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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



B6

Date: **FEB 01 2012**

Office: TEXAS SERVICE CENTER FILE:



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:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** On May 20, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on November 25, 2002. The director of the Texas Service Center ("the director"), however, revoked the approval of the immigrant petition on July 20, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).<sup>1</sup> As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on November 25, 2002 by the VSC, but that approval was revoked in July 2009. The director found that the beneficiary's claimed employment as a cook in Brazil was questionable. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, current counsel for the petitioner – [REDACTED] – argues that the director has improperly revoked the approval of the petition. Specifically, counsel contends that the petitioner has submitted sufficient evidence to demonstrate that the beneficiary qualifies for the position, that he did have the requisite work experience in the job offered as of the priority date.

Counsel asserts that the beneficiary was employed as a cook in Brazil for more than two years, from 1994 to 1997. Counsel states that the beneficiary worked at a restaurant owned by [REDACTED] [REDACTED] restaurant had existed and was fully operative before it was officially registered in the CNPJ Brazilian company registration system.<sup>3</sup>

<sup>1</sup> Section 203(b)(3)(A)(i) of 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.

<sup>2</sup> Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision. Previous counsel, [REDACTED] will be referred to as previous or former counsel or by name.

<sup>3</sup> Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ (Cadastro Nacional da Pessoa Juridica) is similar to the federal tax ID or employer ID number in the United States. The director wrote in the Notice of Revocation, "The U.S. Department of State has determined that the CNPJ provides reliable verification with

To show that the beneficiary worked as a cook for more than two years before the priority date and that he qualifies for the position, counsel submits the following evidence:

- An employment verification letter dated February 8, 2001 from [REDACTED] stating that the beneficiary worked at his restaurant as a cook from May 23, 1994 to March 1, 1997;
- A signed statement from [REDACTED] attesting to the existence of the restaurant owned by [REDACTED] before its official registration in the CNPJ in 1997 and to the veracity of the beneficiary's employment at the restaurant owned by [REDACTED];
- A copy of [REDACTED]'s work and social security card showing his employment as a bus driver;
- A sworn statement from [REDACTED] confirming the beneficiary's employment at [REDACTED] restaurant as a cook for several years in the 1990s;<sup>5</sup>
- A signed statement from [REDACTED] stating that he worked alongside the beneficiary between 1994 and 1997 and that he knew about the existence of [REDACTED] restaurant even before he worked there;
- Photographs of the restaurant and steak house (Churrascaria) owned by [REDACTED];
- A map of Route [REDACTED] restaurant is located;
- Various articles, studies, and reports reporting that many businesses operate in the informal economy in Brazil;<sup>6</sup> and

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respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date."

<sup>4</sup> [REDACTED] states in his signed statement that he has been a bus driver for the last thirty years, that he has known about the existence of [REDACTED] restaurant and gas station for at least sixteen years, and that he regularly stops by [REDACTED] restaurant and gas station since he passes Route [REDACTED] MG. He claims that he and the beneficiary have known each other since they were children, and that beginning in the early 1990s he saw the beneficiary working as a cook at [REDACTED] restaurant.

<sup>5</sup> [REDACTED] states that he has known the beneficiary for more than twenty years, that for more than fourteen years he has been driving through Route 116 to go to work, and twice a week for fifteen years, he has been stopping by [REDACTED] and gas station to eat and fill up gas for his car. He further indicates that the beneficiary started to work at [REDACTED] soon after the beneficiary got married in December 1993 and remembers seeing the beneficiary working as a cook for several years afterward.

<sup>6</sup> Counsel on appeal argues that [REDACTED] restaurant was one of these small businesses that did not register until 1997.

- A sworn statement dated September 3, 2009 from [REDACTED] petitioning company, claiming that the beneficiary clearly knew what he was doing in the kitchen before he was hired in 1999.<sup>7</sup>

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>8</sup>

Preliminarily, as a procedural matter, the AAO finds that the director erred in revoking the approval of the petition under the authority of 8 C.F.R. § 205.1. The regulation at 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

Further, the AAO finds, after reviewing all of the evidence submitted, that the petitioner has established that the beneficiary was qualified for the position as of the priority date.

Nevertheless, the petition is currently not approvable because the record does not contain sufficient evidence establishing the petitioner's ability to pay the proffered wage from the priority date. In adjudicating the appeal, the AAO observed that the record did not establish that

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<sup>7</sup> [REDACTED] in his sworn statement states that his restaurants are up-scale and combine modern American cuisine with a lively eclectic bar scene. Before hiring a cook, he first of all reviews resumes of applicants before inviting them for an interview. Then he tests the skills of applicants for cook positions in his restaurants by having them do an *estage*, or shadowing in the kitchen. If he likes the resume of an applicant and the interview goes well, he invites the applicant to shadow in the kitchen for part of a shift to see if he knows what he is doing. If the first *estage* goes well, [REDACTED] will call the applicant back to do a full-shift *estage* so he can assess the applicant's skill level. After a few times, if all goes well, [REDACTED] will offer the applicant a job as a cook. [REDACTED] indicates that most applicants do not make it past the *estage* process and that it is a way of testing someone's real skill level, not just what is on their resume. [REDACTED] states, "There is no way to hide in the kitchen if you don't know what you're doing."

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

the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO also noted that the petitioner has filed one other employment-based immigrant visa petition on behalf of an alien beneficiary named [REDACTED] on September 20, 2002. The petition for [REDACTED] was approved on June 25, 2003 but the approval was revoked on July 21, 2009 (Receipt Number [REDACTED]).

On January 11, 2011, the AAO sent Request for Evidence (RFE) to the petitioner advising the petitioner to submit additional evidence, such as:

- Copies of the petitioning company's tax returns for 2001-2009, audited financial statements, or annual reports for those years;
- Copies of the beneficiary's Forms W-2 or 1099-MISC for 2002-2009 or other documents indicating payments to the beneficiary during the qualifying period;
- Copies of the labor certification application that the petitioner filed on behalf of [REDACTED] and [REDACTED];
- Copies of the W-2s, 1099-MISCs, paystubs, or other documents that the petitioner issued to [REDACTED].

On January 11, 2011, the AAO also sent RFE to the beneficiary advising the beneficiary to submit additional evidence, such as:

- The beneficiary's most recent Social Security Statement.

The AAO afforded the petitioner and the beneficiary 60 days to respond.

In response to the AAO's RFE, counsel for the petitioner states that the beneficiary has not been paid or employed by the petitioner since 2001 but has been working for [REDACTED] since 2002. Referring to a couple of AAO decisions, [REDACTED] (May 20, 2005) and In re: --, [REDACTED] (April 8, 2010), counsel claims that [REDACTED] has the ability to pay the wage of the beneficiary and of the other alien beneficiary ([REDACTED]) based on the compensation he has received as an officer of the company.

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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the ETA Form 750 was accepted for processing by the DOL on April 19, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year based on a 35 hour work week.<sup>9</sup>

Further, the ETA Form 750 filed for [REDACTED] (the other alien beneficiary) was accepted for processing by the DOL on June 7, 2001. The rate of pay specified on the Form ETA 750 filed on behalf of [REDACTED] is \$13.01 per hour or \$23,678.20 per year.

If the instant petition were the only petition filed, the petitioner would have only been required to demonstrate the ability to pay the proffered wage to the single beneficiary of the instant petition. However, that is not the case here. In this case, the petitioner has filed one other petition in the past. Hence, consistent with the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner is required to establish the ability to pay the proffered wages *not only* for the current beneficiary but for the other immigrant visa beneficiary until both receive their legal permanent residence (LPR), or until the petition is withdrawn, or as with the other petition in this case, until the petition was revoked.

To show that the petitioner has the continuing ability to pay \$12.57 per hour or \$22,877.40 per year from April 19, 2001 and \$25.58 per hour (\$12.57 per hour plus \$13.01 per hour) or \$46,555.60 per year (based on a 35-work-a-week) from June 7, 2001, the petitioner submitted the following evidence:

- Copies of Forms 1120, U.S. Corporation Income Tax Return for an S Corporation, for the years 2002 through 2009;<sup>10</sup>
- Copies of the beneficiary's Forms W-2 from the petitioner for 2001, from [REDACTED] the years 2002 through 2008; and from [REDACTED]
- A copy of the Articles of Organization of the petitioning company;
- A copy of the Certificate of Organization of [REDACTED];
- A copy of the Articles of Voluntary Dissolution of [REDACTED]; and
- A signed statement dated March 9, 2011 from [REDACTED] stating, among other things, that the petitioning company has never had any problem paying any of its employees'

<sup>9</sup> The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

<sup>10</sup> The petitioner's tax return for the year 2000 will not be considered since the petitioner is only required to demonstrate the ability to pay the proffered wage from the priority date (April 27, 2001).

wages and that if there was ever an issue of ability to pay the employees, he would have paid the wage to the employee and taken less officer compensation.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. [redacted] are both the equal (50/50) owners of the petitioning corporation. On the petition, the petitioner claimed to have been established in August 1996.

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, United States Citizenship and Immigration Services (USCIS) 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, USCIS 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 this case, the beneficiary, based on the evidence submitted, was employed and paid by the petitioner in 2001.<sup>11</sup> The beneficiary received the following wages from the petitioner in that year:

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2001	\$11,884.89	\$22,877.40	(\$10,992.51)

On appeal, counsel for the petitioner states that [redacted] the owner of the petitioning company, along with [redacted] and that the beneficiary was employed by [redacted] from 2002 to 2010. Counsel states that USCIS should consider the wages the beneficiary received from [redacted] as evidence of the petitioner's ability to pay since [redacted] one point, were owned and run by [redacted]

<sup>11</sup> Based on the Forms W-2 submitted, the beneficiary was employed by [redacted] from 2001 to 2008 and by [redacted] in 2009 and 2010. In his signed statement dated March 9, 2011, Mr. [redacted] stated that he and [redacted] until they sold the company in 2009. [redacted] also stated that he no longer owned [redacted]

Upon review, the AAO determines that the Forms W-2 from [REDACTED] should not be considered as evidence of the petitioner's ability to pay. Nor should they be considered as evidence of the beneficiary's employment with the petitioner. 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). 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Hence, since [REDACTED] both are distinct and separate legal entities from the petitioner, they have no legal obligation to pay the wage of the beneficiary.

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay \$10,992.51 in 2001 and the full proffered wage of \$22,877.40 from 2002 thereon. The petitioner can show the ability to pay those amounts through either its net income or net current assets.

If the petitioner chooses to pay these amounts through its net income, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873 (E.D. Mich. 2010). 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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 USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the

years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. "[USCIS] 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." *Chi-Feng Chang* at 537 (emphasis added).

The record before the AAO closed on March 11, 2011 with the receipt by the AAO of the petitioner's submission in response to the AAO's request for evidence. As of that date, the petitioner's 2009 federal income tax return is the most recent return available. The petitioner's tax returns demonstrate its net income (loss) for the years 2001 through 2009, as shown below:

<i>Tax Year</i>	<i>Net Income (Loss)<sup>12</sup> - in \$</i>	<i>PW for two beneficiaries - in \$</i>
2001	Not Available <sup>13</sup>	46,555.60
2002	(22,278.00)	46,555.60
2003	61,044.00	46,555.60
2004	(21,617.00)	46,555.60

<sup>12</sup> For an S Corporation, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S if the S corporation's income is exclusively from a trade or business. 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) line 17e (2004-2005) line 18 (2006-2010) of Schedule K. See Instructions for Form 1120S, 2010, at <http://www.irs.gov/pub/irs-prior/i1120s--2010.pdf> (last accessed January 5, 2012) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In the instant case, the net income is found on line 23, 17e, or 18 of schedule K.

<sup>13</sup> [REDACTED] stated in his signed statement dated March 9, 2011 that he only kept company tax records for seven years, and therefore, he no longer has the copy of the company's 2001 tax return.

2005	(24,067.00)	46,555.60
2006	9,052.00	46,555.60
2007	(79,514.00)	46,555.60
2008	(8,128.00)	46,555.60
2009	37,424.00	46,555.60

Therefore, the petitioner only had sufficient net income to pay the combined proffered wage of the two beneficiaries in 2003.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>14</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 tax returns demonstrate its end-of-year net current assets for the years 2001 and 2002 and from 2004 to 2009, as shown below:

<i>Tax Year</i>	<i>Net Current Assets – in \$</i>	<i>PW for two beneficiaries – in \$</i>
2001	15,119.00 <sup>15</sup>	46,555.60
2002	(8,168.00)	46,555.60
2004	(20,329.00)	46,555.60
2005	16,166.00	46,555.60
2006	(44,680.00)	46,555.60
2007	(76,748.00)	46,555.60
2008	(74,947.00)	46,555.60
2009	(32,225.00)	46,555.60

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in any of the years shown above. Based on the net income and net current asset analysis above, the AAO determines that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence.

<sup>14</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>15</sup> This figure is based on the company's 2002 tax return, beginning of year of Schedule L.

On appeal, counsel for the petitioner urges the AAO to consider the officers' compensation as evidence of the petitioner's ability to pay. Citing a couple of AAO past decisions, counsel states that the officers' compensation is not fixed, and that it can be adjusted to meet the business needs of the petitioning corporation. Counsel further claims that [REDACTED] the owner of the petitioning corporation, is able and willing to reduce his compensation, if necessary, to pay the proffered wage of the beneficiary.

According to the tax returns submitted, the compensation of officers for the years 2002 to 2009 is as follows:<sup>16</sup>

Year	Officers' Compensation - in \$
2002	98,000.00
2003	230,000.00
2004	312,994.00
2005	284,616.00
2006	321,588.00
2007	237,848.00
2008	301,874.00
2009	251,957.00

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owners 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, counsel for the petitioner is not suggesting that USCIS examine the personal assets of the petitioner's owners or officers, but, rather, the financial flexibility that the owners or officers have in setting their annual compensation based on the profitability of their business enterprise. As described above, the petitioning entity here is a profitable enterprise for its owners or officers. The owners of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

Nevertheless, the overage in the shareholder or officer compensation may not be sufficient to cover the beneficiary's wage in any of the qualifying years from the priority date. While [REDACTED] has expressed his willingness to forego part of his annual compensation from his

<sup>16</sup> The petitioner is equally owned by [REDACTED]

business to pay the beneficiary's wage, no evidence regarding what part of the total officer compensation might be available to pay both of the beneficiaries' wages until they have received legal permanent residence. The record contains no information about [REDACTED] family and no evidence of his personal monthly expenses to demonstrate that it is realistic for him to give up part of his officer compensation to pay the proffered wage of the beneficiary. For instance, in *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income. Without a more fully developed record concerning [REDACTED] income and expenses, the AAO cannot determine that [REDACTED] is making a realistic offer to pay the beneficiary's wage.

Though not specifically raised on appeal, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years 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 USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The AAO acknowledges that the petitioner has been in a competitive field since 1996. A review of the record including the tax returns submitted and the various consumer reviews establish that the petitioner is a viable business and one that has a good reputation. Unlike *Sonogawa*, however, the petitioner in this case has not provided any evidence reflecting the company's historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Similarly, the tax records submitted do not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner's inability to pay the proffered wage particularly in 2001 and 2002 and from 2004 to 2009.

Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence. In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the evidence submitted, the AAO is not persuaded that the petitioner has that ability.

The petition will be denied for this reason. 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. The approval of the petition remains revoked.