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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[Redacted]

FILE: [Redacted]
EAC 06 054 52066

Office: VERMONT SERVICE CENTER

Date: MAR 07 2008

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:

[Redacted]

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 electrical installation and repair. It seeks to employ the beneficiary permanently in the United States as an electrician. 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. 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. 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 September 11, 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:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. 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 the Service.

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 the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner 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 the U.S. Department of Labor 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 March 22, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$22.00 per hour (\$45,760.00 per year). The Form ETA 750 states that the position requires three 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.²

Relevant evidence in the record includes the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor and a letter from counsel dated July 27, 2006.

The petitioner submitted a statement and opinion from its accountants dated July 6, 2006, that opined that because the petitioner "has a substantial amount of work³ ... [the petitioner] will need additional help." Attached to the statement/opinion were four signed proposals by the petitioner in 2006. Since the issue in this case is the petitioner's ability to pay the proffered wage according to the criteria stated in the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner's evidence is examined from the priority date. It is not examined contingent upon some event in the future.⁴ 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).

Further the petitioner's accountant provided a statement dated July 24, 2006, stating that the petitioner is a Subchapter S corporation. This is correct. Where an S corporation's income is exclusively from a trade or business, Citizenship and Immigration Services (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."

¹ 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."

² 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).

³ We note that the director found that the petitioner had not submitted evidence that the contracts submitted were accepted by the petitioner's customers.

⁴ Since the beneficiary has been employed by the petitioner since 2001, the accountant's assertion that the petitioner "will need additional help," which can be taken to mean someone other than the beneficiary, does not support the petitioner's burden of proof to demonstrate its ability to pay the proffered wage.

Where an S corporation has income, credits, deductions or other adjustments from sources other than from a trade or business, net income is found 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 (2001-2003) or Line 17e (2004-2005) of Schedule K. See Internal Revenue Service, Instructions for Form 1120S, 2003, 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 deductions shown on its Schedule K for 2002 and 2004, the petitioner's net income is found on Schedule K of its tax returns for 2002 and 2004.

Further the petitioner's accountant provided an additional opinion in the statement dated July 24, 2006, that the shareholder's personal tax return demonstrates sufficient income to pay the proffered wage. Contrary to counsel's assertion, 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. 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

Other relevant evidence in the record includes the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2001, 2002, 2003, 2004 and 2005.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The gross annual income stated on the petition was \$200,000.00. On the Form ETA 750, signed by the beneficiary on March 19, 2001, the beneficiary did claim to have worked for the petitioner.

Accompanying the appeal, counsel submits a legal brief and no additional evidence. On appeal, counsel asserts that the petitioner's bank records (i.e. business checking account statements) are evidence of the petitioner's ability to pay the proffered wage.

Counsel submitted approximately 60 copies of the petitioner's business checking statements for the years 2001, 2002, 2003, 2004 and 2005. As noted by the director in his decision, counsel's reliance on the balances in the petitioner's business checking account statements 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 show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. The account balance as of the priority date (March 2001) is \$14,444.04. This amount is not greater than the proffered wage. Nor do the succeeding months demonstrate increases in monthly balances to equate to the amount of the proffered wage. 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 petitioner's

taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel states on appeal that the director committed error because the director in his request for evidence dated May 2, 2006, did not request the petitioner's banking statements, and once received by the director, "it is obvious that ... [CIS] totally ignored them." 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). Reviewing the request for evidence, the director requested "... additional evidence to establish that the employer had the ability to pay the proffered wage" It is unclear why counsel is contending that the director restricted the petitioner from submitting its bank statements. The petitioner did submit its bank statements to the director, and the director considered the statements in connection with the determination of the petitioner's ability to pay the proffered wage. It is also unclear why counsel contends that the director "totally ignored" the bank statement evidence submitted since counsel acknowledges in his brief that the director considered the statements and found that they did not establish the petitioner's ability to pay the proffered wage.

Counsel asserts without independent objective substantiation that since the beneficiary was paid "off of the books" (i.e. no W-2s were issued) that the bank statements are "supplementary proof" that the petitioner had the funds to pay the proffered wage "separate and apart from the cash indicated on the Schedule L of the tax returns." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Since the bank statements are a series of summaries without any separate individual check items provided, counsel's statement is not supported by evidence in the record of proceeding. And as already stated, 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. 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)).

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 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 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, 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.

The director requested on May 2, 2006, the beneficiary's wage information for the five year period beginning 2001, but it was not submitted. In a letter dated July 27, 2006, counsel stated that although the beneficiary had been employed by the petitioner since September 1999, the beneficiary "... does not have a social security number and therefore is not paid on the books and has not been given a W-2 for any year he has worked for the company." 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The AAO will therefore evaluate the petitioner's ability to pay the proffered wage as of the priority date.

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 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). 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 Form 1120S tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120S stated net income of \$1,394.00.
- In 2002, the Form 1120S stated net income of \$2,842.00.
- In 2003, the Form 1120S stated net income of \$2,938.00.
- In 2004, the Form 1120S stated net income of \$2,436.00.
- In 2005, the Form 1120S stated net income of \$1,224.00.

Since the proffered wage is \$45,760.00 per year, the petitioner did not have sufficient net income to pay 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.⁵ 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 were \$10,049.00; during 2002 were \$9,126.00; during 2003 were \$8,734.00; during 2004 were \$8,058.00 and during 2005 were \$6,639.00.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of its net income or net current assets.

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.

⁵ 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.