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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship
and Immigration
Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 10 2007

EAC 06 011 51309

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 Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a property management company. It seeks to employ the beneficiary permanently in the United States as a janitorial supervisor. As required by statute, the petition is accompanied by a Form ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). 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. 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 March 13, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the 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 9089 was accepted on June 15, 2005. The proffered wage as stated on the Form ETA 9089 is $16.01 per hour ($33,300.80 per year). The Form ETA 9089 states that the position requires at least two years of high school education, and two years of experience in the job offered or two years of experience as a supervisor.[1]

[1] This office notes that the record does not establish that the beneficiary has the required two years of high school education. If the petitioner further pursues this matter, this issue must be addressed.

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.[2] On appeal, counsel submits two briefs, a letter dated April 11, 2006 from the petitioner's accountant and copies of two cases cited by the director in her decision. Relevant evidence in the record includes the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2004, an unaudited financial report for the petitioner for 2004, a letter dated January 31, 2006 from the petitioner's sole shareholder, a payroll earnings register, two forms from the Metropolitan Regional Information System, Inc. regarding property located at [redacted], Arlington, Virginia and [redacted], McLean, Virginia, and three of the petitioner's bank statements issued by BB&T. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1983, to have a gross annual income of $486,762.00, to have a net annual income of $15,436.00, and to currently employ eight workers. According to the tax return in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, signed by the beneficiary on October 5, 2005, the beneficiary claimed to have worked for the petitioner as a janitorial supervisor from April 15, 2001 to June 13, 2005.

In his initial brief on appeal, counsel asserts that the petitioner's 2005 tax return will not be filed until August of 2006 and requests additional time to provide the return. Counsel states that the 2005 return will establish a net income of $45,000.00. Counsel states that the petitioner is a sole proprietorship, and that it is standard business practice for the sole owner to use private funds and savings to meet downpayment obligations and as collateral for business loans. Counsel asserts that the petitioner's owner owns the office building where the petitioner's business is located and that its assessed value is $572,400.00. Counsel further asserts that the petitioner's owner owns additional property valued at $1,000,410.00 and that the petitioner's owner and his company can afford to pay the proffered wage. Counsel points out that the petitioner's depreciation deduction in 2004 was $37,267.00.

On appeal, counsel indicated that he would submit evidence to the AAO within 30 days. The AAO sent a fax to counsel on July 31, 2007 informing counsel that no separate brief and/or evidence was received, to confirm whether or not he would send anything else in this matter, and as a courtesy, providing him with five days to respond. Counsel responded with a fax on August 6, 2007. In counsel's brief, counsel reasserts arguments made in counsel's initial brief, and further asserts that the director misconstrued cited case precedent for the proposition that 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.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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

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[2] 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).

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, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 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 beneficiary claimed to have worked for the petitioner as a janitorial supervisor from April 15, 2001 to June 13, 2005. However, although requested by the director in her request for evidence dated November 10, 2005, the petitioner did not submit IRS Forms W-2, Wage and Tax Statements, evidencing wage payments to the beneficiary. Further, the petitioner did not submit IRS Forms 1099 or paystubs for the beneficiary. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2005 or subsequently.

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 as suggested by counsel. 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 gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.[3]

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 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*

[3] This office notes that the record contains a one-page earnings register for Forstar Corp. for 2005. Although the petitioner claims that the document is a summary of the four quarterly reports that the petitioner filed with the IRS, and that it paid total gross wages of $243,410.91 in 2005, the earnings register does not indicate that the figures provided are those of the petitioner. Further, the petitioner's 2004 tax return indicates that it paid no salaries, wages, or costs of labor in 2004.

> *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

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.[4] The record before the director closed on February 3, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2005 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2004 is the most recent return available.[5] The petitioner's 2004 Form 1120 stated net income of -$15,436.00. Therefore, for the year 2004, the petitioner did not have sufficient net income to pay the proffered wage.[6]

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[7] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current 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 IRS Form 1120 stated net current assets of $4,425.00. Therefore, for the year 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

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[4] On appeal, counsel asserts that the petitioner is a sole proprietorship. However, the petitioner's tax return shows that it is taxed as a C corporation.

[5] This office notes that in his initial brief on appeal, counsel asserts that the petitioner's 2005 tax return will not be filed until August of 2006 and requests additional time to provide the return. Counsel states that the 2005 return will establish a net income of $45,000.00. Although counsel submitted an additional brief and evidence on August 6, 2007, the petitioner did not submit its 2005 tax return.

[6] The record contains an unaudited financial report for the petitioner for 2004. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying this statement, the AAO cannot conclude that it is an audited statement. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Further, the record contains three of the petitioner's bank statements issued by BB&T dated June 30, 2005, July 29, 2005, and November 30, 2005. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. In addition, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

[7] 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.

Therefore, from the date the Form ETA 9089 was accepted for processing by the DOL, 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, or its net income or net current assets.

On appeal, counsel asserts that it is standard business practice for the sole owner to use private funds and savings to meet downpayment obligations and as collateral for business loans. Counsel asserts that the petitioner's owner owns the office building where the petitioner's business is located and that its assessed value is $572,400.00. Counsel further asserts that the petitioner's owner owns additional property valued at $1,000,410.00 and that the petitioner's owner and his company can afford to pay the proffered wage. Counsel also asserts that the director misconstrued cited case precedent for the proposition that 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.

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 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." Despite counsel's assertion to the contrary, the cases of *Matter of Aphrodite Investments, Ltd.*, Id., *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Comm. 1981), and *Matter of M*, 8 I&N Dec. 24 (BIA 1958) (cited in *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980)), specifically state that a corporation is a separate legal entity from its stockholders.

As the owners, stockholders, and others are not obliged to pay the petitioner's debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered.[8] The petitioner must show the ability to pay the proffered wage out of its own funds.

The record contains a letter from the petitioner's owner dated January 31, 2006. The owner states that the petitioner's income will increase with the employment of the beneficiary. However, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the DOL.

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[8] This office notes that the record does not illustrate what type of encumbrances and debts may limit the availability of the owner's equity in his properties. Further, even if the petitioner had submitted evidence of the debts related to his real estate holdings, they are not the type of assets typically liquefied in order to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.