (1) California Animal Hospital, Los Angeles, California, April 2001 to present; (2) Best Sound, Milano, Italy, November 1997 to April 1998; and (3) [redacted] Italy, from January 1995 to September 1997. We note that her experience listed varies between the three forms. Further, the experience listed does not match the W-2 Form employers listed that the beneficiary submitted. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Based on the foregoing, we find that the petitioner has failed to demonstrate its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. Accordingly, the petition was properly denied.

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.