



U.S. Citizenship  
and Immigration  
Services

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FILE:

[REDACTED]  
LIN 07 153 52723

Office: NEBRASKA SERVICE CENTER

Date: **MAY 19 2008**

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

*Mari Johnson*

Z Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a real estate firm. It seeks to employ the beneficiary permanently in the United States as a market research analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is eligible for classification under section 203(b)(2) of the Act, that the beneficiary meets the requirements of the alien employment certification or that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner's president, \_\_\_\_\_ submits a brief and additional evidence.<sup>1</sup> The petitioner also requests oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b).

\_\_\_\_\_ lists seven reasons why oral argument should be granted. The first five reasons are all vague assertions that the petitioner will argue why the evidence submitted was sufficient. Mr. \_\_\_\_\_ does not explain in these first five "reasons" why the petitioner's assertions in this regard cannot adequately be addressed in writing. \_\_\_\_\_ also asserts that he will present a bank check at the time of oral argument that would cover the proffered wage. He does not explain how presenting such a check will establish *the petitioner's* ability to pay the proffered wage *as of the priority date* or why the petitioner cannot submit a copy of such a check in support of a written brief. Finally, \_\_\_\_\_ asserts that the beneficiary will appear at oral argument to demonstrate her "talent, interpersonal skills, persuasiveness, professional appearance and negotiating skills." Mr. \_\_\_\_\_ is not persuasive. As will be discussed in more detail below, determinations of exceptional ability are not made based on a subjective evaluation of the alien's skills, but on whether the alien meets at least three of the objective regulatory criteria listed at 8 C.F.R. § 204.5(k)(3)(ii). In this instance, \_\_\_\_\_ identified no unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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<sup>1</sup> The petitioner, as reflected on the Form I-140 petition, is a corporation, not an individual. The petitioner's president has acted on behalf of the corporation in this matter. As will be discussed below in the body of this decision, it is a well-recognized principle that a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Commr. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Commr. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958).

For the reasons discussed below, while the petitioner has now demonstrated that the beneficiary possesses the associate's degree required for the job as certified by (DOL), the petitioner has not overcome the director's other concerns.

**Eligibility as a Member of the Professions Holding an Advanced Degree or Alien of Exceptional Ability**

The petitioner indicated on the Form I-140 that it was seeking to classify the beneficiary under section 203(b)(2) of the Act as a member of the professions holding an advanced degree or alien of exceptional ability. The Form I-140 does not allow for the petitioner to specify which of the two sub-classifications it is pursuing. The petitioner's cover letter does not explicitly specify whether the petitioner seeks to classify the beneficiary as a member of the holding an advanced degree or an alien of exceptional ability, although the petitioner's president, asserts that he "immediately recognized the exceptional ability which has been demonstrated" by the beneficiary. The petitioner did not explain how the beneficiary meets at least three of the regulatory criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii) although the list of supporting documents does reference some of the regulatory criteria.

The director concluded that "no representations have been made that the beneficiary has exceptional ability" and that the job certified by DOL does not require a member of the professions holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(providing that the job itself must require a member of the professions holding an advanced degree or an alien of exceptional ability).

On appeal, the petitioner asserts that the evidence submitted was "in conformance with the initial evidence required for a person of exceptional ability." The petitioner references a letter attesting to the beneficiary's remuneration and letters that affirm the beneficiary's "exceptional ability." The petitioner does not specifically address or even acknowledge the regulatory criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii). We will consider the evidence submitted under those mandatory criteria.

The first issue to resolve is the title of the job actually being offered. The petition being adjudicated is the Form I-140 petition filed with Citizenship and Immigration Services (CIS). On this form, Part 6, the petitioner indicated that the proposed employment is "Market Research Analyst" with "SOC" Code 19-3021. This is the same job title and O\*NET code listed on Part H, lines 2 and 3 of the alien employment certification.

We acknowledge, however, that on Part H, line 11 of the alien employment certification, which requests a listing of the job duties, the petitioner listed market research analysis duties and then stated: "In the alternative, willing to accept an administrative assistant." While we do not have the jurisdiction to readjudicate the alien employment certification, DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). It is within our jurisdiction to determine whether or not the alien is qualified for a specific immigrant classification

or even the job offered. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The petitioner points to no statute or regulation, and we know of none, that would allow an employer to classify a beneficiary as an alien of exceptional ability as defined at 8 C.F.R. § 204.5(k)(3)(ii) using evidence relating to more than one occupation. In determining whether an alien is an alien of exceptional ability, we must consider the evidence relating to the occupation identified on the Form I-140 petition, the form falling under our jurisdiction, which must match the job opportunity identified on Part F, lines 2 and 3 of the alien employment certification. 20 C.F.R. § 656.30(c)(2). In this matter, the job opportunity listed on the Form I-140 and Part F, lines 2 and 3 on the ETA Form 9089, is market research analyst, O\*NET Code 19-3021.00.

The petitioner has not cited any regulation or DOL policy that would shed light on the legal significance of the “alternative” occupation listed on Part H, line 11, a line designated for the job duties, not an “alternative” occupation. As stated above, the regulation at 20 C.F.R. § 656.30(c)(2) provides that a labor certification for a specific job offer is valid only for the particular job opportunity. In the absence of additional legal guidance, we must presume that the particular job opportunity being certified is the one listed in Part F, lines 2 and 3, the only section that is designated for listing the job title and O\*NET Code. We note that “market research analyst” and code 19-3021.00 are the occupation and O\*NET Code listed on DOL’s cover letter advising the petitioner that the alien employment certification had been approved. Notably, administrative assistants fall under an entirely separate O\*NET Code, 43-6011.00.

In light of the above, the petitioner must demonstrate that the beneficiary is an alien of exceptional ability in the field of market research analysis, a position she had never held as of the priority date.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered.” Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate “a degree of expertise significantly above that ordinarily encountered.” The criteria follow.

*An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the

petitioner's degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

Moreover, the petitioner must demonstrate that the beneficiary was an alien of exceptional ability as of the priority date. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). In this matter, the priority date is September 22, 2006, the date the alien employment certification was accepted for processing by DOL. See 8 C.F.R. § 204.5(d). The beneficiary received her Bachelor of Business Administration from The Bernard M. Baruch College of the City University of New York in February 2007. As the beneficiary did not have a baccalaureate as of the priority date, we cannot consider this degree.

On appeal, counsel submits evidence that the beneficiary received an Associate in Science degree in Business-Business Administration from the State University of New York Rockland Community College in December 2003. We can consider this degree.

On the ETA Form 9089, the petitioner indicated that the proffered position is "Market Research Analyst," O\*NET Code 19-3021.00. The petitioner indicated that an associate's degree was required for the position. Moreover, according to DOL's Occupational Outlook Handbook 176 (2006-2007 ed.) under the heading "Market and Survey Researchers," which includes O\*NET Code 19.3021.00, a "bachelor's degree is the minimum educational requirement for many market and survey research jobs." The "details" page for O\*NET Code 19-3021.00 on the O\*NET website, <http://online.onetcenter.org/link/details/19-3021.00>, indicates that 82 percent of individuals in this occupation have a bachelor's degree or higher.

As of the priority date in this matter, the beneficiary only had an associate's degree. As 82 percent of individuals in the proffered position have a bachelor's degree or above, the petitioner has not demonstrated that the beneficiary's associate's degree is indicative of a degree of expertise significantly above that ordinarily encountered in the field. Thus, the petitioner has not established that the beneficiary meets this criterion.

*Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought*

On the ETA Form 9089, Part J, the petitioner indicated that the beneficiary had worked as a sales assistant and administrative assistant. The record lacks evidence that the beneficiary has 10 years of full-time experience as a market research analyst, the occupation for which she is being sought as required under 8 C.F.R. § 204.5(k)(3)(ii)(B).

*A license to practice the profession or certification for a particular profession or occupation*

Section 203(b)(2)(C) of the Act provides that the possession of a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the beneficiary's license is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The petitioner submitted evidence that the beneficiary is a “duly licensed real estate sales person and is affiliated with” the petitioning company. The petitioner also submitted a certificate from the American Marketing Association confirming that the beneficiary “has successfully completed requirements for the Professional Certified Marketer Program.”

The beneficiary’s real estate sales person license is not in the field of marketing research analysis. Thus, it cannot demonstrate her exceptional ability in the field of marketing research analysis. In fact, the license, issued to the beneficiary as an affiliate of the petitioner, raises the concern that the petitioner no longer intends to employ her as a market research analyst but as a sales associate. The regulation at 20 C.F.R. § 656.30(c)(2) provides that an alien employment certification for a specific job offer “is valid only for the particular job opportunity.” Finally, the beneficiary’s real estate license is dated March 5, 2007, after the priority date in this matter. Thus, it is not evidence of eligibility as of the priority date, the date as of which the petitioner must establish the beneficiary’s eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49.

The record contains no evidence regarding the significance of the beneficiary’s Professional Certified Marketer Program certification from the American Marketing Association. Moreover, the certificate is undated. Thus, the petitioner has not established that the beneficiary received this certification prior to the priority date in this matter.

In light of the above, the petitioner has not demonstrated that the beneficiary met this criterion as of the priority date in this matter.

*Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability*

██████████, founder of Coritsidis and Lambros, PLLC, advises in a letter that the beneficiary is working for that firm as an administrative assistant. ██████████ further asserts that the beneficiary’s “abilities have led to remuneration for her services, which reflects her exceptional ability.”

The letter from ██████████ cannot serve to meet this criterion. First, ██████████ discusses the beneficiary’s remuneration as an administrative assistant. Such remuneration cannot demonstrate exceptional ability as a market research analyst. Second, the petitioner did not provide any objective evidence to support ██████████’ assertion. The regulation at 8 C.F.R. § 103.2(b)(2) requires the submission of primary evidence unless such evidence is unavailable or does not exist. Primary evidence of the beneficiary’s remuneration would be in the form of a Form W-2 Wage and Tax Statement, quarterly employer tax returns or pay statements. The petitioner did not submit such evidence. In fact, ██████████ does not even provide the beneficiary’s exact remuneration. Third, the petitioner has not submitted any evidence of average and high-end remuneration nationally for market research analysts for comparison purposes. Thus, even if the petitioner had established the beneficiary’s exact remuneration, without data showing the average and high-end remuneration for market research analysts nationally, we would not be able to determine whether the beneficiary’s

remuneration is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the field of market research analysis.

In light of the above, [REDACTED] unsupported assertion that the beneficiary's remuneration is indicative of exceptional ability is insufficient.

*Evidence of membership in professional associations*

The petitioner submitted an undated letter from the American Marketing Association thanking the beneficiary for joining the association, which boasts 38,000 members. First, the petitioner has not demonstrated that the beneficiary was a member of the association as of the priority date in this matter, the date as of which the petitioner must establish the beneficiary's eligibility. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Moreover, the evidence submitted to meet a given criterion must be indicative of or consistent with exceptional ability in the proffered position. The record contains no evidence that the association limits membership to those who demonstrate achievements consistent with a degree of expertise significantly above that ordinarily encountered in the field of marketing research analysis.

*Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations*

The petitioner submitted a "Certificate of Merit" from the New York State Assembly issued to the beneficiary in May 2003. The record does not establish that this certificate was issued to recognize a significant contribution to the field of marketing research analysis, an occupation in which the beneficiary had never engaged as of the date of filing. The petitioner also submitted evidence that the beneficiary received student scholarships at Rockland Community College. The petitioner has not established how a scholarship, based on academic achievements, can be considered recognition for significant contributions to a field the student has not yet entered.

Finally, the petitioner initially submitted letters from [REDACTED] the Honorable Judge Larry Stephen and the beneficiary's former professor, [REDACTED] who all attest generally to the beneficiary's exceptional ability. On appeal, the petitioner submits a letter from [REDACTED] President and Chief Operating Office of the [REDACTED] Realty Group, who asserts that he has done business with the law firm employing the beneficiary as an administrative assistant and that the beneficiary has demonstrated exceptional ability in that role.

Reference letters do not constitute the type of formal recognition contemplated by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F). Moreover, none of the letters identify a specific contribution by the beneficiary to the field of market research analysis or explain how this contribution has influenced the field. Simply performing well as a student or performing the job responsibilities of an administrative assistant in a competent and professional manner is not a significant contribution to the field of market research analysis.

In light of the above, the petitioner has not demonstrated that the beneficiary is an alien of exceptional ability.

Beyond the decision of the director, the petitioner has not demonstrated that the job requires an alien of exceptional ability as required under 8 C.F.R. § 204.5(k)(4). For example, the job requires only an associate's degree, does not require any experience and does not require a specific license. Moreover, the petitioner is only offering \$213 over the prevailing wage, suggesting that the job will not be compensated at a level indicative of exceptional ability.

### **Ability to Pay the Proffered Wage**

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 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, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, as stated above, the ETA Form 9089 was accepted for processing on September 22, 2006. The proffered wage as stated on the ETA Form 9089 is \$55,000 annually. On Part K of the ETA Form 9089, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date on November 18, 1997, a gross annual income of \$97,250, a net income of \$83,293 and one employee. In support of the petition, the petitioner submitted its 2006 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation.

Contrary to the claims made on the Form I-140 petition, the tax return submitted initially reflects the following information:

Gross income	\$15,000
Net income	(\$643)
Total Assets	\$125,000
Current Assets	Not provided
Current Liabilities	Not provided
Net current assets	Unknown

In an accompanying letter, [REDACTED] the petitioner's president, asserted that the petitioner has no liabilities and the \$125,000 in total assets listed on the tax return constitute the company's net current assets. [REDACTED] provides no explanation for the significant discrepancy between the gross and net income listed on the Form I-140, filed in May 2007, and the gross and net loss listed on the 2006 tax return. We note that [REDACTED] signed both the Form I-140 and the tax return.

In addition, the petitioner submitted a bank letter dated April 26, 2007 asserting that the petitioner maintained an account with a balance of \$116,000 and financial statements for accounts owned by [REDACTED] personally.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition.

On appeal, the petitioner asserts that the director erred in determining that the petitioner's tax returns reflected no current assets. The petitioner notes that the tax return lists \$125,000 in total assets and asserts that the petitioner was not required to complete Schedule L because the petitioner's total receipts and assets are less than \$250,000. The petitioner further asserts that the director should have considered the petitioner's bank statement. The petitioner further asserts that the director should have considered the sole shareholder's assets because, under New York law, the ten majority shareholders are liable for the wages of the employees of a closed corporation. The petitioner does not provide a citation for this New York law, but we have confirmed this section of law, Bus. Corp. § 630(a).

The petitioner submits what [REDACTED] characterizes as an "amended federal income tax return which has been duly filed with the Internal Revenue Service." The new Form 1120S is checked as an amended return but the record contains no evidence that this amended form was actually filed with the IRS. Schedule L reflects \$125,000 in cash, no additional current assets, no current liabilities, and \$125,543 in loans from shareholders. This information directly contracts the initial claim by [REDACTED] that the petitioner had "no liabilities." Moreover, the petitioner listed \$36 in depreciation on line 14 of the IRS Form 1120S, suggesting that the petitioner has depreciable assets. The amended Schedule L does not include any depreciable assets. Finally, as stated above, the petitioner indicated on the Form I-140 petition that its annual gross income was \$97,250 and its net annual income was \$83,293, numbers that are totally inconsistent with the petitioner's 2006 tax return, the only tax return submitted and the most recent that would have been available when the petition was completed and filed.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The petitioner has not resolved the inconsistencies within the 2006 tax return and between the tax return and claims advanced by the petitioner. Therefore, the 2006 tax returns are not credible documents.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), CIS will first examine whether the petitioner employed and paid the beneficiary during the relevant 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, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2006.

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. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). See also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. 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.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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

current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2006. In 2006, the petitioner shows a gross income of only \$15,000 and a net loss. The amended tax return, as stated above, now purports to document \$125,000 in net current assets. As discussed above, however, this document is not credible. Moreover, even if we accepted that the petitioner had \$125,000 in cash as of December 31, 2006 and no current liabilities, the entire amount of cash derives from a loan from the sole shareholder. As noted above, the petitioner was established in 1987 and is not a start-up company. The fact that it shows very minimal gross income and that its only assets derive from a shareholder loan is not indicative of a financially stable company that can demonstrate the ability to pay the proffered wage as of the priority date.

The petitioner's reliance on the balance in the petitioner's bank account is misplaced. 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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 cash specified on Schedule L considered above in determining the petitioner's net current assets.

Finally, the petitioner's reliance on the assets of its sole shareholder is not persuasive. It is a well-recognized principle that a corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Commr. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Commr. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003).

As stated above, the petitioner appears to rely on Bus. Corp. Law § 630(a) for the proposition that the petitioner's sole shareholder is legally obligated to pay the proffered wage. This provision provides:

The ten largest shareholders . . . shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation. Before such laborer, servant or employee shall charge such shareholder for such services, he shall give notice in writing to such shareholder that he intends to hold him liable under

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expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

**this section.** Such notice shall be given within one hundred and eighty days after termination of such services. . . . An action to enforce such liability shall be commenced within ninety days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for such services.

This section of the Business Corporation law, however, “was enacted as a safeguard to laborers or employees of corporation which *upon insolvency of the corporation* would leave such working people without recourse and without payment for their work, labor and services.” *See Lindsey v. Winkler*, 52 Misc. 2d 1037, 1038, 277 N.Y.S. 2d 768, 770 (D.C. NY 2<sup>nd</sup> Dist. 1967). We are not persuaded that this provision obligates the petitioner’s shareholder to pay the full proffered wage during the beneficiary’s period of employment as the petitioner is obligated to do. Rather, the petitioner remains primarily liable for the beneficiary’s wages. Only if the beneficiary is terminated does the petitioner’s shareholder become liable for any unpaid back wages and then only if the beneficiary first obtains an actual judgment against the petitioner that is then unsatisfied.

Even if we were to consider the sole shareholder’s ability to pay the proffered wage, and we emphasize that the petitioner has not demonstrated that it is appropriate for us to do so, when considering assets, it is necessary to weigh those assets against liabilities. Even when considering the ability of a sole proprietor to pay the proffered wage, we consider the sole proprietor’s liabilities and expenses. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). The record contains no evidence of the expenses and liabilities of the petitioner’s sole shareholder.

Ultimately, it is the petitioner’s burden to demonstrate that it is making a “realistic job offer.” *Matter of Great Wall*, 16 I. & N. Dec. 142, 144 (Regl. Commr. 1977). The record contains no evidence that the petitioner’s offer to pay the beneficiary \$55,000 is realistic. The only tax return provided shows gross receipts of only \$15,000 and a net loss. The petitioner does not currently pay any wages to any employees. The petitioner’s only asset is cash loaned from its shareholder. The record simply contains no evidence that the petitioner is a financially viable employer that has ever or will ever be able to generate sufficient income to cover even a small portion of the proffered wage. The fact that the petitioner’s shareholder may be, independent of his income from the petitioner, a successful lawyer and have personal assets sufficient to pay the proffered wage is not persuasive evidence that the job offer itself, made by the petitioner, is realistic.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2006 or subsequently. Therefore, the petitioner has not established that it 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.