U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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DATE: APR 28 2011 Office: VERMONT SERVICE CENTER FILE: [redacted] EAC 05 197 53563

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The AAO will affirm the previous decisions of the director and the AAO. The petition remains denied.

The petitioner is a firm that provides complete tennis court construction and court equipment sales. It seeks to employ the beneficiary permanently in the United States as a custom woodworker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

With the petitioner's initial July 19, 2007 appeal, counsel for the petitioner indicated on the appeal Form I-290B that she would submit a brief and /or additional evidence to the AAO within 30 days. The AAO sent an inquiry to counsel on April 22, 2009 requesting a copy of such brief or additional evidence to afford the petitioner the opportunity to submit any additional evidence as stated on Form I-290B. Counsel's response indicated that a brief or evidence in support of the appeal was not filed. The appeal was dismissed on December 27, 2010.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

On January 28, 2011, the petitioner, through counsel, filed a motion to reopen. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Included with the motion, counsel submits new evidence related to the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act 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 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

[1] The petitioner submitted a copy of the Form ETA 750, but a duplicate original was requested.

> 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the approved labor certification, 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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).[2]

The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, as shown on the Form ETA 750, the priority date is January 13, 1998. The proffered wage is $45,000 per year. As noted in the AAO's prior decision, despite the beneficiary's claim to employment with the petitioner since January 2001, the petitioner did not submit any W-2 statements, Forms 1099, or any evidence of pay to the beneficiary.

In its previous decision, the AAO explained the process of reviewing a petitioner's ability to pay a proposed wage offer to a beneficiary. In that case, it reviewed the 1998- 2004 corporate tax returns that were provided, as well as other materials, and determined that the corporate petitioner had not demonstrated that it had the continuing ability to pay the proffered wage of $45,000 beginning as of the January 13, 1998, priority date. Specifically, the AAO noted that corporate petitioner had failed to submit complete copies of tax returns including all relevant statements, and that even the materials provided failed to show sufficient net income or net current assets to establish the petitioner's continuing ability to pay the proffered wage from the priority date onward. Specifically, the AAO noted that neither the petitioner's net income of $25,166 in 1998; $23,531 in 1999; or -$249,101 in 2002 was sufficient to cover the proffered wage in those years. Similarly, neither the petitioner's -$95,658 in net current assets in 1998;

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[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

$33,973 in 1999 or its -$315,744 in 2002 were sufficient to pay the full $45,000 per year proffered wage.

On motion, in support of the corporate petitioner's continuing financial ability to pay the proffered wage, counsel submits a copy of a life insurance statement representing a life insurance policy held individually by the sole shareholder of the petitioning corporation. Counsel also submits copies of statements of a certificate of deposit account, from June 30, 1998, December 31, 1998, June 30, 1999, and March 31, 2003. The two accounts represented are held individually by the sole shareholder. Counsel asserts that the principal shareholder could have used these funds to pay the proffered wage.

The AAO does not find these assertions persuasive. It remains that the petitioner and named employer on the I-140 is a corporation and must establish its own continuing ability to pay the proffered salary. 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). Counsel cites no legal authority compelling U.S. Citizenship and Immigration Services (USCIS) to view the value of a shareholder's individually held assets as indistinguishable from that of the corporation when evaluating a corporate petitioner's ability to pay the proffered wage. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

> The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.
>
> The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.
>
> A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.
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> In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

In *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is January 13, 1998. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its continuing ability to pay for the rest of the pertinent period of time.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), 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 could not conduct 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.

The AAO noted in its prior decision that the petitioner failed to submit any evidence of its reputation to demonstrate that *Sonegawa* should apply. The petitioner similarly failed to submit any such evidence with its motion to reopen. While the petitioner can show its ability to pay in some years, the petitioner has not established its continued ability tto pay the proffered wage from the time of the priority date onward. The petitioner's early tax returns reflect very low officer compensation, only a little over $10,000 from 1998 to 2002, and only $7,600 in 2003. The petitioner's 2002 tax return reflects substantial negative net income (-$249,101) and net current assets (-$315,744) in addition to the petitioner's failure to demonstrate its ability to pay in 1998 and 1999.

The regulation at 8 C.F.R. 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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 motion to reopen is approved. The AAO affirms its prior decision dated December 27, 2010. The petition remains rejected.