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U.S. Citizenship
and Immigration
Services

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FILE:

LIN 06 151 50647

Office: NEBRASKA SERVICE CENTER

Date: FEB 04 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The director, Nebraska Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an alterations and dry cleaning business. It seeks to employ the beneficiary permanently in the United States as an alterations tailor.¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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 2001 priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's August 6, 2007 denial, 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 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

¹ The record indicates that the petitioner substituted the beneficiary on the ETA Form 750 on April 11, 2006. The original beneficiary was [REDACTED]. The record also contains a request for withdrawal letter signed by the substituted beneficiary dated January 19, 2009 that was submitted to the U.S. Citizenship and Immigration Services (USCIS) San Antonio District Office. This request for withdrawal was made in conjunction with the adjudication of a Form I-360 Special Immigrant Religious Worker petition for the beneficiary's wife, the beneficiary and their children. The regulation at 8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

(B) Meaning of affected party. For purposes of this section and sections 103.4 and 103.5 of this part, affected party (in addition to [USCIS]) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. Thus, the beneficiary in the instant petition cannot request the withdrawal of the petitioner's appeal of the instant petition.

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 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 [USCIS].

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$32,000 per year. The Form ETA 750 states that the position requires two years of experience in the proffered job.

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 relevant evidence in the record, including new evidence properly submitted on appeal.²

With the initial petition, the petitioner submitted copies of its IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2000³ to 2004.⁴ In the petitioner's response to the director's

² 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).

³ The petitioner's 2000 tax return is for a period of time prior to the priority date and, thus, is not dispositive in this proceeding, but may be considered generally.

⁴ The petitioner's tax returns for tax years 2003 and 2004 did not provide available attachments and schedules. There are conflicting versions of the petitioner's 2001 and 2002 tax returns. While the tax returns for 2001 and 2002 initially submitted with the petition indicated that the petitioner had positive net income, the 2001 and 2002 tax returns submitted to the record in response to the director's Request for Evidence (RFE) indicated the same figures for net income but identified these figures as negative net income for both years. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The AAO will discuss the petitioner's net income during the relevant years further in this proceeding.

Request for Evidence (RFE) dated May 2, 2007, the petitioner resubmitted its tax returns for 2001 to 2004, and its tax return for tax year 2005 with available attachments and schedules. Counsel asserted that the petitioner's total assets identified at Section E, on the first page of the 1120S form established the petitioner's ability to pay the proffered wage.

On appeal the petitioner submits a copy of the beneficiary's 2006 W-2 Wage and Tax Statement that indicates the petitioner paid the beneficiary \$13,600 in that year. Counsel also submits the petitioner's Payroll Journal for the months January 2007 to August 2007 that indicate the beneficiary received a weekly salary of \$680. The petitioner also submits copies of W-2 Forms for [REDACTED], also the petitioner's employee, for tax years 2005 and 2006. These documents indicate that the petitioner paid \$36,400 in tax year 2005 and \$19,710 in tax year 2006.

Counsel also submits a copy of an interoffice memorandum written by [REDACTED] former USCIS Associate Director for Operations, with regard to the determination of a petitioner's ability to pay the proffered wage.⁵

Finally, the petitioner also submits a one page document prepared by [REDACTED], dated August 29 2007, with an accompanying cover letter. In his letter [REDACTED] states that he has prepared the petitioner's tax returns since it incorporated and that he had reviewed and prepared the document he describes as a "Cash Review Analysis" for the petitioner. [REDACTED] also states that the petitioner has faced some deep discount stores opening in the area recently and that it was bouncing back toward its original status. [REDACTED] states that since the petitioner opened, the petitioner's shareholder "started other business ventures that required his time and thus the petitioner had a plant manager," while the officer/shareholder did not take a large salary from the petitioner. [REDACTED] notes the wages paid by the petitioner to [REDACTED], whom he identifies as the petitioner's plant manager who resigned in mid-2006. [REDACTED] notes that the combined wages of the beneficiary and the former manager in 2006 totaled \$33,310.

In the one page document prepared by [REDACTED] he added the petitioner's net income, with non-cash expenses of depreciation and amortization to calculate the petitioner's income before noncash expenses for tax years 2001 to 2006. He then subtracted the petitioner's yearly bank loan principal payments to calculate the amount of funds available to pay the beneficiary during the tax years 2001 to 2006. [REDACTED] also listed the officer's compensation listed on the tax returns for each year, and added this annual compensation to arrive at what he described as the "total available" for the beneficiary. In a note at the bottom of this document, [REDACTED] states that the total available was the amount available to pay the beneficiary since the [petitioner's] "officer has many other activities he cannot devote his time to this particular enterprise and for that he is had (sic) full-time manager." [REDACTED] also notes that other than 2005 when two other businesses opened across the street from the petitioner, there was enough cash flow to pay the beneficiary's proffered wage, and that the

⁵ Memorandum from [REDACTED] Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

[petitioner's] officer did not require the compensation he had previously taken, once [the petitioner] had a competent plant manager.

The record does not contain any further evidence with regard to the petitioner's ability to pay the proffered wage.

On appeal, counsel states that the beneficiary had been employed by the petitioner since June 13, 2006, and that based on the beneficiary's pay stubs for 2007, he is paid \$17 an hour, which totals \$35,360 per annum, a salary greater than the proffered wage.⁶ Counsel refers to the Yates memo that states the petitioner may establish its ability to pay the proffered wage "if the record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has or currently is paying the proffered wage." Counsel states that based on the petitioner's employment of the beneficiary, there should be no question about the petitioner's ability to pay the beneficiary the proffered wage from June 13, 2006. With regard to the petitioner's ability to pay the proffered wage from 2001 to 2006, counsel states that [REDACTED] financial analysis revealed the total available funds with which to pay the proffered salary. In reference to [REDACTED], the petitioner's plant manager who resigned in 2006, counsel states that his wages can be transferred to pay the beneficiary's proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on July 11, 2000, to have a gross annual income of more than \$378,000, a net annual income of more than \$378,000, and to currently employ three employees. On the Form ETA 750, signed by the beneficiary on March 21, 2006, the beneficiary did not claim to have worked with the petitioner.

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, 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).

⁶ The record does not contain the beneficiary's pay stubs, but rather a list of checks issued to the beneficiary on a weekly basis from January to August 2007. This list indicates a weekly salary of \$680, and, on page seven, total wages paid of \$23,800. However, this document only establishes the beneficiary's wages for the January through August 2007 time period, and does not establish the petitioner paid the beneficiary the proffered wage at any other period of time.

On appeal, [REDACTED] the petitioner's accountant, utilizes the petitioner's depreciation and amortization expenses in his analysis of the petitioner's finances. He also mentions the petitioner's cash flow as another factor in determining whether the petitioner had paid the proffered wage. However, [REDACTED]'s reliance on the petitioner's depreciation and amortization is misplaced. His assertion that the petitioner's depreciation and amortization deductions should be added back to the petitioner's income is unconvincing. [REDACTED] is correct that those deductions do not represent specific cash expenditures during the year claimed. They are systematic allocations of the cost of long-term assets, tangible and intangible, respectively.

The depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While those expenses do not require or represent the current use of cash, neither are they available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's selection of an accounting method and a depreciation schedule accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its redistribution to other years as convenient.

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.

On appeal, the petitioner submitted a 2006 W-2 Form for the beneficiary that indicated the petitioner paid the beneficiary \$13,600 in tax year 2006. The petitioner also submitted a Payroll Journal that lists paychecks issued to the beneficiary from January 4, 2007 to August 30, 2007 that indicates the beneficiary's wages during this period of time totaled \$23,800. However, the AAO does not view this documentation to have as much probative weight as copies of the actual processed checks issued to the beneficiary, or the actual pay stubs. Nor is the documentation sufficient to establish that the petitioner continued to pay the beneficiary the same weekly salary during the remainder of 2007.

Further, while the petitioner has provided evidence as to the beneficiary's wages in 2006 and provided documentation with claimed wages in 2007, it has not established that it employed and paid the beneficiary the proffered wage as of the 2001 priority date and through 2006.⁷ Thus, the petitioner had not established that it employed and paid the beneficiary the proffered wage as of the 2001 priority date and through 2006. The petitioner has to establish its ability to pay the entire proffered wage from 2001 to 2005, and the difference between the beneficiary's actual wages and the proffered wage in 2006, based on its net income or net current assets.⁸

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, and contrary to the petitioner's accountant, 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 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. The court in *Chi-Feng Chang* further noted:

⁷ Counsel refers to the Yates memo on appeal. In the Yates memo, the regulation at 8 C.F.R. § 204.5(g)(2) is set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date.

⁸ The AAO notes that the record of proceeding closed as of the petitioner's response to the director dated May 26, 2007. At this date, the petitioner's 2006 tax return would have been available; however, the petitioner did not submit it or explain why the return was not submitted to the record. Thus, the AAO cannot consider further whether the petitioner could establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage based on the petitioner's 2006 net income or net current assets. Since the record does not contain the petitioner's 2007 tax return, the AAO will also not examine further the petitioner's ability to pay entire proffered wage in tax year 2007, based on the petitioner's net income or net current assets. With regard to counsel's remarks on using another employee's wages to establish the petitioner's ability to pay the beneficiary the proffered wage in either 2006 or 2007, the AAO will examine this issue more fully further in this proceeding.

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. [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.

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

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$32,000 per year from the priority date:

- In 2001, the Form 1120S stated a net income⁹ of -\$20,788.
- In 2002, the Form 1120S stated a net income of -\$1,647.
- In 2003, the Form 1120S stated a net income of \$17,757.
- In 2004, the Form 1120S stated a net income of \$16,587.
- In 2005, the Form 1120S stated a net income of -\$35,482.

Therefore, for the years 2001 to 2005, the petitioner did not have sufficient net income to pay the 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, USCIS will review the petitioner's assets. Contrary to counsel's assertion in the petitioner's response to the director's RFE, the petitioner's total assets identified on the petitioner's Schedules L¹⁰ are not the petitioner's net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts

⁹Where an S corporation's income is exclusively from a trade or business, 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. 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) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, 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. The AAO notes that during all relevant years in question, the petitioner in the instant petition had additional deductions that reduced the petitioner's actual net income. Thus, the petitioner's net income for tax years 2001, 2002, and 2003 are found on line 23, Schedule K, and the petitioner's net income for tax years 2004 and 2005 are found on line 17e, Schedule K.

¹⁰ Line 15 of the Schedule L.

should be considered. 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, USCIS 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.¹¹ 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 net current assets during 2001 were \$17,056.
- The petitioner's net current assets during 2002 were \$10,620.
- The petitioner's net current assets during 2003 were \$13,216
- The petitioner's net current assets during 2004 were \$10,503.
- The petitioner's net current assets during 2005 were \$6,059.

Therefore, for the years 2001 to 2005, the petitioner did not have sufficient net current assets to pay the proffered wage of \$32,000.

Therefore, from the date the Form ETA 750, was filed with the Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the 2001 priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. Because the petitioner did not submit its tax return for tax year 2006, the AAO cannot consider whether the petitioner had either sufficient net income or net current assets in 2006 to pay the difference between the beneficiary's actual wages of \$13,600 and the proffered wage of \$32,000.

Counsel and the petitioner's accountant on appeal suggest that the petitioner could use 2006 wages available to pay another employee who resigned in mid-2006 to establish its ability to pay the difference between the beneficiary's actual wages in 2006 and the proffered wage, or to pay the beneficiary's future wages. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

¹¹According 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.

With regard to using the future wages of the manager to pay the beneficiary, there is no evidence that petitioner will no longer require the services of a manager, or that the position of the plant manager who resigned in 2006 involves the same duties as those set forth in the Form ETA 750 of alterations tailor. In fact, the Form ETA 750 indicates that the beneficiary will be supervised by the manager. Since the employee who resigned performed other kinds of work other than those described in the Form ETA 750, and would have supervised the beneficiary, the beneficiary could not have replaced him or her. The record thus does not support the use of the previous manager's wages to pay the beneficiary either in 2006 or in the future.

Further, while the petitioner's accountant states that the petitioner's officer's compensation could also be considered as funds available to pay the beneficiary's wages, his assertion is not sufficient to establish fact. The assertions of counsel, and by extension, the assertions of the petitioner's accountant, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence that the petitioner's officer is willing and able to use his compensation as a source of money with which to pay the proffered wage. Further, in cases in which the AAO has considered officer's compensation as a source of additional funds with which to pay the proffered wage, the petitioner is usually a personal services corporation, such as a medical practice, and the officers' compensation is not viewed as a set salary, and among other issues, is significantly higher than the proffered wage.

Further, 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."

Counsel's remarks cannot be concluded to outweigh the present regulations that mandate a petitioner establish its ability to pay the proffered wage as of the priority date and until the beneficiary obtains lawful permanent residency. The evidence presented in the tax returns as submitted by the petitioner demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had 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.