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U.S. Citizenship  
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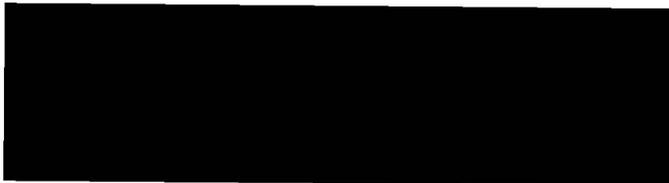
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a vintage instruments restoration firm. It seeks to employ the beneficiary permanently in the United States as a piano technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 submits additional evidence and asserts that the petitioner has demonstrated its ability to pay the proffered wage.

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 other 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(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 DOL's employment system. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 15, 2003. The proffered wage as stated on the Form ETA 750 is \$15.30 per hour, which amounts to \$31,824 annually. The ETA 750B, signed by the alien beneficiary on September 23, 2003, does not indicate that the alien has worked for the petitioner.

On Part 5 of the visa petition, filed on December 28, 2005, it is claimed that the petitioner was established in 1989, has a gross annual income of \$519,015 and currently employs eight workers.

As evidence of its continuing financial ability to pay the certified wage of \$31,824 per year, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002, 2003 and 2004. They indicate that the petitioner uses a standard calendar year to file its taxes. The returns contain the following information:

	2002	2003	2004
Ordinary Income <sup>1</sup>	-\$ 37,018	-\$ 156	\$ 16,745
Current Assets (Sched. L)	\$ 100,007	\$ 95,660	\$ 42,586
Current Liabilities (Sched. L)	\$ 147,467	\$ 175,246	\$ 115,373
Net Current Assets	-\$ 47,460	-\$ 79,586	-\$ 72,787

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets. It is noted that as the priority date is in 2003, the 2003 and 2004 tax returns are more relevant than the 2002 return in determining the petitioner's continuing ability to pay the certified wage beginning on the priority date.

The director denied the petition on March 22, 2006, concluding that the petitioner had failed to establish its continuing ability to pay the proffered wage based on the corporate tax returns showing that neither its net current assets nor its ordinary income for the years offered demonstrated that it had the ability to pay the proffered wage.<sup>3</sup>

On appeal, counsel resubmits copies of the petitioner's 2002, 2003, and 2004 federal tax returns. He also provides a copy of the petitioner's 2005 corporate tax return. It contains the following:

Ordinary Income	-\$14,961
Current Assets	\$57,507
Current Liabilities	\$60,065
Net Current Assets	-\$ 2,558

Counsel additionally provides on appeal a copy of the sole shareholder's individual income tax return for 2005, which shows an adjusted gross income of \$85,493 for the sole shareholder, his spouse and three dependents. Counsel asserts that the evidence submitted supports the petitioner's ability to pay the certified wage because the owner could have opted to take less in officer compensation or opted to take less depreciation for items purchased and already paid for, thus showing a higher ordinary income on the tax return, but made such decisions, in part, in order to reduce taxable income. Counsel also asserts that the company is virtually debt free, owns significant

<sup>1</sup>For the purpose of this review, ordinary income will be treated as net income.

<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.

<sup>3</sup> Although the director erred in his calculation of net current assets, his conclusion that net current assets did not cover the proffered wage in 2002, 2003, and 2004 are also supported by our figures set forth above.

assets and pays out significant amounts of salaries each year. He contends that the business has met its expenses and been profitable for many years and that should the beneficiary be hired, either he would generate additional revenue or the owner would take less. Counsel also states that the company has hired outside help to provide some of the beneficiary's proposed services.

Counsel's assertions are not persuasive. Regardless of any tax avoidance strategy in selecting the corporate structure, it remains that the petitioner and named employer on the I-140, Immigrant Petition for Alien Worker is a corporation and must establish its own continuing ability to pay the proffered salary. In this case, CIS does not find persuasive the assertion that the officer compensation presented on the petitioner's tax returns should be automatically added back to the corporate petitioner's income. It is observed that officer compensation of \$16,900, \$40,000, and \$52,000 was expensed as officer's compensation in 2003, 2004, and 2005, respectively. Such compensation is paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. There is also no first-hand evidence from the officer that such compensation could have been foregone during the period given.<sup>4</sup>

Counsel cites no legal authority in support of his position that the value of a shareholder's individually held assets may be considered when evaluating a corporate petitioner's ability to pay the proffered wage. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

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<sup>4</sup> The suggestion that the beneficiary would be assuming a portion of this officer's compensation and that such compensation would be considered available to pay the proffered wage is not documented. Aside from the 2005 individual tax return of the sole shareholder, which shows that his adjusted gross income would have to be reduced by almost 40% to cover the proffered wage, there is no other credible documentation supporting such a theory. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary would assume this officer's duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

It is further noted that counsel's assertion that the petitioner has hired others to provide some of the services that the beneficiary would perform is not supported by any first-hand documentation and does not therefore, constitute evidence on this issue. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record contains no evidence that the petitioner has employed the beneficiary.

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 (or net current assets) as 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)). 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. Similarly, the fact that a petitioner may have paid other wages to other employees in a given year is not indicative of its ability to pay the proffered salary to a beneficiary. Also, the depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources. 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, a 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. We also do not concur with counsel's characterization of the petitioner as "debt free," as Schedule L of the tax return(s) shows current liabilities of \$175,246 in 2003, \$115,373 in current liabilities in 2004, and \$60,065 in current liabilities in 2005.

In 2003, neither the petitioner's net income of -\$156, nor its net current assets of -\$79,586 were sufficient to pay the certified wage of \$31,824 and demonstrate the petitioner's ability to pay in that year. Similarly, in 2004, neither the petitioner's net income of \$16,745, nor its net current assets of -\$72,787 were enough to cover the proposed wage offer. Finally, in 2004, neither the petitioner's net income of -\$14,961, nor its net current assets of -\$2,558 could cover the proffered salary. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.