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U.S. Citizenship  
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File: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: DEC 26 2006  
LIN-04-031-50874

In re: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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, Nebraska 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 solutions consulting company and seeks to employ the beneficiary permanently in the United States as a programmer analyst (“Systems Analyst/Systems Administrator”). 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 June 9, 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.<sup>1</sup>

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 professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

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

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<sup>1</sup> 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).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on June 12, 2002. The proffered wage as stated on Form ETA 750 for the position of a programmer analyst is \$58,275 per year based on a 40 hour work week.<sup>2</sup> The labor certification was approved on March 21, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on November 25, 2003. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: 1994; gross annual income: \$500,000; net annual income: not listed; and current number of employees: five.

On March 23, 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. Further, the RFE requested that the petitioner provide evidence that the beneficiary met the requirements as set forth on Form ETA 750. Counsel responded to the RFE.

On June 9, 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 May 20, 2002, the beneficiary listed that he has been employed with the petitioner since July 2000. The petitioner provided the following evidence of wage payment:

<u>Year</u>	<u>W-2 Wages</u>
2004	\$46,424.50
2003	\$48,498.62
2002	\$51,404.37

Counsel provides that the beneficiary took unpaid leave in 2004, and, therefore, the wages are correct for the year based on the time he worked.<sup>3</sup> The petitioner submitted a payroll summary for the time period January through June 2005, which exhibited total gross pay to the beneficiary in the amount of \$30,817.67. The petitioner also provides that based on wages paid for the first part of the year, the beneficiary should earn over \$61,000 for 2005. None of the W-2 statements, however, exhibit full payment of the proffered wage to the beneficiary. Based on the foregoing, the petitioner cannot establish its ability to pay the proffered wage to the beneficiary on prior wage payment alone. The petitioner must demonstrate that it can pay the difference between the wages paid to the beneficiary and the proffered wage.

<sup>2</sup> The petitioner initially listed an annual rate of \$55,000, but the DOL required that the wage be changed to \$58,275 prior to DOL certification.

<sup>3</sup> CIS will not prorate the proffered wage for the portion of the year that the beneficiary did not work.

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).

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 reflects the following income:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	not submitted <sup>4</sup>
2003	\$53,506
2002	\$8,540
2001	-\$20,060 <sup>5</sup>

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the forgoing years. However, if the wages paid to the beneficiary were combined with the petitioner's net income, the petitioner would be able to demonstrate its ability to pay in the year 2003 (combined wages and net income totaling \$102,004.62), as well as in 2002 (combined wages and net income totaling \$59,944.37).

This would leave the petitioner's ability to pay in question for 2004, where based on the W-2 submitted, would leave a wage differential of \$11,851 between the amount the petitioner paid the beneficiary and the amount of the proffered wage.

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.<sup>1</sup> Current assets include cash on hand, inventories, and receivables expected to be

<sup>4</sup>Counsel indicated that the petitioner's 2004 federal tax return was unavailable at the time of filing the appeal.

<sup>5</sup> Based on the priority date of June 12, 2002, the petitioner's 2001 tax return would not be required, but will be considered generally.

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. The petitioner's net current assets are as follows:

<u>Tax year</u>	<u>Net current assets</u>
2004	not submitted
2003	\$9,868
2002	\$10,833
2001	-\$11,441

As the petitioner has not submitted its 2004 tax return, we cannot determine the petitioner's net current assets for that year. Based on an examination of the wages paid to the beneficiary, the petitioner's net income, and the petitioner's net current assets, the petitioner can demonstrate its ability to pay in the years 2002, and 2003, but not in 2004 where the wages paid to the beneficiary were \$11,851 below the proffered wage.

For further consideration, the petitioner's tax returns also exhibit the following gross receipts and wages paid:

<u>Year</u>	<u>Gross Receipts</u>	<u>Wages paid</u>
2003	\$305,534	\$132,678
2002	\$239,691	\$131,423
2001	\$459,896	\$253,538

We note that there is a substantial variation in gross receipts between the years, with 2001 gross receipts almost double that of the following year. The petitioner provides that its business has research and development cycles followed by greater revenue streams once the product is deployable.

As additional documentation related to the petitioner's ability to pay for 2004 and 2005, the petitioner provided evidence of \$187,500.00 in loan commitments from Sky Bank as part of a \$250,000 project. CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). If the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position.

The petitioner also provided a "personal financial statement" for the petitioning company's owner. The petitioner is organized as an S corporation, and, therefore, personal assets are not relevant and cannot be considered. In the case of a sole proprietorship, CIS may consider the proprietor's personal assets and liabilities. However, in the case of a corporation, CIS may not pierce the corporate veil and look to the assets of the corporation's owner or shareholders. 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 owner may have substantial individual assets or income, those assets or income are not relevant in the case at hand.

The petitioner additionally submitted a Profit and Loss Statement for the time period January 1 through July 8, 2005. The statement estimated net ordinary income in the amount of \$35,060.39. Further, we note that the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited profit and loss statement submitted without an audited report, which may be viewed similar to a financial statement, is not persuasive evidence, and insufficient to demonstrate the petitioner's ability to pay the proffered wage.

Counsel further cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) that the AAO should consider the totality of the circumstances. Looking to *Matter of Sonogawa*, in that case, the petitioner provided evidence to show that the petitioner had sustained significant expenses in one year related to the relocation of the business, and an increase in rent, which accounted for the petitioner's decrease in ability to pay the required wages. The petitioner in *Sonogawa* also provided magazine articles, which helped to establish the petitioner's reputation, and potential future growth.

Counsel, here, compares the petitioner's situation to that of *Matter of Sonogawa*, that as a technology company, the petitioner has invested capital and research and development before a product goes to market, or had substantial expenses in certain years. Further, counsel notes that the firm plans to introduce new computer software products into the market later this year. In support, the petitioner provides a statement from the petitioner's president regarding its projects and estimates regarding development and productivity. Further, the petitioner provided a summary from Jumpstart, a venture capital company, that summarizes the general cycle of development where in the development phase companies experience high costs in hiring workers to develop and design products, and test and deploy software. Later, after the product is fully scalable and deployable, revenue will grow.

While the petitioner's explanation of the business cycle is reasonable, we note that the petitioner's gross receipts have varied substantially. The petitioner's tax returns do not exhibit a consistently high net income, **and reflects low net current assets. Further, information reflects that the petitioner has filed for three beneficiaries for permanent residence, and would need to be able to demonstrate the ability to pay for all petitioned-for employees.** The petitioner has additionally filed a number of H-1B petitions for other employees, which would obligate the employer under DOL regulations to pay the prevailing wage to these employees as well. Examining the totality of the circumstances, we would not conclude that the petitioner is able to demonstrate its ability to pay the proffered wage for all employees sponsored.

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. 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.