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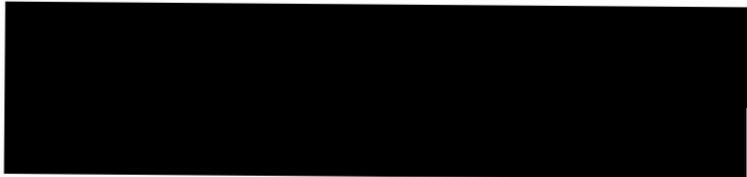


FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **SEP 29 2008**  
LIN-06-133-52044

IN RE: Petitioner: [Redacted]  
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:



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.

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 computer software developer. It seeks to employ the beneficiary permanently in the United States as a computer software engineer 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, ETA Form 9089. The ETA Form 9089 lists the same company name as the petitioner and the worksite address listed on the ETA Form 9089 is the address listed for the petitioner on the petition. The ETA Form 9089 and Form I-140 petition, however, list different Federal Employer Identification Numbers (FEIN). Moreover, the FEIN listed on the petition, [REDACTED] is not the FEIN of the petitioner's holding company, which lists the FEIN [REDACTED] on its 2005 tax return. Significantly, the holding company's consolidated 2005 tax return lists yet a third FEIN for the petitioner, [REDACTED]. The FEIN listed on the ETA Form [REDACTED] matches a Form W-2 in the record; the FEIN listed on the petition does not match any document in the record. While not raised by the director, the record does not resolve the three FEINs associated with the petitioner.

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.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the petitioner has not overcome the director's decision with evidence that the petitioner, as opposed to its holding company, is capable of paying 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, the ETA Form 9089 was accepted for processing on November 21, 2005. The proffered wage as stated on the ETA Form 9089 is \$78,583 annually. On the ETA Form 9089, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 4, 2005.

On the petition, the petitioner claimed to have an establishment date in 2004, a gross annual income of \$1,217,281.08, a net income of \$327,942.66 and 16 employees. In support of the petition, the petitioner submitted no evidence of its ability to pay the proffered wage.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 13, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns filed by Instant Software, Inc. for 2005. The tax return, marked as a consolidated return for Instant Software, Inc. and its subsidiaries, reflects the following information:

	Instant Software	Petitioner <sup>1</sup>
Net income	(\$88,954) <sup>*</sup>	(\$379,709) <sup>‡</sup>
Compensation of Officers	\$236,165 <sup>*</sup>	\$0 <sup>‡</sup>
Salaries and Wages	\$919,641 <sup>*</sup>	\$0 <sup>‡</sup>
Payroll Expense	N/A <sup>†</sup>	\$894,708 <sup>†</sup>
Current Assets	\$395,825 <sup>**</sup>	\$93,396 <sup>‡‡</sup>
Current Liabilities	\$821,004 <sup>**</sup>	\$818,414 <sup>‡‡</sup>
Net current assets	(\$425,179)	(\$725,018)

\* From IRS Form 1120, page 1 (lines 28, 12 and 13).

\*\* From IRS Form 1120, Schedule L (lines 1-6 and 16-18).

† From Statement 3 for Form 1120, Page 1, Line 26 (other deductions).

‡ From Consolidated Report, Form 1120, Page 1.

‡‡ From Consolidated Report, Form 1120, Schedule L End of Tax Year.

In addition, the petitioner submitted the 2005 Form W-2 issued by the petitioner to the beneficiary reflecting wages of only \$52,084.47, \$26,497.93 less than the proffered wage. While this Form W-2 does not represent a full year of wages since the beneficiary only began working for the petitioner in April of that year, it is still the petitioner's burden to demonstrate that it had the ability to pay the full proffered wage as of the priority date in 2005. In addition, the petitioner submitted financial statements for the first six months of 2006. These statements are not audited and are for the holding company, Instant Software. The statements do not break down the finances of the individual

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<sup>1</sup> These figures are for the petitioner but indicate the FEIN 20-2021732, which is not listed on the Form ETA 9089 or the petition. If this entity is not the petitioner, however, than the holding company's information also cannot be considered because it is the holding company of a company with the same name as the petitioner but no established relationship to the petitioner.

subsidiaries other than to identify certain bank accounts as belonging to specific subsidiaries. Finally, the petitioner submitted payroll and pay stub documentation reflecting that the holding company had paid the beneficiary year to date wages of \$48,666.64 as of August 31, 2006. The monthly proffered wage, \$78,583, divided by 12 is approximately \$6,548.58. Thus, the proffered wage for the first eight months of 2006 would be \$52,388.64. As such, the petitioner was not paying the full proffered wage as of August 2006.

The director, using the holding company's net income and net current assets, 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, on December 30, 2006, denied the petition.

On appeal, counsel notes the holding company's gross sales in 2005 and the high officer compensation paid to a single officer. Counsel further asserts that depreciation should have been "added back" to the holding company's net income. Counsel questions how the director calculated the holding company's net current assets, asserting that the consolidated figures on Schedules M-1 and M-2 are "misleading." Specifically, counsel refers to the figure -\$436,974, which, according to Schedule M-2 and the consolidated report for that schedule, was the petitioner's unappropriated retained earnings. Counsel does not explain why this figure should have been used as the petitioner's net current assets, which is calculated from Schedule L as indicated above and as will be explained in more detail below.

The petitioner submits a letter from [REDACTED] Executive Vice President of the holding company, asserting that in 2005, the petitioner directly paid its 17 employees. [REDACTED] asserts that in January 2006, "all accounting and payroll *functions* have been consolidated under the parent company." (Emphasis added.) It is not clear from this letter that the holding company has any obligation to meet the subsidiaries' payroll obligations. Finally, the petitioner submits a letter from [REDACTED] the certified public accountant who prepared the holding company's 2005 tax return. [REDACTED] asserts that the director should have added back depreciation and amortization deductions and considered the company's ability to borrow "which has apparently been demonstrated." [REDACTED] further asserts that the director should have considered the company's net worth, which [REDACTED] asserts is "positive" as well as the net worth of its officers. Finally, [REDACTED] asserts that using the present to project into the future, the petitioner has the ability to pay the proffered wage which is "somewhat small in relation to the assets of the group."

The unaudited financial statements for the first six months of 2006 are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (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 2005 or 2006. Rather, the petitioner must establish its ability to pay the \$26,497.93 difference between the proffered wage and wages paid in 2005.

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. Contrary to the assertions of counsel and [REDACTED] on appeal, we will consider net income 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, which would be taken into account if we evaluated total net worth as urged by [REDACTED] on appeal, 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 current 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 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.

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 the full proffered wage. In 2005, both the petitioner and the holding company show a net loss and negative net current assets. Thus, the petitioner has not demonstrated its ability to pay the proffered wage from its own net income or net current assets. In addition, the petitioner has not demonstrated that the holding company has a legal obligation to pay the salary obligations of its subsidiaries. As noted above, the petitioner incurred \$894,708 in payroll expenses in 2005, which is a separate deduction from the \$919,641 in salaries paid by the holding company that year. 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). Regardless, the holding company also shows a net loss and negative net current assets for 2005.

As stated above, counsel and \_\_\_\_\_ assert that the director should have considered officer compensation or the officer's net worth. A corporation, however, is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). As stated above, CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant*, 2003 WL 22203713 at \*3. Moreover, wages paid are no longer available to pay the proffered wage. There may be instances where officer compensation represents a discretionary distribution of the company's profits. In the case before us, however, the petitioner did not pay any officer compensation. Rather, the holding company did. The record contains no confirmation from the officer who received this compensation that he would forgo any of his compensation to pay the proffered wage of an employee of his employer's subsidiary.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2005 or subsequently during 2006. 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.