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U.S. Citizenship  
and Immigration  
Services

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OCT 24 2007

FILE:

WAC 06 028 50810

Office: TEXAS SERVICE CENTER Date:

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.

Handwritten signature of Robert P. Wiemann in black ink.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile wholesaler. It seeks to employ the beneficiary permanently in the United States as an inventory inspector. 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.

The petitioner has retained two attorneys during the pendency of this visa petition. With the appeal the petitioner provided a duly executed Form G-28 acknowledging the second attorney as its counsel for the purpose of this appeal. All representations will be considered, but the decision in this matter will be provided only to the petitioner and its current counsel of record.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 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 either 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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 19, 2002. The proffered wage as stated on the Form ETA 750 is \$15.04 per hour, which equals \$31,283.20 per year.

The Form I-140 petition in this matter was submitted on November 2, 2005. On the petition, the petitioner stated that it was established during April of 1997 and that it employs one worker. The petition states that the

petitioner's gross annual income is \$60,000 and that its net annual income is \$36,890.<sup>1</sup> On the Form ETA 750, Part B, signed by the beneficiary on July 15, 2002, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Anaheim, California.

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).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup> In the instant case the record contains (1) the 2002 Form 1120, U.S. Corporation Income Tax Return of National Fleet and Lease Incorporated, of the same address as the petitioner, (2) a letter from the petitioner's president, [REDACTED] dated August 11, 2005, (3) the 2002, 2003 and 2004 joint Form 1040 U.S. Individual Income Tax Returns of [REDACTED], (4) unaudited financial statements of National Fleet and Lease Incorporated for the twelve months ending November 30, 2002 and the twelve months ending November 30, 2003, (5) unaudited income and expense information of National Fleet and Lease for the 2004 and 2005 calendar years, (6) evidence pertinent to real property owned by [REDACTED] evidence pertinent to properties offered for sale, and (8) evidence pertinent to properties recently sold. The record does not contain any other evidence relevant<sup>3</sup> to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2002 tax return of National Fleet and Lease Incorporated indicates that it is a corporation, that it incorporated on December 14, 1998, and that it reports taxes pursuant to accrual convention accounting. During its 2002 fiscal year, which ran from December 1, 2002 to November 30, 2003, National Fleet and Lease Incorporated declared taxable income before net operating loss deduction and special deductions of \$93,712. At the end of that year National Fleet and Lease had current assets of \$352,754 and no current liabilities, which yields net current assets of \$352,754. An accompanying Schedule E identifies that corporation's owners as [REDACTED] both of whom have a 50% interest.

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<sup>1</sup> The record contains no evidence confirming that estimate of the petitioner's gross and net annual incomes. This office notes, however, that the 2004 adjusted gross income of [REDACTED] As is explained further below, the adjusted gross income shown on an individual income tax return is not a petitioning corporation's net income.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> The record contains a 2003 Form W-2 issued by the National Fleet and Leasing Incorporated to the petitioner's owner. Counsel did not address that document in argument and its relevance to the instant petition is unknown in this office. Various other documents with no apparent relevance to the petitioner's continuing ability to pay the proffered wage beginning on the priority date will not be further addressed.

Line 12, Business income, on the 2002, 2003 and 2004 personal tax returns of [REDACTED] blank and no Schedule C, Profit or Loss from Business, accompanied those returns. The absence of business income or loss indicates that neither [REDACTED] owned a sole proprietorship during those years.

The August 11, 2005 letter is from [REDACTED]. That letter begins, “[REDACTED], Southwest Remarketing, Inc. the employer certify that the job opportunity is bona fide . . . .” [REDACTED] is apparently asserting that he owns the petitioner, either in whole or in part. **Although the evidence of record is insufficient to establish that as a fact, the analysis in today’s decision assumes, *arguendo*, that he is.**

The director denied the petition on June 26, 2006. On appeal, counsel asserted that the real estate evidence demonstrates that each of [REDACTED] properties for which evidence was submitted is worth at least \$2 million. Counsel further asserted that the evidence demonstrates that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date.

The decision of denial incorrectly stated that the petitioner is a sole proprietorship. This office notes that no evidence in the record supports that conclusion. In fact, that the petitioner is Southwest Remarketing **Incorporated**, apparently precludes that possibility.

Further, in a request for evidence issued in this matter on April 4, 2006 the director asked for evidence pertinent to the petitioner’s ability to pay the proffered wage during 2002, 2003, and 2005, apparently because the director, under the misapprehension that the petitioner is a sole proprietorship, misconstrued the 2004 Form 1040 U.S. Individual Income Tax Return to be that of the petitioner’s sole proprietor. The regulation at 8 C.F.R. § 204.5(g)(2), however, obliged the petitioner to provide the required evidence of the petitioner’s ability to pay the proffered wage during each of the salient years.

As was noted above, the record contains the 2002 Form 1120, U.S. Corporation Income Tax Return of National Fleet and Lease Incorporated. The petitioner in the instant case, however, is identified on the Form I-140 visa petition as Southwest Remarketing Incorporated. Although National Fleet and Lease Incorporated has the same address as the petitioner, the record does not demonstrate that they are the same entity, and this office will make no such assumption. **Significantly, the two corporations have different Employer Identification Numbers (EIN).**

The petitioner purports to be a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [Citizenship and Immigration Services] to consider the financial resources of individuals or entities with no legal obligation to pay the wage.”

As the owners, stockholders, and others are not obliged to pay the petitioner’s debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation’s debts and obligations, are irrelevant to this matter. The petitioner **must show the ability to pay the proffered wage out of its own funds.** The evidence of the personal income of [REDACTED] including the value of his equity in real

estate, and the evidence pertinent to the finances of National Fleet and Lease Incorporated have not been demonstrated to be relevant.

Even if National Fleet and Lease Incorporated were demonstrably the same entity as the instant petitioner, Counsel's reliance on its unaudited financial records would be misplaced. 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.<sup>4</sup> The unaudited financial statements in the record, both those of the petitioner and those of National Fleet and Lease Incorporated, are insufficiently reliable to sustain the burden of proof in this matter and will not be further discussed.

As is discussed above, the income and assets of other entities is not available to the petitioner as a matter of right and is not, therefore, relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Even if [REDACTED] in real estate were relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, however, the record does not contain a reliable estimate of the value of that equity.

First, nothing in the record demonstrates that counsel's estimate of the value of that property is reliable. First, counsel merely provided raw data and a statement of value without any analysis or indication that his conclusion follows from the facts. Further, a reliable, disinterested real estate appraisal would typically be performed by a licensed or certified real estate appraiser. It is neither alleged nor assumed that counsel is disinterested or competent to perform real estate valuations. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

The amount by which the property is encumbered is insufficiently demonstrated. Although the record contains evidence of previous mortgage loans no evidence was submitted to demonstrate that the properties in question are otherwise unencumbered. A list of a property's encumbrances would typically be generated by a real estate title search. This office finds that the petitioner did not demonstrate that the properties are encumbered only in the amounts represented.

Even if the value of the properties and the amounts by which they are encumbered were sufficiently demonstrated, and even if the property owner's assets were available to the petitioner as a matter of right, that would be insufficient to show that the property owner's equity, was available to pay wages. The property owner will not necessarily realize the value of that property in cash in the near future and that value has not, therefore, been shown to be available to pay wages.

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<sup>4</sup> Even if the financial statements submitted were deemed to be reliable evidence, this office notes that the net profit shown on the petitioner's own unaudited financial statements, \$5,481 during 2004 and \$15,162 during 2005, were both insufficient to pay the annual amount of the proffered wage.

The property owner could secure a home equity loan with whatever equity he has in his home. An indication of available credit, however, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of any other person or entity, including a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

For all of these reasons, the value of [REDACTED] in real property owned would not be considered in evaluating the petitioner's continuing ability to pay the proffered wage beginning on the priority date, even if the assets of [REDACTED] had been shown to be relevant to the petitioner's own ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. 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). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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. In the instant case, the petitioner did not establish that it employed and paid 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 a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>5</sup> shown on lines 16(d) through 18(d). 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$31,283.20 per year. The priority date is August 19, 2002.

The record contains no copies of the petitioner's annual reports, federal tax returns, audited financial statements, or other reliable evidence pertinent to the ability of the petitioner, Southwest Remarketing, Incorporated, to pay the proffered wage during 2002, 2003, 2004, or 2005.<sup>6</sup> The petitioner has failed to show the ability to pay the proffered wage during those years.<sup>7</sup>

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 2003, 2004, and 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

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<sup>5</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

<sup>6</sup> The petition in this matter was submitted on November 2, 2005. On that date the petitioner's 2005 and 2006 tax returns were unavailable. On April 4, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was likely available,<sup>6</sup> but its 2006 tax return was unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

<sup>7</sup> The fiscal year 2002 tax return of National Fleet and Lease Incorporated showed taxable income before net operating loss deduction and special deductions of [REDACTED]. That amount is greater than the annual amount of the proffered wage. If National Fleet and Leasing Incorporated had been shown to be the petitioner, that evidence would have demonstrated the petitioner's ability to pay the proffered wage during that fiscal year, from December 1, 2002 to November 30, 2003, but not at any other time.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.