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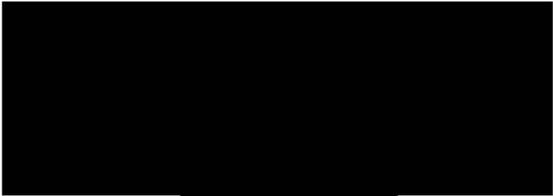
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3000  
Washington, DC 20529



**U.S. Citizenship  
and Immigration  
Services**

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **SEP 05 2006**  
EAC 05 193 53943

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as an Other Worker, Unskilled pursuant to section 203(b)(3)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(iii)

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a rug repair and garment cleaning business. It seeks to employ the beneficiary permanently in the United States as an oriental rug repairer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 states that the petitioner is a Subchapter S corporation and the personal assets of the stockholders and owners of the corporation are relevant in determining whether the petitioner has the ability to pay the proffered wage. Counsel submits additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii) provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) also provides

(ii) Other documentation--

(D) *Other Worker*. If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 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 Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is an annual salary of \$19,781. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in April 1, 1971, to have twelve employees, and to have a gross annual income of \$737,545. In support of the petition, the petitioner submitted IRS Form

1120S, the petitioner's corporate income tax return for 2001, 2002 and 2003. These documents indicated that the petitioner had ordinary income of -\$6,046 in 2001, \$21,192 in 2002, and \$41,681 in 2003. The petitioner submitted a letter of previous work experience from [REDACTED] Teheran, Iran, that stated the beneficiary had worked for the business from August 1984 to August 1987. Counsel also submitted documents with regard to the assets of [REDACTED], the petitioner's sole stockholder and owner. This documentation included unaudited statements as to Mr. [REDACTED] assets and liabilities as of June 1, 2001. This document identifies [REDACTED] Certified Public Accountants, New York, at the bottom of the page. An additional sheet identified as **Financial Statement** appears to be signed by Mr. [REDACTED] and lists the value of his home, his investment account with [REDACTED] his investment in [REDACTED] and the value of his life insurance policy. Counsel also submitted a statement from [REDACTED] as of June 29, 2001 that indicated total investments of \$420,292.<sup>1</sup> Counsel then submitted the petitioner's sole shareholder's life insurance policy statement for August 2001. Counsel also submitted the same documentation dated June 1, 2005, that showed additional assets for Mr. [REDACTED] including a second home in Pennsylvania, along with a Bank of America private client account statement for April 30, 2005, and real estate tax record for Mr. [REDACTED] home. Counsel stated in a cover letter that the petitioner's business is a subchapter S Corporation and therefore all the personal assets of the stockholder and owner of the corporation are relevant in determining the petitioner's 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, and the beneficiary's previous work experience as an oriental rug repairer, on October 27, 2005, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide a letter of work verification with regard to the requisite two years of prior work experience as an oriental rug repairer as stipulated by the Form ETA 750. The director also stated that the petitioner had submitted its Form 1120S for the priority date year of 2001; however, this document indicated an ordinary income of -\$6,046. The director requested that the petitioner submit additional evidence to show its ability to pay the proffered wage of \$19,781, and that such evidence might include copies of annual reports accompanied by audited or reviewed financial statements, or complete federal tax returns, or a statement from the petitioner's financial officer to establish the petitioner's ability to pay the proffered wage.<sup>2</sup> The director also stated that the petitioner could also submit evidence such as accredited profit/loss statements, bank account records, or personnel records. With regard to any wages paid to the beneficiary, the director requested copies of the beneficiary's W-2 forms if the petitioner had employed the beneficiary as of the priority date year of 2001.

In response, counsel resubmitted Mr. [REDACTED]'s financial documentation, with an updated statement from Merrill Lynch investment firm that indicated Mr. [REDACTED]'s investments totaled \$156,797.17 as of April 29, 2005. Counsel also resubmitted the letter of employment verification originally submitted with the instant

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<sup>1</sup> This document identifies three accounts covered by the statement, and the record is not clear whether the \$420,292 balance represents the assets in Mr. [REDACTED] account, or in all three accounts identified on the statement's first page.

<sup>2</sup> Since the I-140 petition indicated the petitioner had twelve employees, the record is not clear why the director referred to a letter from the petitioner's officer to establish the petitioner's ability to pay the proffered wage. Such a letter is only relevant to petitioners with more than 100 employees.

petition. Counsel reiterated that the petitioner is a Subchapter S corporation and that the personal assets of the petitioner<sup>3</sup> would be a relevant factor in determining the petitioner's ability to pay the proffered wage.

On February 27, 2006, the director denied the petition. The director stated that the petitioner's 2001 income tax return indicated ordinary income of -\$6,046, and that the Schedule L balance sheet submitted with the petitioner's 2001 Form 1120S also indicated the petitioner's liabilities were greater than its assets.<sup>4</sup> The director also stated that the assets of the petitioner's owner could not be considered in determining the petitioner's ability to pay the proffered wage.

On appeal, counsel reiterates that because the petitioner is a subchapter S corporation, the personal assets of the petitioner would be a relevant factor in establishing the petitioner's ability to pay the proffered wage. Counsel resubmits the petitioner's owner and sole shareholder's financial records in tax years 2001 and 2005. These documents include the unaudited statement of assets and liabilities as of June 1, 2001, provided by [REDACTED], a signed statement from the petitioner's officer/sole shareholder with regard to his financial worth as of June 2001, a Merrill Lynch statement for June 2001, and the petitioner's owner's life insurance policy value as of August 27, 2001.

Counsel in the initial petition, in response to the director's request for further evidence, and on appeal, states that based on the petitioner's structure as a subchapter S corporation, the personal assets of the petitioner's owner and sole shareholder is a relevant factor in determining the petitioner's ability to pay the proffered wage. Twice counsel refers to the petitioner's owner's assets as the petitioner's assets. Contrary to counsel's assertion, Citizenship and Immigration Services (CIS) may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. It is further noted that even if the petitioner's owner's assets could be considered, the petitioner's owner's has significant assets that are not liquidable to serve as a source of further funding to pay the proffered wage. These non-liquidable assets would include real estate properties, and life insurance policies.

It is noted that unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities can also considered as part of the petitioner's ability to pay. However, the petitioner is structured as a Subchapter S corporation, not a sole proprietorship. The AAO realizes that sole shareholders in corporations do have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income; however, the sole shareholder is not obligated to cover the petitioner's expenses. The AAO will discuss this factor further in these proceedings.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by

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<sup>3</sup> Counsel appears to refer to the petitioner's sole shareholder and officer, not the petitioner.

<sup>4</sup> The director's reference to the petitioner's assets and liabilities alludes to the petitioner's net current assets. The AAO will discuss the petitioner's net current assets more completely further in these proceedings.

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 ETA 750, the beneficiary stated that she had not worked for the petitioner prior to the filing date of the labor certification. The petitioner also did not present any evidentiary documentation to establish that the petitioner had paid the beneficiary a salary equal to or greater than the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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. 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). 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.

The evidence indicates that 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 petitioner's tax returns for 2001, 2002 and 2003 shows the following amounts of ordinary income: -\$6,046 in 2001, \$21,192 in 2002, and \$41,681 in 2003. Thus, the petitioner has established that it has sufficient net income in tax year 2002 and 2003 to pay the proffered wage of \$19,781. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not established that it has the ability to pay the proffered wage as of the April 27, 2001 priority date.

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. 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>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If 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. As previously stated, the petitioner established its ability to pay the proffered wage as of tax year 2002 and 2003 based on its net income. The petitioner submitted the following information for tax year 2001:

	2001
Ordinary Income	\$ -6,046
Current Assets	\$ 394
Current Liabilities	\$ 89,981
Net current assets	\$ -89,587

These figures fail to establish the ability of the petitioner to pay the proffered wage as of the priority date. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of -\$6,046, and net current assets of -\$89,587, and has not, therefore, demonstrated the ability to pay the proffered wage in tax year 2001 out of its net income or net current assets.

As noted previously, contrary to counsel's assertion with regard to S corporations, the assets of the sole shareholder/officer are not viewed as corporate assets. However, the sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

To determine whether or not an entity's officer compensation would have been available to the proffered wage, CIS examines many issues, including the flexibility that the shareholders have in setting their own compensation; the profitability of the corporation; whether the officer compensation is discretionary as opposed to wages which are not discretionary; and/or whether the officer compensation is substantially more than the amount of the proffered wage. In addition, the CIS would examine whether the amount of officer compensation varies over the course of the pertinent years, and whether the officer receiving the compensation is the sole owner/stockholder or majority owner/stockholder.

In addition, the totality of the circumstances (i.e., other information in the record) should support the fact that the petitioner is a viable, profitable enterprise. Such information would include issues examined in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). This precedent decision relates to petitions filed during

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<sup>5</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. In *Matter of Sonogawa*, the courts looked at such issues as the petitioner's longevity, number of employees, and reputation, in examining the totality of the petitioner's circumstances. .

The documentation presented here indicates that [REDACTED] as the petitioner's sole shareholder/officer, holds 100 percent of the company's stock. According to the petitioner's 2001, 2002, and 2003 tax returns, Mr. [REDACTED] elected to pay himself \$78,000 in officer compensation each year. The record reflects no further substantiation of this compensation, such as W-2 Forms. With regard to the sole shareholder's use of his compensation to reduce the corporation's taxable income, the record reflects that while the sole shareholder's compensation remain fixed, the petitioner's taxable income rose in the years 2002 and 2003. This would suggest that the sole shareholder's compensation is more of a salary rather than a variable compensation to reduce tax liability.

In looking at the officer compensation in relation to the proffered wage, the proffered wage of \$19,781 is slightly more than 25 per cent of the officer compensation for 2001, namely \$78,000. The I-140 petition also reflects that the petitioner has been in business since 1971, although the petitioner submitted no further information as to this claimed longevity. While the record indicates a negative net income in the 2001 priority year, nevertheless, the petitioner had profitable years in tax years 2002 and 2003, with sufficient net income to establish its ability to pay the proffered wage.

It is noted that while the petitioner's owner has submitted evidence of his willingness to use personal assets to pay the proffered wage, he has not submitted any documentation that he would be willing to reduce his compensation, which appears to be a fixed salary rather than a variable compensation, to pay the proffered wage.

With regard to the totality of the petitioner's circumstances, the petitioner has submitted no further information with regard to its reputation, and overall profitability, particularly in the years prior to the 2001 priority date and subsequent to this date. Furthermore, the petitioner's gross profits and level of salaries paid to its claimed twelve employees, and the sole officer's compensation does not vary significantly over the three years in question.<sup>6</sup> Such factors suggest a lack of flexibility in allocating the profits of the corporation into other legitimate business expenses. Upon examination of the issues identified above, and after examining the totality of the petitioner's circumstances, the AAO does not find that the preponderance of the evidence shows that the petitioner's sole shareholder could have reallocated the petitioner's officer compensation to pay the proffered wage. Thus, the petitioner did not establish its ability to pay the proffered wage in the priority year 2001 based on the petitioner's officer compensation. Therefore the petitioner did not establish its ability to pay the proffered wage as of the 2001 priority date year and to the present.

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.

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It is noted that the wages paid in the priority year of 2001 were higher than in any of the subsequent two years in question.

**ORDER:** The appeal is dismissed.