U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 7 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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: SELF-REPRESENTED

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

cc: [redacted]

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign specialty (Mexican-style) food cook.[1] As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On appeal, the petitioner states that the evidence establishes its ability to pay the proffered wage. The petitioner asserts that the director should have considered a separate corporation, as the petitioner in this matter and reviewed its ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this

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[1] The regulation at 8 C.F.R. § 103.2(a)(3) specifies that a petitioner may be represented "by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter." In this case, the person listed on the G-28 is not an authorized representative. Although the director erroneously recognized the person listed on the Form G-28 as the petitioner's representative, the AAO will treat the petitioner as self-represented.

instance is April 30, 2001. The beneficiary's salary as stated on the labor certification is $11.01 per hour or $22,900.80 per year.

As the AAO must evaluate the petitioner's ability to pay, the identity of the petitioner is critical to this matter. The Form I-140 petition identifies the petitioner as with an IRS Employer Identification Number of 33-1003749. The Form ETA-750 also identifies the petitioner as n a letter accompanying the initial petition dated April 22, 2003, dentified herself as the owner of The record reveals that as of the priority date, the petitioning restaurant was owned by Fiesta"). In June 2002, the restaurant was sold to "Amador"), which is owned by The petitioner has submitted sufficient evidence to establish that Amador purchased the restaurant and assumed all of the rights, duties, obligations from Fiesta, and is therefore the "successor in interest" to Fiesta. *See Matter of Dial Auto Shop* 19 I&N Dec. 481 (Comm. 1986).

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. Specifically, the petitioner failed to submit evidence relevant to the petitioner's ability to pay as of 2001, the time that the priority date was established. In a request for evidence (RFE) dated September 11, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The director specifically requested the petitioner's 2001 corporate income tax return.

In response to the RFE the petitioner submitted a letter dated December 3, 2003 from an accounting firm, , asserting that the director should consider the petitioner's depreciation. The petitioner also submitted copies of bank account summaries of a copy of Form 112 Income Tax Return for 2001 of copies of an unaudited income statements of for 2002 and for the first ten months of 2003; and copies of an unaudited income statement of , for 2001.

Under a separate cover letter dated December 4, 2003 the petitioner also submitted a copy of the Form 1120 U.S. Corporation Income Tax Return for 2001 of Eateries, Inc. and Subsidiaries (hereinafter "Eateries, Inc.").

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the present, and denied the petition.

On appeal, the petitioner submits additional evidence consisting of the following, in relevant part: a copy of the Form 1120S U.S. Income Tax Return for an S Corporation for 2003 of copies of unaudited financial documents for Amador Restaurants, Inc.; copies of unaudited financial documents for a letter dated March 24, 2004 from the treasurer of relating to the 2002 sale of the restaurant; a letter dated March 26, 2004 from the Chief Financial Officer documents related to the sale of the restaurant in 2002; and copies of bank statements for accounts of for the years 2002, 2003, and 2004. The copies of bank statements were submitted in mixed chronological order and include statements from multiple accounts.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. Although the petitioner claims that it has employed the beneficiary as a cook since January 2000, no evidence was submitted in support of this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus the petitioner did not establish that it had previously employed the beneficiary.

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 petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well 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. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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 Immigration and Naturalization Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For a subchapter "S" corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S, U.S. Income Tax Return for an S Corporation. Amador Restaurant's tax return for 2002 shows the figure of -$63,285 for ordinary income. Since that figures is negative it fails to establish the ability of the petitioner to pay the proffered wage in that year.

The previous owner, [redacted] is a subchapter "C" corporation and not an S-corporation. For a subchapter "C" corporation, CIS considers net income to be the figure shown on Line 29, taxable income before net operating loss deduction and special deductions, of the IRS Form 1120, U.S. Corporation Income Tax Return. On the tax return for 2001 for Eateries, Inc. the amount on line 29 is -$1,099,709.00. Since the previous owner had a negative net income, it also fails to establish the ability of the petitioner's previous owner to pay the proffered wage as of the time the priority date was established in 2001.

The 2001 federal tax information for [redacted] a consolidated tax return and includes in the return the financial data for the subsidiary [redacted] and the petitioning restaurant. However, the petitioner has also submitted the individual state tax return, [redacted]

that confirms that the previous owner did not have the ability to pay the proffered wage in 2001. That return shows federal taxable income on line 1 as -$423,745.00.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.[2] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L attached to Amador Restaurant's tax return for 2002 yield the following amounts for net current assets: zero for the beginning of 2002 and $80,579.00 the end of 2002. The figure of zero for the beginning of 2002 apparently reflects the fact that Amador Restaurants, Inc., was not incorporated until April 19, 2002, as shown on the copy of its articles of incorporation submitted for the record. However, the petitioner's net current assets of $80,579.00 at the end of 2002 are greater than the proffered wage of $22,900.80, and they are therefore sufficient to establish the petitioner's ability to pay the proffered wage in 2002.

As stated above, the record contains a copy of the consolidated IRS Form 1120 U.S. Corporation Income Tax Return for 2001 for [redacted] As stated on the attached Form 551 Affiliations Schedule, one of the subsidiaries of that corporation is [redacted] the previous owner of the petitioning restaurant.

Calculations based on the Schedule L attached to the 2001 tax return of [redacted] and subsidiaries yield the following amounts for net current assets: -$11,042,678.00 for the beginning of 2001 and -$7,425,721.00 for the end of 2001. Since the previous owner had significant current liabilities at the time the labor certification was filed, the negative figures fail to establish the ability of the petitioner to pay the proffered wage as of the beginning of 2001 or the end of 2001. The Colorado state income tax return for 2001 for Fiesta Restaurants, Inc., contains no schedule L or equivalent schedule on which a calculation of that corporation's net current assets might be based.

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[2] 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The record contains copies of bank statements for accounts of the petitioner. Nonetheless, there is no proof that the funds in those accounts represent additional funds beyond those of the tax returns, such as the cash represented on Schedule L. The record also contains copies of unaudited financial statements for the petitioner and for Fiesta Restaurants, Inc. Unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. The regulations specifically require audited financial statements, if financial statements are to be submitted. *See* 8 C.F.R. § 204.5(g)(2). That regulation neither states nor implies that an unaudited document may be submitted in lieu of the required annual reports, federal tax returns, or audited financial statements.

Regarding the director's decision, it is noted that the director incorrectly stated the proffered wage as $22,880.00 per year, a figure apparently calculated on an hourly wage of $11.00 per hour. However, the ETA 750 states the proffered hourly wage as $11.01 per hour, equivalent to an annual wage of $22,900.80 per year, as stated above. This small error in the director's calculations did not affect the director's analysis.

The director correctly stated that the tax return for 2002 [redacted] showed an ordinary loss of $63,285, and correctly found that that figure failed to establish the petitioner's ability to pay the proffered wage in that year. The director failed to calculate the net current assets of [redacted] However that error did not affect the director's decision to deny the petition since the petitioner must establish its ability to pay the proffered wage as of the priority date, which, as discussed above, it has not done.

The director did not consider the tax return of Eateries Inc. and the subsidiaries, and failed to consider the issue of [redacted], as a potential successor in interest to [redacted] Nonetheless, as shown above, the tax return information of Fiesta Restaurants, Inc. and its parent, [redacted] fails to establish the ability of either entity to pay the proffered wage at the time the priority date was established and forward. Therefore the director's error in analysis on this point also did not affect the director's ultimate decision to deny the petition.

On appeal the petitioner submits additional evidence. That evidence includes copies of corporate documents indicating a sale of the petitioner from [redacted] to [redacted] in 2002. Those documents give additional information on the status of Amador Restaurants, Inc., as a successor in interest to [redacted] Nonetheless, the additional evidence submitted on appeal fails to establish the ability of either [redacted] or of Eateries Inc., to pay the proffered wage as of the priority date.

The additional evidence includes a copy of the Form 1120S U.S. Income Tax Return for an S Corporation for 2003 of the [redacted] The ordinary income on that return is -$71,390.00. Since that number is negative it fails to establish the ability of the petitioner to pay the proffered wage. But calculations based on the Schedule L show net current assets at the end of 2003 as $77,390.00, which would be sufficient to pay the proffered wage. Nonetheless, information in the return for 2003 fails to provide any evidence of the petitioner's ability to pay the proffered wage in 2001. As previously discussed, the petitioner did not have the ability to pay the proffered wage in either of these years.

For the foregoing reasons, the evidence submitted on appeal fails to overcome the decision of the director.

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.