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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 25 2009
SRC 07 088 51754

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Other Worker Pursuant to § 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the appeal will be sustained.

The petitioner is a dry cleaning establishment. It seeks to employ the beneficiary permanently in the United States as a machine presser. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.[1] 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 and 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original October 25, 2007, decision, 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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[1] We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services ("USCIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

The regulation at 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 either be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is February 17, 2004. The proffered wage as stated on the Form ETA 750 is $8.55 per hour or $17,784 annually.

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.[2]

Relevant evidence submitted on appeal includes counsel's brief, a letter, dated November 19, 2007, from [redacted] President and owner of the petitioner, copies of the petitioner's previously submitted 2004 through 2006 Forms 1120S, U.S. Income Tax Returns for an S Corporation, and a letter, dated November 20, 2007, from [redacted], of [redacted]. Other relevant evidence in the record of proceeding includes compiled financial statements for the periods ended December 31,

[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).

2005, September 30, 2006, and August 31, 2007.[3] The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2004 through 2006 Forms 1120S reflect ordinary incomes or net incomes of $5,595, -$33,718, and $29,581, respectively. The petitioner's 2004 through 2006 Forms 1120S also reflect net current assets of $16,842, $7,513, and $31,116, respectively.

The letter, dated November 19, 2007, from the petitioner's president and owner states:

> Because I am the sole officer of [the petitioner], you should be able to include my officer compensation and the depreciation in determining whether [the petitioner] has the ability to pay for [the beneficiary's] proffered wage. Your approval of this immigrant petition greatly impacts our ability to build up our staff and operate at full capacity. . . .

The letter, date November 20, 2007, from the petitioner's C.P.A. states:

> This is to verify that the depreciation expenses in 1120S of [the petitioner] year 2004, 2005, and 2006 are not real expenses, but artificial expenses generated by tax law so those expenses should be added back to the company's net income for cash flow purpose[s].

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage of $17,784 based on its officer compensation and depreciation.

After reviewing the documentation submitted on appeal, the AAO noted that [redacted] claimed that he is the petitioner's sole 100% shareholder of the company's stock. However, the petitioner's tax returns indicated that the petitioner consists of two shareholders, [redacted] and [redacted] with each shareholder having 50% interest in the company. Since the petitioner claims that it has established its ability to pay the proffered wage based on its compensation of officers, the AAO issued a request for evidence (RFE). The AAO specifically requested:

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[3] 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the AAO will not consider the petitioner's compiled financial statements when determining the petitioner's continuing ability to pay the proffered wage from the priority date of February 17, 2004.

> Updated evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date in 2004 to the present, to include evidence the [redacted] is the sole shareholder or [redacted] is his spouse or is a family member and that the petitioner has elected to treat family members as a sole shareholder (election must be made with the IRS). Evidence of such election must be submitted as well as evidence of the family relationship.

In response, counsel submitted copies of 2007 and 2008 Forms 1040, U.S. Individual Income Tax Returns showing [redacted] and [redacted] filing "married filing jointly," copies of the petitioner's 2007 and 2008 Forms 1120S, a letter, dated June 23, 2009, from [redacted] of [redacted], Certified Public Accountant, and an affidavit, dated June 23, 2009, from [redacted] and [redacted].

The petitioner's 2007 and 2008 Forms 1120S reflect ordinary incomes of $49,198 and $58,020, respectively. The petitioner's 2007 through 2008 Forms 1120S also reflect net current assets of $25,151 and $21,860, respectively.

The letter, dated June 23, 2009, from [redacted] states:

> This is to inform that as of July of 2002, Mr. has elected to treat his entire family as one shareholder of his S corporation, First Class Cleaners, Inc.
>
> Section 231 of the American Jobs Creation Act of 2004 ("the Act") allows any family member to make an election under new 1361(c)(1)(D) of the IRS Code to treat all members of the family as one shareholder of an S Corporation for purposes of determining the number of shareholders of the corporation.
>
> The election is made by notifying the corporation to which the election applies according to 1361(c)(1)(D). This means that the corporation does not need any proof of confirmation from the IRS on this election. Attached is a copy of the IRS documents explanation Family Shareholder Election.

The affidavit, dated June 23, 2009, from [redacted] and [redacted] states:

> My wife, [redacted] and I, [redacted] do hereby certify to the following:
>
> As of July 2002, I have elected to treat my entire family as one shareholder of my S Corporation, First Class Cleaners, Inc.
>
> I understand the purpose of this affidavit and swear that the above statements are true and correct.

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, USCIS 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, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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 750, signed by the beneficiary on January 11, 2007, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary for the years 2004 through 2008. Therefore, the petitioner has not established that it employed the beneficiary in 2004 through 2008, and the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage of $17,784 in those years.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. 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 USCIS, 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 USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] 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." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on October 18, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's tax returns demonstrate its net income for 2004 through 2008, as shown in the table below.

- In 2004, the Form 1120S stated net income[4] of $5,595.
- In 2005, the Form 1120S stated net income of -$33,718.
- In 2006, the Form 1120S stated net income of $29,581.
- In 2007, the Form 1120S stated net income of $49,198.

[4] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2008) of Schedule K. *See* Instructions for Form 1120S, 2008, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2004 through 2008, the petitioner's net income is found on line 21 of its 2004 through 2008 tax returns.

- In 2008, the Form 1120S stated net income of $58,020.

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net income to pay the proffered wage. In the years 2006 through 2008, the petitioner did have sufficient net income to pay the proffered wage of $17,784.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 tax returns demonstrate its end-of-year net current assets for 2004 and 2005, as shown in the table below.

- In 2004, the Form 1120S stated net current assets of $16,842.
- In 2005, the Form 1120S stated net current assets of $7,513.

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage. The petitioner has already established its ability to pay the proffered wage of $17,784 from its net incomes in 2006 through 2008.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of $17,784 based on its depreciation and officer compensation.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D.

[5]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.

Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated. Therefore, the AAO will not consider the petitioner's depreciation when determining the petitioner's ability to pay the proffered wage and continuing until the beneficiary obtains lawful permanent residence.

On appeal counsel and the petitioner's owner claim that officer compensation should be considered when determining the petitioner's ability to pay the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [redacted] holds 100 percent of the company's stock. According to the petitioner's 2004 and 2005 IRS Forms 1120S, [redacted] elected to pay himself $86,000 and $96,000, respectively. We note here that the compensation received by the company's owner during these two years was not a fixed salary.

USCIS has long held that it 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.

In the present case, however, counsel is not suggesting that USCIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owner has in setting his salary based on the profitability of the company. We concur with the arguments presented by counsel on appeal. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owner confirms that the job offer is realistic and that the proffered salary of $17,784 can be paid by the petitioner.[6]

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[6] It is noted that in 2004, the petitioner's net current assets were $16,842 or only $942 less than the proffered wage. After contributing that amount from his officer compensation of $86,000, the owner would still have realized a balance of $85,058 in officer compensation. In 2005, the petitioner's net current assets were $7,513 or $10,271 less than the proffered wage. After contributing that amount from his officer compensation of $96,000, the owner would still have realized a balance of $85,729 in officer compensation.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do overcome the decision of the director.

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 been met.

ORDER: The director's decision of October 25, 2007 is withdrawn. The appeal is sustained. The petition is approved.