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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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 09 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 our 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 Director, Texas Service Center, denied the immigrant visa petition.[1] The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a trucking transportation company. It seeks to employ the beneficiary permanently in the United States as a mechanic/truck driver pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its ability to pay the proffered wage from the priority date through the present, 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 the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

As set forth in the director's April 28, 2009 denial, the primary issue in this case is whether or not the petitioner has established that it had 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 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.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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[1] U.S. citizenship and Immigration Services (USCIS) records show that the petitioner filed an I-140 immigrant petition (EAC-06-091-52340) on February 7, 2006 for the beneficiary in the position of truck driver as an unskilled worker based on an approved Form ETA 750 (A-05311-50387) with the priority date of November 9, 2005 and the petition was approved by the Vermont Service Center on September 18, 2006.

[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). However, counsel did not submit any new or additional evidence on appeal but asserted in his appeal brief that the submitted evidence with the petition and in response to the director's request for evidence is sufficient to establish the petitioner's continuing ability to pay the proffered wage from the priority date to the present.

> *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 either 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 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 Form ETA 750, Application for Alien 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 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $40,000 per year. The petition shows that the petitioner was established on May 24, 1995, and currently employs seven workers. The beneficiary did not claim to have worked for the petitioner on the Form ETA 750B. The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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, United States Citizenship and Immigration Services (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).

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[3] 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).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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. The record does not contain the beneficiary's W-2 forms for any relevant years issued by the petitioner. However, counsel submitted Form 1099-MISC issued by [redacted] for 2001 through 2008 as evidence that the petitioner paid the beneficiary as a subcontractor truck driver for the petitioner the full proffered wage for these relevant years and therefore, the petitioner established its ability to pay the proffered wage from the priority date to the present through examination of wages actually paid to the beneficiary. As supporting evidence, counsel also submitted a copy of Assignment of Payment Agreement entered on December 10, 2000 by and between the petitioner and [redacted]

A careful review of these 1099 forms reveals that these 1099 forms were issued by [redacted] identified with a Federal identification number [redacted], which is a different identification number than the FEIN assigned to the petitioner. The submitted Assignment of Payment Agreement provides that [redacted] acquired its own transportation and provides the trucking transportation service for and on behalf of the petitioner according to the FedEx Ground's bills of loading and Title Loading Condition (TLC) Order and receives the payments for trucking transportation services from FedEX Ground directly. There is no provision which can be interpreted that the petitioner hired the beneficiary as a truck driver performing its duties according to the agreement it entered into with FedEx Ground. Further, [redacted], not to the individual beneficiary. The records at the New York State Department of State Division of Corporations official website show that the beneficiary formed [redacted] as a C corporation on January 25, 2005 and has been filing its corporate tax returns on Form 1120 since then; on July 21, 2009 the corporation changed its name to [redacted] Ground issued the 1099 forms to Zinovi Trucking as a corporation using the corporation's [redacted] identification number [redacted] since 2005. Before 2005, the 1099 forms were issued to Zinovi Trucking as a sole proprietorship using its business identification number [redacted] instead of the beneficiary's personal social security number.

Therefore, counsel's assertion that the compensation [redacted] on Form 1099 for 2001 through 2008 should be treated as the petitioner paid the beneficiary for his services as the petitioner's truck driver for these years, and therefore, should be considered as wages actually paid to the beneficiary by the petitioner in determining the petitioner's ability to pay the proffered wage cannot be accepted. The petitioner failed to establish its ability to pay the proffered wage through examination of wages actually paid to the beneficiary and thus, it must demonstrate that it had sufficient net income or net current assets to pay the beneficiary the full proffered wage of $40,000 per year form the priority date to the present.

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); *Taco*

Especial v. Napolitano, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

Counsel submitted a letter dated April 14, 2009 from [redacted], a professional association of certified public accountants in Somerville, New Jersey claiming that the petitioner double depreciated its assets which makes the petitioner's lower than it should be. 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 118. "[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).

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The record contains the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 through 2008. The petitioner's tax returns demonstrate its net income for 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120S stated net income[4] of $13,130.
- In 2002, the Form 1120S stated net income of $15,579.
- In 2003, the Form 1120S stated net income of $15,098.
- In 2004, the Form 1120S stated net income of $31,978.
- In 2005, the Form 1120S stated net income of ($18,540).
- In 2006, the Form 1120S stated net income of ($9,425).
- In 2007, the Form 1120S stated net income of ($26,424).
- In 2008, the Form 1120S stated net income of ($26,125).

[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 (2001-2003) 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 January 24, 2010).

Therefore, for the years 2001 through 2008, the petitioner did not have sufficient net income to pay the proffered wage.

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 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of $22,886.
- In 2002, the Form 1120S stated net current assets of $9,333.
- In 2003, the Form 1120S stated net current assets of $8,510.
- In 2004, the Form 1120S stated net current assets of $9,360.
- In 2005, the Form 1120S stated net current assets of $18,585.
- In 2006, the Form 1120S stated net current assets of $9,324.
- In 2007, the Form 1120S stated net current assets of $23,773.
- In 2008, the Form 1120S stated net current assets of ($657).

Therefore, for the years 2001 through 2008, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 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 requests consideration of officer compensation in 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 U.S. Corporation 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.

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[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.

The documentation presented here indicates that [redacted] holds one hundred percent (100%) of the company's stock. According to the petitioner's line 7 Compensation of officers on Form 1120S, [redacted] elected to pay himself $50,000 in 2001, $60,000 in 2002, $60,000 in 2003, $73,585 in 2004, $73,976 in 2005, $74,742 in 2006, $75,255 in 2007, and $68,962 in 2008 respectively. We note here that the compensation received by the company's sole shareholder during these eight years was not a fixed salary. However, these figures are not supported by the sole shareholder's W-2 forms or by the petitioner's Quarterly Federal Tax Returns (Form 941) for these relevant years 2001 through 2008.

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's shareholder 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, although counsel is not suggesting that USCIS examine the personal assets of the petitioner's shareholder, but, rather, the financial flexibility that the employee-owner has in setting his salaries based on the profitability of his trucking business, the petitioner did not document that the sole shareholder is willing and able to forego a significant percentage of his compensation of officer to pay the beneficiary the proffered wage in the years 2001 through 2008. 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). Furthermore, the record does not contain the sole shareholder's individual income tax returns and statements of his family's living expenses for these relevant years. Without such documentation, the AAO cannot determine whether the sole shareholder would have sufficient funds to support his family after he forgoes a significant percentage of his officer's compensation to pay the proffered wage. Therefore, counsel has not demonstrated that the sole shareholder was willing and also able to forego a significant percentage of his officer's compensation to pay the beneficiary the proffered wage in 2001 through 2008 and thus the petitioner has not established its ability to pay the proffered wage from 2001 to the present through the examination of officer's compensation.

As counsel asserts on appeal, USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). 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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner did not have sufficient net income or net current assets to pay the proffered wage for any single year. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that any of the eight years under consideration were uncharacteristically unprofitable years for the petitioner. While the officer's compensation can be considered in determining the petitioner's ability to pay the proffered wage in this matter, the record does not contain documentation that the sole shareholder is willing and able to forego a significant percentage of his nominal officer's compensation to pay the beneficiary the proffered wage for the years 2001 through 2008. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date to the present.

Counsel's assertions on appeal cannot overcome the ground of denial in the director's April 28, 2009 decision. The petitioner failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date and continues to the present. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

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 not been met.

ORDER: The appeal is dismissed.