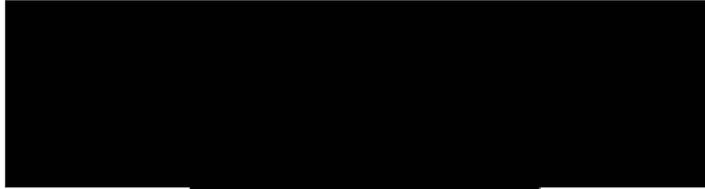




U.S. Citizenship
and Immigration
Services

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Office: TEXAS SERVICE CENTER Date: **DEC 14 2006**

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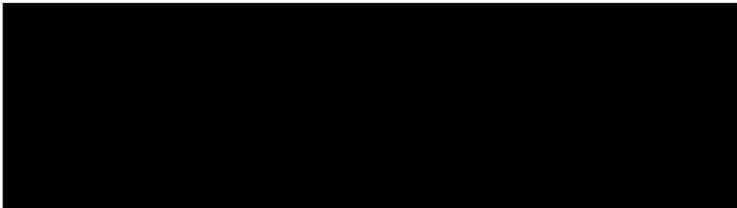
In re:

Petitioner:
Beneficiary



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and graphics design company and seeks to employ the beneficiary permanently in the United States as a graphic designer. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's July 6, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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

¹ 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 the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on June 21, 2002. The proffered wage as stated on Form ETA 750 for the position of graphic designer is \$41,000 per year based on a 40 hour work week.² The labor certification was approved on May 30, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on August 31, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: March 26, 1996; gross annual income: \$72,857; net annual income: \$14,758; and current number of employees: 4.

On February 12, 2005, the director issued a Request for Additional Evidence ("RFE"), requesting that the petitioner submit additional evidence, specifically: related to the petitioner's ability to pay, including the petitioner's federal tax returns, annual reports, or audited financial statements for the years 2004, and 2005, as well as the beneficiary's W-2 Forms. Counsel responded to the RFE on the petitioner's behalf and provided that the petitioner was "in the process of being bought out by another company." Further, counsel indicated that the new owners were out of the country and would shortly be able to submit financial information.

On July 6, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the beneficiary on April 16, 2002, the beneficiary listed that he has been employed with the petitioner since January 1999 to the present (April 16, 2002, the date of signature). The petitioner did not initially submit any evidence of wage payment. On appeal, the petitioner provided the following W-2 Forms:

<u>Year</u>	<u>Wage Payment</u>
2004	\$20,462.90
2003	\$19,259.15
2002	\$15,867.88

While the W-2 Forms exhibit partial wage payment to the beneficiary, the petitioner cannot establish its ability to pay the beneficiary the proffered wage based on prior wage payment alone.

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, Citizenship & Immigration Services ("CIS") will next examine the net income figure reflected on the petitioner's federal income tax return. 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).

² The petitioner initially listed \$38,000 per year, but the wage was changed to \$41,000 prior to DOL certification.

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.

The petitioner is structured as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). Line 21 shows the following income:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	-\$17,291
2003	-\$15,266
2002	\$14,758

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the forgoing years, even if the wages paid to the beneficiary were added to the beneficiary's net income.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	\$21,851
2003	\$35,058
2002	\$21,851

Following this analysis, the petitioner's federal tax returns shows that the petitioner would lack the ability to pay the proffered wage in all of the above years under the net current asset test as well. However, if we were to add the wages paid to the beneficiary to the net current assets, the petitioner would be able to demonstrate its ability to pay the proffered wage in 2003 and 2004, but not in the year 2002. While the amount the

³According 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.

petitioner would be deficient in wages after adding together the net current assets and prior wages paid would not be an extremely large amount, we note that the petitioner's business would not allow us to conclude that it has the ability to pay the proffered wage based on other factors. The petitioner's tax returns do not demonstrate significant gross receipts (2004: \$67,913; 2003: \$63,601; 2002: \$72,857), or consistent annual increases in gross receipts. Further, the tax returns do not demonstrate significant wages paid, or other factors to allow us to conclude that the petitioner can pay the proffered wage. Additionally, counsel raised the issue that a "new company" was in the process of buying the petitioner. For the beneficiary to be able to continue processing based on the initially approved labor certification for the petitioner, ChristAm Computer Corporation, the new owners would need to demonstrate that the new business is a successor-in-interest company to the initial petitioner.

On appeal, counsel submitted the beneficiary's W-2 statements, along with 2002, 2003, and 2004 tax returns for ChristAm Corporation, and 2002, 2003, and 2004 tax returns for the new owners. Counsel provides that the petitioner's prior owner returned to India and that counsel had requested more time to respond to the RFE in order to provide financial documentation for the new owners, but the director denied the petition.

Counsel provides a Stock Purchase Agreement and contends that the new owners have established successorship-in-interest to the prior company, which would allow the beneficiary to continue processing based on the previously filed labor certification. The Stock Purchase Agreement provides, "for and in consideration of Ten Dollars and no Cents (\$10.00) and other good and valuable consideration, [redacted] hereby agrees to sell, assign, transfer, and set over to [redacted] and [redacted] husband and wife of [redacted] Oklahoma, their executors, administrators, and assigns, with full power to transfer same on the books of the Corporation, all the shares of stock of CHRISTAM COMPUTER CORPORATION."

Counsel additionally submitted a Resolution of Board of Directors of ChristAm Computer Corporation. The Resolution approves the Stock Purchase Agreement. The Resolution further provides that the Walkers are authorized to take all actions necessary to fulfill the company's obligations under the Stock Purchase Agreement, and that the [redacted] are authorized "execute and deliver any and all agreements, certificates, instruments, and documents and to do or perform . . . all such acts and things as may be necessary or appropriate to carry out the intent and accomplish the purposes of the foregoing resolutions."

To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). *See also* letter dated October 17, 2001, from [redacted] Director, Business and Trade Services, to [redacted] which refers to Policy Memorandum from James A. Puleo, Acting Exec. Assoc. Comm., *reprinted in 70 Interpreter Releases* 1692-93 (Dec. 20, 1993)(Attachment I)) that a "new employing entity that is a successor in interest must file a new I-140 petition and submit documentation to establish that it has assumed the rights, duties, obligations and assets of the original employer and that it continues to operate the same type of business."

We note that the 2004 tax return shows the [redacted] "total assets" as \$41,242. Based on the \$10.00 stock purchase, it is not clear that the petitioner assumed all the company's assets, rights, duties, and obligations, and that the new entity continues to do business. The new employer did not submit documentation to show that it had assumed all of the rights, duties, and obligations. The Resolutions merely refer to the Walkers ability to carry out the resolutions and the Stock Purchase Agreement, which allows for purchasing the stock.

Further, counsel provides the new owner's Forms 1040 for the years 2002, 2003, and 2004. ChristAM Corporation is structured as an S corporation, and therefore, personal assets of a shareholder would not be considered. In the case of a corporation, CIS may not "pierce the corporate veil" and look to the assets of the owner to satisfy the petitioner'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. Therefore, while the petitioner's shareholders may have a reasonable income, such income or assets are not relevant in the case at hand. Assets of the shareholders (or of other enterprises or corporations) cannot be considered in determining the petitioner's ability to pay the proffered wage. Counsel submitted no documentation to demonstrate that with the asserted transfer of the company the petitioner changed corporate structure and now operates as a sole proprietorship.

Further, counsel provides that [REDACTED] had four employees through the date of sale to the [REDACTED]. These included [REDACTED] owner, [REDACTED] and spouse of owner, beneficiary [REDACTED], and an office supervisor, bookkeeper. In 2005, the company added a fifth employee . . . (H-1B status) to serve as a Web Designer. [REDACTED] and the clerical assistant were the only pay rolled employees until 2005.⁴

Although not raised in the director's denial, the petitioner has not demonstrated that the [REDACTED], as the new owners, would qualify as the successors-in-interest to the petitioning business or that they or the new entity have the ability to pay from the date of acquisition. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the record does not demonstrate

⁴ Based on the information that counsel has provided, the time period that he asserts the petitioner had only four employees is unclear. Further, based on a record of the petitioner's prior filings, it would be unusual that just the beneficiary and the clerical assistant were the only employees on payroll. We note that the petitioner filed two H-1B petitions in 1999, as well as two additional H-1B petitions in 2000, one H-1B petition in 2003, one H-1B petition in 2004 for the beneficiary, and another petition in 2005 for the employee referenced above and just hired. Additionally, the petitioner filed to sponsor an additional person for permanent residence in 2002. From counsel's statement, it is unclear whether the foregoing employees that the petitioner filed for were ever employed or on the payroll. This discrepancy in the number of employees filed for, and the number of employees counsel states were employed raises some concerns. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Further, "it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice." *Matter of Ho*, 19 I&N Dec. at 591-592.

that the new owners have assumed all the rights, duties and obligations to qualify as a successor-in-interest. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.