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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

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 29 2011

IN RE: Petitioner:
Beneficiary: [redacted]

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 preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a care home for the developmentally disabled. It seeks to employ the beneficiary permanently in the United States as a member of the direct care staff 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 had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On July 15, 2010, the AAO dismissed the subsequent appeal affirming the director's denial. The AAO specifically reviewed the cancelled checks showing payments to the beneficiary by the petitioner in the amount of $22,550 in 2007, and the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation (Form 1120S), for 2001 through 2007. The AAO determined that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary and its net income or net current assets for years 2001 through 2006.

The record shows that the motion is properly filed and timely and provides the petitioner's tax returns for 2008 and 2009, and bank statements and materials for the petitioner's shareholder's bank accounts and real properties as new evidence to establish the petitioner's ability to pay the proffered wage. The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. The instant motion is granted and the AAO will consider it as the motion to reopen. 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.

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:

> *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.

As noted in the AAO's prior decision, 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 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 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 $11.18 per hour ($23,254.40 per year). The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. The AAO's prior analysis of the petitioner's net income, net current assets, wages paid to the beneficiary and the overall magnitude of the petitioner's business activities is affirmed. On motion, the issue is whether the petitioner's tax returns for 2008 and 2009 and the shareholder's assets overcome the AAO's prior decision. The AAO notes at the outset that the petitioner has still failed to submit regulatory-prescribed evidence to establish its ability to pay the proffered wage for 2001 through 2006, and documentary evidence showing that the petitioner paid the beneficiary any compensation in 2008 and 2009 even after receiving notice of that deficiency in the AAO's prior decision, and this remains an impediment to a full and conclusive analysis of the petitioner's ability to pay.

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, the United States Citizenship and Immigration Services (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).

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).

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.[1] 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.

On motion, counsel submitted the petitioner's tax returns for 2008 and 2009. The petitioner's tax returns demonstrate its net income and net current assets for 208 and 2009, as shown in the table below.

- In 2008, the Form 1120S stated net income[2] of $38,022 and net current assets of $31,750.

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[1] 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.

[2] Where an S corporation's income is exclusively from a trade or business, USCIS considers net

- In 2009, the Form 1120S stated net income of $32,189[3] and net current assets of $63,852.

Therefore, for the year of 2008, it appears that the petitioner had sufficient net income to pay the instant beneficiary the proffered wage and for the year of 2009, although the petitioner's net income is not clear because counsel failed to submit the Schedule K of the tax return for this year, the petitioner had sufficient net current assets to pay the instant beneficiary the proffered wage.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

USCIS records indicate that the petitioner had at least one additional Immigrant Petition for Alien Worker (Form I-140) pending with USCIS from 2007 to 2011.[4] The record does not contain any evidence showing that the petitioner paid any compensation to the beneficiary of the pending petition during the period from 2007 to 2009. Therefore, the petitioner must also show that it had sufficient net income or net current assets to pay two proffered wages for 2007 through 2009. *See* 8 C.F.R. § 204.5(g)(2). However, while the petitioner had sufficient net

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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 18 (2008-2009) of Schedule K. *See* Instructions for Form 1120S, 2009, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 1, 20111) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2009, the petitioner's net income is found on Schedule K of its tax return.

[3] The figure is from line 21 of page one of the petitioner's IRS Form 1120S. The petitioner had additional deductions on its Schedule K for 2007 and 2009. However, it is not clear whether the petitioner had any additional income, credits, deductions or other adjustments shown on its Schedule K for 2008 because counsel did not submit the Schedule K for 2008.

[4] USCIS records show that the petitioner filed Form I-140 immigrant petition LIN-08-055-52291 for Sablan in 2007 and a subsequent appeal from the denial of the petition was dismissed by the AAO in February 2011. The duration the petitioner was responsible to establish its ability to pay this beneficiary the proffered wage would be in fact much longer if we account it from the priority date.

income of $11,584 or net current assets of $14,337 to pay the instant beneficiary the difference of $704.40 between wages actually paid and the proffered wage in 2007, neither the net income nor net current assets of the petitioner in 2007 were sufficient to establish the ability to pay the beneficiary of the pending petition the proffered wage[5] for 2007. As previously discussed in this decision, the petitioner did not have sufficient net income or net current assets to pay two proffered wages in 2008. However, the petitioner's net current assets appear to be sufficient to pay two proffered wages in 2009.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001 to the present except for 2009, the petitioner had not established that it had the continuing ability to pay the beneficiaries the proffered wages through an examination of wages paid to the beneficiary, or its net income or net current assets.

On motion, counsel contends that the AAO should have given a favorable consideration of the personal assets of the sole and only owner of the S corporation, and submits materials regarding the shareholder's personal assets including her bank accounts and real properties. The record shows that the petitioning business in the instant matter is structured as an S corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders (even if there is only one shareholder[6]), the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Contrary to counsel's assertion, USCIS 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 the petitioner's shareholder cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel's assertions and evidence submitted on motion cannot overcome the grounds of denial in the director's March 3, 2008 decision and the AAO's July 15, 2010 decision. The petitioner failed to establish that it had the continuing ability to pay all proffered wages from 2001 through the present. Therefore, the petition cannot be approved.

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[5] Assuming the petitioner offered the beneficiary of the pending petition the proffered wage at the same level with the instant beneficiary.

[6] In the instant matter, the petitioner in fact has two shareholders, and each of them owns fifty percent (50%) of shares of the corporation. The AAO also notes that shareholders appear to be husband and wife by using a same last name and residential address.

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 granted and the decision of the AAO dated July 15, 2010 is affirmed. The petition is denied.