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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **AUG 12 2008**
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 sustained, the petition will be approved.

The petitioner is a retail pharmacy. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, a Form ETA 9089, Application for Permanent 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. Although not part of the director's decision denying the visa petition, the director noted that the record raises questions regarding the petitioner's intent to provide full-time employment to the beneficiary.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original May 10, 2007 decision, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 was accepted for processing by any office within the employment

system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is July 8, 2005. The proffered wage as stated on the Form ETA 9089 is \$58,469 annually.

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. Dépt. 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 pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ Relevant evidence submitted on appeal includes counsel's brief and copies of the petitioner's bank statements for the periods June 2005 through December 2005, 2006, and January 2007 through February 2007. Other relevant evidence includes copies of the petitioner's 2004 and 2005 Forms 1120, U.S. Corporation Income Tax Returns, for the fiscal years February 1 through January 31 for each year, a copy of the petitioner's 2006 Form 1120S, U.S. Income Tax Return for an S Corporation, for the period February 1, 2006 through December 31, 2006, copies of the 2005 and 2006 Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary and copies of the beneficiary's 2005 and 2006 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2004 and 2005 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$14,601 and -\$18,750, respectively. The petitioner's 2004 and 2005 Forms 1120 also reflect net current assets of -\$243,782 and -\$13,176, respectively.

The petitioner's 2006 Form 1120S reflects an ordinary income or net income from Schedule K, line 18, of \$267,281.²

The 2005 and 2006 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary reflect wages paid to the beneficiary of \$8,875 in 2005 and \$9,657.50 in 2006.

The beneficiary's 2005 and 2006 Forms 1040 show that the beneficiary was self-employed in those years.

The petitioner's bank statements for the period June 30, 2005 through February 28, 2007 reflect balances ranging from a low of -\$10,377.30 to a high of \$276,607.29.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage of \$58,469 based on its bank statements and the totality of the circumstances affecting the petitioning business. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in support of his contention.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained

¹ 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).

² The AAO notes that the petitioner's officer compensation for the sole officer in 2005 was nearly five times the officer compensation in 2004 and more than six times the officer compensation in 2006.

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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (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. at 612.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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 9089, signed by the beneficiary on February 5, 2007, the beneficiary claims to have been self-employed from January 1, 1994 to the present (February 5, 2007). However, counsel has provided copies of the 2005 and 2006 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, showing that the beneficiary was employed in some manner by the petitioner during 2005 and 2006.

The petitioner is obligated to establish that it has sufficient funds to pay the difference between the proffered wage of \$58,469 and the actual wages paid to the beneficiary of \$8,875 in 2005 and \$9,657.50 in 2006. Those differences would be \$49,594 in 2005 and \$48,811.50 in 2006.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure 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 supported by federal case law. *See 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng Chang* 719 F. Supp. at 537.

In fiscal years 2004 and 2005, the petitioner was organized as a "C" corporation. For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation

Income Tax Return or line 24 of the petitioner's Form 1120-A. The petitioner's tax returns demonstrate that its net incomes in 2004³ and 2005 were \$14,601 and -\$18,750, respectively. The petitioner could not have paid the difference of \$49,594 between the proffered wage of \$58,469 and the actual wage paid to the beneficiary of \$8,875 in 2005 from its net income.

In 2006, the petitioner was organized 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) or line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional 2006 income and deductions shown on its Schedule K, the petitioner's net income is found on Schedule K, line 18, of its 2006 tax returns.

In the instant case, the petitioner's net income from Schedule K for 2006 was \$267,281. The petitioner could have paid the difference of \$48,811.50 between the proffered wage of \$58,469 and the actual wages paid to the beneficiary of \$9,657.50 from its net income in 2006. Therefore, the petitioner has established its ability to pay the proffered wage in 2006.

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.⁴ 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. (The petitioner has already established its ability to pay the proffered wage of \$58,469 in 2006 from its net income.) The petitioner's net current assets in 2005 were -\$13,176. The petitioner could not have paid the difference of \$49,594 between

³ It is noted that the 2004 Form 1120 for the fiscal February 1, 2004 through January 31, 2005 is for the year prior to the priority date of July 8, 2005, and, therefore, has limited value when determining the petitioner's continuing ability to pay the proffered wage of \$58,469 from the priority date. Therefore, the AAO will not consider the petitioner's 2004 Form 1120 except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

the proffered wage of \$58,469 and the actual wages paid to the beneficiary of \$8,875 in 2005 from its net current assets in 2005.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage of \$58,469 based on its bank statements and the totality of the circumstances affecting the petitioning business. Counsel cites *Matter of Sonogawa*; 12 I&N Dec. at 612 in support of his contention.

Counsel is correct in part. However, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements cannot show the sustainable ability to pay a proffered wage as funds available to pay the proffered wage in one month would no longer be available the next month. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

However, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. at 612. In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, in light of the petitioner's long and continuing business presence (more than 15 years), its large revenues (more than \$5,000,000 each year), its large salary output, its minimal outlay native of the beneficiary's wages compared to the petitioner's overall income, its large net income in 2006, and the fact that the petitioner's compensation of officers appears to be a flexible

figure,⁵ the AAO finds that the petitioner could pay the proffered wage from the priority date and continuing to the present.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer⁶ and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's tax returns and other evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal overcome the decision of the director.

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 been met.

ORDER: The director's decision of May 10, 2007 is withdrawn. The petition is approved.

⁵ CIS has long held that it 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.

In the present case, however, it appears that the employee/owner of the corporation has great financial flexibility in setting his salary based on the profitability of the corporation (i.e., payment to the sole officer of compensation in 2005 nearly five times the amount from 2004 and more than six times the amount in 2006). Had the petitioner's owner chose not to take such a large compensation in 2005, the petitioner would have had sufficient funds to pay the difference of \$49,594 between the proffered wage of \$58,469 and the actual wage paid to the beneficiary of \$8,875 in 2005. (The difference of \$49,594 between the proffered wage of \$58,469 and the actual wages paid to the beneficiary of \$8,875 in 2005 is only a small percentage of the compensation of officers for that year.)

⁶ It should be noted that the AAO finds no evidence that the petitioner does not intend to employ the beneficiary in a full-time position. The mere fact that the petitioner has not employed the beneficiary in a full-time position in the past is not proof that it does not have a current or future need for the beneficiary in the full-time position of accountant.