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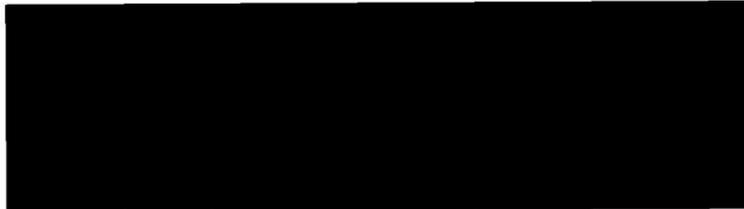
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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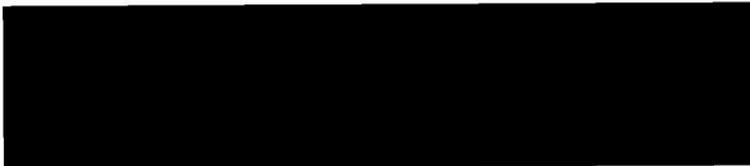
Date: **AUG 26 2008**

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The nature of the petitioner's business is a beauty salon. It seeks to employ the beneficiary<sup>1</sup> permanently in the United States as a hairstylist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner<sup>2</sup> 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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.

As set forth in the director's denial dated October 5, 2006, 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. See 8 C.F.R. § 204.5(d). The petitioner

<sup>1</sup> The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

<sup>2</sup> The petitioner is [REDACTED] variously known as [REDACTED] c. doing business as [REDACTED] and [REDACTED]. The Federal Employer Identification Number for the business (obscured here for privacy purposes) is [REDACTED]

must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001.<sup>3</sup> The proffered wage as stated on the Form ETA 750 is \$18.68 per hour (\$38,854.40 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>4</sup>

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form tax returns for 2001, 2002, 2003, 2004 and 2005; Form W-2 Wage and Tax Statements for 2001,<sup>5</sup> 2002, 2003, and 2004 issued by the petitioner to the beneficiary in the amount of \$3,605.00, \$4,907.00, \$4,300.50, \$5,000.00, as well as pay statements issued by the petitioner to the beneficiary for the period between June 26, 2005 to September 25, 2005 stating year-to-date wages paid of \$14,300.00; also submitted were pay statements issued by the petitioner to the beneficiary for the period between May 7, 2006 to July 30, 2006 stating year-to-date wages paid of \$21,000.00; an explanatory letter from counsel dated August 3, 2006; the petitioner's Employers Quarterly Federal Tax Form (Form-941) statements for 2001; a letter from the petitioner's accountant's dated July 13, 2006; approximately 64 of the petitioner's bank statements for the period of time between February 1, 2001 and June 30, 2006; the beneficiary's cosmetologist license from the Commonwealth of Virginia, Board for Barbers and Cosmetology; a Deed of Trust for property owned by [REDACTED] as well as a bank's letter dated July 28, 2006, concerning a bank savings account owned by [REDACTED]; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2000 and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net

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<sup>3</sup> It has been approximately seven years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>4</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

<sup>5</sup> Along with the W-2 statements for the substitute beneficiary, counsel has submitted W-2 statements of the original beneficiary in the amounts of \$15,407.10 and \$16,000.00 for years 2000 and 2001. Wage information submitted for years before the priority date have slight probative value in these matters.

annual income and gross annual income stated on the petition were \$1,385.00 and \$228,828.00 respectively. On the Form ETA 750, signed by the beneficiary on September 29, 2005, the beneficiary did claim to have worked for the petitioner since October 2001.

Counsel has made the following contentions or submitted the following evidence on appeal:

- The petitioner's accountant noted that the petitioner has been in business since 2000 and on the priority date had \$56,712.00 in available cash, and as of September 30, 2006, had \$126,615.00 in available cash, and according to that accountant, these points illustrate the petitioner's ability to pay the proffered wage.
- Counsel states that the "employer, [REDACTED] has increased her net worth from 2001 to 2006.
- Counsel asserts that the petitioner has a favorable ratio of current assets to total current liabilities.
- Counsel contends that depreciation, special deductions and credits reduce the petitioner's taxable income "but do not decrease the company's cash flow" and the petitioner's ability to pay the proffered wage.
- Counsel asserts that the petitioner "tries" to lower its taxable income to avoid (lawfully) paying taxes.<sup>6</sup>

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes the following documents: five personal bank statements of [REDACTED] and [REDACTED] or [REDACTED]; two unaudited financial statements for the petitioner; and a letter from the petitioner's accountant with compiled financial statements

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application 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 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. 612 (BIA 1967).

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 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

Counsel submitted W-2 Wage and Tax statements from the petitioner to the beneficiary for the years 2001, 2002, 2003, and 2004 in the amount of \$3,605.00,<sup>7</sup> \$4,907.00, \$4,300.50, and \$5,000.00. In the instant case,

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<sup>6</sup> It is unclear and not explained by counsel why lawful tax avoidance schemes are proof of the petitioner's ability to pay the proffered wage.

<sup>7</sup> If credit is given for wages paid to the original beneficiary of \$16,000.00 paid in 2001, that wage in

the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$38,854.40 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, for the years 2001, 2002, 2003, and 2004 which is \$35,249.40, \$33,947.40, \$34,553.90 and \$33,854.40 respectively. Pay statements were issued by the petitioner to the beneficiary for the period June 26, 2005 to September 25, 2005 stating year-to-date wages paid of \$14,300.00. The difference between the wage paid in 2005 and the proffered wage was \$24,554.40.<sup>8</sup>

As already stated, counsel contends that depreciation, special deductions and credits reduce the petitioner's taxable income "but do not decrease the company's cash flow" and the petitioner's ability to pay the proffered wage. 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 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. 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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. 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.

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

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

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combination with the wage of \$3,605.00 still will not equal the proffered wage.

<sup>8</sup> Counsel also submitted evidence of year-to-date wages paid by the petitioner to the beneficiary of \$21,000.00 but submitted no correlative financial evidence such as a federal tax return for that year.

- In 2001, the Form 1120 stated net income of <\$2,686.00>.<sup>9</sup>
- In 2002, the Form 1120 stated net income of \$4,462.00.
- In 2003, the Form 1120 stated net income of \$8,610.00.
- In 2004, the Form 1120 stated net income of \$1,385.00.
- In 2005, the Form 1120 stated net income of \$2,905.00.

Since the proffered wage is \$38,854.40 per year, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2001, 2002, 2003, 2004 and 2005.

If the net income the petitioner demonstrates it had available during the 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>10</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001, 2002, 2003, 2004 and 2005 were \$2,712.00, \$1,432.00, \$3,495.00, \$1,081.00, and \$1,681.00 respectively.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net income, sufficient net current assets to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2001, 2002, 2003, 2004 and 2005.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>11</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

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<sup>9</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>10</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>11</sup> 8 C.F.R. § 204.5(g)(2).

As already stated, the petitioner's accountant stated that the petitioner has been in business since 2000 and on the priority date had \$56,712.00 in available cash and as of September 30, 2006<sup>12</sup> had \$126,615.00 in available cash and that is evidence of the petitioner's ability to pay the proffered wage. However, according to the petitioner's 2001 tax return the petitioner stated on Form 1120, Schedule L, line 1(d) "cash" the amount of \$1,576.00. Counsel has submitted the petitioner's bank statements. The bank statement for April 2001 stated an ending balance of \$3,238.71, and the bank statement for June 2006 stated an ending balance of \$2,724.97. Since no tax return was submitted for 2006, the petitioner's accountant statement of available cash in either year is not supported by the record.

Without providing audited financial statements, line references to the petitioner's tax returns or documentary evidence, the petitioner's accountant opines that in tax years 2001 to 2006 there was available cash that should be considered. The available cash figures stated by the accountant do not appear on the tax returns nor in a letter submitted by petitioner's accountant dated July 13, 2006. Without more information the AAO is unable to consider whether available cash should be considered in this matter.

Petitioner's accountant has submitted in her letter dated July 13, 2006, a statement that for years 2001, 2002 and 2003, the petitioner's "net profit" is determined by subtracting the petitioner's "operating expenses" and employee salaries from its gross profit to determine the petitioner's net profit. Further the accountant opines that "profit distribution" is determined by adding officer salary, and taxable profit (i.e. net income, with the net income for 2001 stated as zero although it is stated in the 2001 tax return as <\$2,686.00>) together with depreciation expenses expressed as positive figures. Expenses expressed on the tax return cannot also be expressed as assets. Counsel has not provided regulation or case precedent that would substantiate the petitioner's accountant opinion that the petitioner has the ability to pay the proffered wage based upon her computations of net profit and profit distribution.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. See *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). 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)).

Counsel has submitted approximately 64 of the petitioner's bank statements for the period of time February 1, 2001 June 30, 2006, as proof of the petitioner's ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts 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, the bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage as any funds available to pay the proffered wage in one month would no longer be available in subsequent months and the statements in the record show minimal balances. 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 in determining the petitioner's net current assets.

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<sup>12</sup> No federal tax return, audited financial statement or annual report was submitted for year 2006 to substantiate this figure.

Counsel states on appeal that the petitioner's "positive cash flow" is proof of its ability to pay the proffered wage. The petitioner has not provided audited cash flow statements nor has the petitioner must submitted documentary evidence such as a detailed business plan that would allow the AAO to evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel refers to a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, regarding the ability to pay the proffered wage. According to counsel, the "record contains verifiable evidence that the petitioner is employing the petitioner and is *currently* paying the proffered wage (emphasis added)." By currently, counsel means five years after the priority date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Further, the regulation at 8 C.F.R. § 204.5(g)(2) requires evidence of the petitioner's ability to pay the proffered wage as of the ability date.

Counsel claims that the petitioner's current ratio and current assets/current liabilities show that the petitioner has the ability to pay the proffered wage in each relevant year. Financial ratio analysis is the calculation and comparison of ratios that are derived from the information in a company's financial statements. The level and historical trends of these ratios can be used to make inferences about a company's financial condition, its operations, and attractiveness as an investment. The AAO notes that there is no single correct *value* for a current ratio, rendering it less useful for determinations of an entity's ability to pay a specific wage during a specific period. In isolation, a financial ratio is a useless piece of information.<sup>13</sup>

While counsel argues that the current ratio shows the petitioner has the ability to pay the proffered wage, he provides no evidence of any industry standard that would allow a comparison with the petitioner's current ratio. In addition, he has not provided any authority or precedent decisions to support the use of current ratios in determining the petitioner's ability to pay the proffered wage. Moreover, because the current ratio is not

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<sup>13</sup> The observation that a particular ratio is high or low depends on the purpose for which the ration is being observed. In context, however, a financial ratio can give a financial analyst an excellent picture of a company's situation and the trends that are developing. A ratio gains utility by comparison to other data and standards, such as the performance of the industry in which a company competes. Ratio Analysis enables the business owner/manager to spot trends in a business and to compare its performance and condition with the average performance of similar businesses in the same industry. Important balance sheet ratios measure liquidity and solvency (a business's ability to pay its bills as they come due) and leverage (the extent to which the business is dependent on creditors' funding). Liquidity ratios indicate the ease of turning assets into cash and include the current ratio, quick ratio, and working capital. *See Financial Ratio Analysis*, <http://www.finpipe.com/equity/finratan.htm> (accessed March 21, 2006); *Financial Management, Financial Ratio Analysis*, <http://www.zeromillion.com/business/financial/financial-ratio.html> (accessed March 21, 2006); *Industry Financial Ratios, Financial Ratio Analysis*, [http://www.ventureline.com/FinAnal\\_indAnalysis.asp](http://www.ventureline.com/FinAnal_indAnalysis.asp) (accessed March 21, 2006).

designed to demonstrate an entity's ability to take on the additional, new obligations such as paying an additional wage, this office is not persuaded to rely upon it.

Counsel has also submitted a Deed of Trust for property owned by [REDACTED] as well as a bank's letter dated July 28, 2006, concerning a bank savings account owned by [REDACTED]. Because 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."

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.

Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that a sole proprietorship's financial ability to pay the proffered wage concerns its over-all fiscal circumstances. *Ranchito Coletero* concerns entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.