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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 16 2008

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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:

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a dry-wall applicator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2001 priority date of the visa petition based on the petitioner's net income or net current assets for tax years 2001 to 2004. 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 December 6, 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 Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *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 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $15.47 per hour ($30,305.60 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position or two years of work experience as a drywall finisher.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial

decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1].

On appeal, counsel submits a brief and a copy of the beneficiary's pay stub from the week of December 8, 2006. This document indicates the beneficiary earned $31,721.68 as of December 8, 2006.

With the initial petition, the petitioner submitted the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for tax years 2001, 2002, 2003, and 2004. In response to the director's Request for Further Evidence (RFE), the petitioner submitted the petitioner's Form 1120 for tax year 2005, and copies of the beneficiary's pay stubs for four weeks including August 18 and 25th, 2006 and September 1, and September 22, 2006.[2] The petitioner also submitted copies of bank statements for its business checking account with either First Union Bank or Wachovia Bank. The bank statements cover a period from January 2001 to January 31, 2006. Finally the petitioner submitted a copy of a document entitled "Deed" that describes a transaction between the petitioner's owner and his wife and another couple with regard to property in Arlington County, Virginia. The document is dated August 19, 1991. 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 August 26, 2000. It does not identify its gross annual income or net annual income, and states that it currently employs six workers. On the Form ETA 750B, signed by the beneficiary on April 29, 2001, the beneficiary claimed to have worked for the petitioner from September 2000 to the date he signed the Form ETA 750, Part B.

On appeal, counsel asserts that the director erred in not considering the petitioner's checking account statements in his decision. Counsel cites *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), and an unpublished AAO decision that stated that CIS must consider the normal accounting practices of the petitioner even if its ability to pay the proffered wage is not reflected in its tax return. Counsel notes that this unpublished decision concerned a medical corporation whose sole shareholder routinely minimized taxable income by taking income as compensation to avoid double taxation.

Counsel then notes that the petitioner is a well-established company that has been in existence for close to seven years. Counsel states that the petitioner's expectation for a continued increase in business and profits is reasonable.

Counsel states that the checking account statements reflect the petitioner's increased cash availability and should be admitted into the record and considered in the AAO decision, as they are material. Counsel states that arguably, the petitioner's checking account statements are one of the better ways to establish a continuous ability to pay the proffered wage, as they show both liquid assets and a "frequent picture" of the petitioner's operational finances. Counsel further notes that the checking account statements indicate continuous

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[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).

[2] This last pay stub indicated gross pay to date of $22,368.24.

operational activity that is essential to prove the proffered job opportunity exists. Counsel then notes that it would be counterproductive and illogical to accept into evidence a "snapshot" of cash reserves reflected on the petitioner's Schedule L, as the director suggested in his denial, but refuse to consider readily available funds demonstrated by the monthly corporate checking account statements. Counsel states that the cash liquidity shown in the petitioner's checking account could clearly be used to employ the beneficiary and pay him the proffered wage of $14.57 an hour. Counsel notes that although the petitioner's checking account statements do not reflect the petitioner's liabilities, the statements show that if any outstanding liabilities had been due or called on for satisfaction, the petitioner "would not have been either solvent or in possession of the funds shown in the bank statements." Counsel states that the petitioner finished every month for the period of time in question with cash reserves varying from several hundreds to tens of thousands of dollars. Counsel states that these available funds demonstrate that the petitioner possessed the ability to pay the proffered wage as of the April 2001 priority date.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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). 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).

The AAO notes that the petitioner submitted a property deed belonging to one of the petitioner's officers in the petitioner's response to the director's RFE. The director did not refer to this document in his decision and counsel does not reference it further on appeal. For purposes of clarification, 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. 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.

On appeal, counsel refers to an unpublished AAO decision and states that the petitioner in this decision was a medical corporation with a sole shareholder who routinely minimized taxable income by taking it as compensation. Counsel refers to the decision, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The AAO also notes that both the director and the AAO have considered the normal accounting practice of the petitioner based on its federal tax returns, and the instant petitioner is not a medical or personal services corporation. Thus, the discussion of this decision appears immaterial to the matter at hand. The AAO will discuss the applicability of *Matter of Sonegawa*, a published precedent decision, further in these proceedings.

As the director correctly noted, counsel's reliance on the balances in the petitioner's bank account is misplaced. Counsel's comments on this issue are also not persuasive. First, 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. The petitioner submitted its federal tax returns, and the director correctly based his decision on the petitioner's federal tax returns.

Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Contrary to counsel's assertions, the bank statements do not routinely reflect balances of hundreds to thousands of dollars. For example, during 2001, the petitioner had negative balances in May and June 2001.[3] Even if CIS considered the petitioner's bank statement balances, the petitioner could not establish its ability to pay the beneficiary's hourly or monthly wages, based on these monthly negative balances. The balances in the petitioner's monthly bank statements also vary greatly. The June 2001 balance is -$363.81, while the October balance is $31,618.27. Further, if the beneficiary's proffered wage of $30,305.60 were deducted from the 2001 balances and the petitioner's bank balances for the following years, the petitioner's monthly balances would be reduced by the amount of hourly wages paid to the beneficiary each month, resulting in lower monthly balances overall. No evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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, although the beneficiary indicated on the Form ETA 750, Part B that he had worked for the petitioner since September 2000, counsel in the petitioner's RFE stated that the beneficiary only began working for the petitioner in 2006. Thus, the record contains contradictory information. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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."[4] Since the petitioner has provided no further evidence as to any wages or compensation paid to the beneficiary as of the 2001 priority date and through 2005, the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2005.

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. 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

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[3] The petitioner's bank statements for January 2006 and June 2003 also reflect negative ending balances.

[4] The AAO notes that the beneficiary's G-325A submitted with his Form I-485, Application to Register Permanent Residence or Adjust Status, indicated the beneficiary began working for the petitioner in September 2000. The beneficiary also indicated on the Form G-325A that he had worked for other companies during identical time periods, and submitted Forms 1099-MISC for other companies for the years 2003 and 2004 to the record. Finally the petitioner's owner submitted a letter with the beneficiary's I-485 application stating the beneficiary had worked for him since September 2000.

(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 not sufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 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 Fang* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $30,305.60 per year from the priority date:

- In 2001, the Form 1120 stated a net income[5] of -$749.
- In 2002, the Form 1120 stated a net income of $10,264.
- In 2003, the Form 1120 stated a net income of $1,614.
- In 2004, the Form 1120 stated a net income of $3,762.
- In 2005, the Form 1120 stated a net income of $22,078.

Therefore, for the years 2001 to 2005, the petitioner did not have sufficient net income to pay the proffered wage.

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 assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

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[5]The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

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 net current assets during 2001 were -$8,030.
- The petitioner's net current assets during 2002 were -$13,095.
  The petitioner's net current assets during 2003 were -$12,595.
- The petitioner's net current assets during 2004 were $410.
- The petitioner's net current assets during 2005 were $31,002.

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net current assets to pay the proffered wage. In tax year 2005, the petitioner had sufficient net current assets to pay the proffered wage of $30,305.60.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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 except for 2005.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Cousnel cites *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). This decision relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, although based on the petitioner's tax return, 2001 was the only unprofitable year for the petitioner in the period of time in question. The petitioner has been in business since August 2000 and has six employees, while the petitioner in *Sonegawa* had been in business for eleven years and was very well known in its specific trade. Neither the petitioner nor counsel provides any further evidence as to the petitioner's profile in the business community, or prospects of further profitability. Counsel on appeal simply notes that the petitioner's increased cash availability based on the petitioner's checking account balances is an indicator of the petitioner's reasonable

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[6]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.

expectation of continued business. As stated previously, the petitioner had at least three months in which its bank balances were negative, a factor that would not support counsel's assertion with regard to the petitioner's continuous ability to pay the proffered wage.

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 750 was accepted for processing by the Department of Labor. 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.