



U.S. Citizenship  
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File: LIN-05-244-52143 Office: NEBRASKA SERVICE CENTER Date: OCT 18 2007

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 (“director”), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner operates a business related to horse training and competition showing, and seeks to employ the beneficiary permanently in the United States as a horse trainer (“English Style Horse Trainer”). 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 March 4, 2006 decision, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).<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 worker. 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 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 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 C.F.R. § 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

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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).

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 August 11, 2001. The proffered wage as stated on Form ETA 750 is \$43,472.00 per year, based on a 40-hour work week. The labor certification was approved on May 7, 2004, and the petitioner filed the I-140 petition on the beneficiary's behalf on August 19, 2005. On the I-140 petition, the petitioner failed to list the following information: date established; gross annual income; net annual income; current number of employees.

On October 12, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit: Forms W-2, or Forms 1099 if the petitioner employed the beneficiary; the petitioner's 2004 federal tax return, or proof that an extension was requested; additional evidence to demonstrate the petitioner's ability to pay the proffered wage; and evidence that the beneficiary completed the minimum required education of high school. The petitioner responded.<sup>2</sup> Following consideration of the petitioner's response, on March 4, 2006, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence, as well as for failure to pay the proffered wage listed on Form ETA 750A. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will examine whether the petitioner 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. The beneficiary did not list on Form ETA 750B that she was employed with the petitioner. The petitioner submitted the beneficiary's individual Form 1040 in response to the RFE. The beneficiary's Form 1040 reflected earnings of \$26,000 in 2004, but the petitioner did not provide Form W-2 with Form 1040 to exhibit that the petitioner paid the beneficiary's Form 1040 earnings.<sup>3,4</sup>

As the petitioner failed to provide any Forms W-2 or Forms 1099, the petitioner is unable to establish its ability to pay the proffered wage based on prior wages paid to the petitioner.

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

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<sup>2</sup> The petitioner's response included evidence that the beneficiary had the required educational background as listed on the certified Form ETA 750.

<sup>3</sup> The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

<sup>4</sup> On appeal, the petitioner's accountant provided a letter to explain the petitioner's financial status. The accountant provided that the beneficiary had, "worked as an employee of [the petitioner] for a number of years and has proven to be an invaluable employee and manager for this business." The petitioner, however, did not provide any W-2 Forms, or Forms 1099 in support of this statement to demonstrate that it paid, or what amount it paid, the beneficiary.

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 record demonstrates that the petitioner is 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). The petitioner lists only income from its business and so its net income is found on line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	not provided <sup>5</sup>
2003	-\$20,769
2002	-\$4,614

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in either of the above years, even if the wages paid to the beneficiary were added to the petitioner'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. 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	not provided
2003	-\$97,589

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<sup>5</sup> The petitioner's tax returns for the years 2002 and 2003 show that the corporation filed in September 2003, and September 2004 based on extensions that were granted. The petitioner did not submit its 2004 tax return, and did not submit evidence that it requested, or was granted, an extension to file its return in 2004. We additionally note that the petitioner did not provide its 2004 return on appeal.

2002           -\$107,045

Following this analysis, the petitioner's federal tax returns show that the petitioner similarly lacks the ability to pay the proffered wage in any of the above years based on net current assets as well.

The petitioner additionally provided four months of business checking statements dated for the time periods ending July 31, 2003, August 29, 2003, September 30, 2003, and October 31, 2003. If we were to examine the statements specifically, the balances range from a low balance of \$3,903.44 in July 2003 to a high balance of \$8,855.07 in August 2003. We note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, already considered in calculating the petitioner's net current assets, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Additionally, the bank statements would reflect a short time period from July 2003 through only October 2003, and not the petitioner's continuing ability to pay the proffered wage.

The director's decision considered the foregoing, as well as the petitioner's assertion that it had \$49,952 in assets reflected on the first page of its 2003 tax return. The director found that it was unreasonable that the petitioner would liquidate all of its assets to pay the proffered wage. Further, none of the foregoing evidence demonstrated the petitioner's ability to pay the proffered wage.

On appeal, counsel provides that the petitioner's owners have substantial business assets outside of the corporation that allow them to fund the petitioner's operations.

The petitioner is incorporated as an S Corporation. A corporation is a separate and distinct legal entity from its owners and shareholders. The 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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." Therefore, the owners' assets, or profits from other corporations would not be relevant to the petitioner's ability to pay the proffered wage.

**The petitioner submitted a letter from its accountant in support.** The letter provides that the petitioner established its business in 1991 and that two of the owners have a 67% controlling interest in the petitioner's business. The petitioner established its business on 66 acres of land and the land was acquired by the DJN Corporation. Further, the two owners also have a 67% interest in DJN. The accountant provides that the owners were advised to establish the business on this basis to manage its risk exposure. Presently, DJN owns all of the real estate the petitioner utilizes, and the petitioner collects income from boarding and upkeep fees, riding lessons, and raising horses. The accountant estimates that the land DJN owns is worth \$3 million, and that there is no debt encumbering the property. The accountant asserts that, "to look at the balance sheet and income statement of [the petitioner] alone without considering the debt-free assets owned by DJN, is an incomplete picture of this business operation, and, importantly, its financial position."

The petitioner submitted the tax returns for DJN. DJN has a separate tax identification number than the petitioning entity and would be a separate entity. The fact that the company has ownership interests in common is not relevant. The 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Even if we were to consider the tax returns of DJN, which the petitioner submitted, the tax returns for the years 2002 through 2004 exhibit negative net income, and minimal net current assets (under \$10,000 for each year), which would be insufficient to pay the proffered wage.<sup>6</sup>

The accountant provides that both owners also have:

Significant business and investment interests outside of DJN and [the petitioning entity]. They have used funds from these other business/investment sources to pay off the original mortgage debt on the DJN land and to fund the negative cash flow operations of [the petitioner]. They have continued to hold the DJN land and operate [the petitioner] (even at a loss) because this land had appreciated in value significantly since 1991 and continues to appreciate at a very healthy rate.

He continues that the owners are capable of covering cash requirement needs that the petitioner or DJN Corporation may encounter, and attached a schedule of the owners' other assets, liabilities, and sources of income.

As noted above, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Therefore, the owners' personal assets, or assets of their other corporations are not relevant to the issue of whether the petitioner has the ability to pay the proffered wage.

The petitioner did not provide any additional evidence that the petitioning entity can pay the beneficiary the proffered wage. Accordingly, based on the foregoing, the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and the petition was properly denied. 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.

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<sup>6</sup> We additionally note that DJN's tax returns list its total assets as \$580,730 for 2002; \$567,088 for 2003; and \$554,029 for 2004. It is unclear where the accountant's estimate that the company has real estate assets of \$3 million comes from, as these values are not reflected on the tax return.