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

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 196 51537 Office: CALIFORNIA SERVICE CENTER Date: OCT 07 2004

IN RE: Petitioner: [redacted]
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: 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

The petitioner is a general contracting firm. It seeks to employ the beneficiary permanently in the United States as a stonemason. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, the petitioner asserts that its gross income has shown a steady growth and demonstrates that has the continued financial 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 nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 9, 1998. The proffered wage as stated on the Form ETA 750 is $627.20 per week, which amounts to $32,614.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since October 1994.

On Part 5 the petition, the petitioner claims to have been established in 1985, to have a gross annual income of $400,000, a net annual income of $80,000, and to currently employ nine workers.

In support of its financial ability to pay the proposed wage of $32,604, the petitioner submitted an unaudited profit and loss statement presenting its financial status as of August 31, 2001 and a copy of a state quarterly wage and withholding report. The wage report indicates that the petitioner paid wages to ten employees during the quarter ending June 30, 2001. The alien beneficiary is listed as one of the individuals. He was paid $595 that quarter. The petitioner also provided a copy of its 1998 state income tax return and copies of

its Form 1120S, U.S. Income Tax Return for an S Corporation for 1999 and 2000. These returns show that the petitioner files its taxes using a standard calendar year. The 1999 and 2000 federal tax returns reflect the following information:

Year	1999	2000
Net income	$ 9,991	$ 5,561
Current Assets	$29,426	$30,857
Current Liabilities	$22,623	$18,221
Net current assets	$ 6,803	$12,636

The director requested additional evidence from the petitioner on April 16, 2003, pertinent to its ability to pay the beneficiary's proposed wage offer of $32,604 per annum. The director advised the petitioner that the evidence must include federal tax returns, annual reports or audited financial statements to demonstrate its continuing ability to pay the proffered wage, beginning on the priority date and continuing until the present.

In response, the petitioner resubmitted its corporate tax returns for 1999 and 2000. It also provided copies of its Form 1120S for 1998 and 2001. For the 2002 tax year, the petitioner filed a Form 1120, U.S. Corporation Income Tax Return. These tax returns reflect the following information for the following years:

Year	1998	2001	2002 (Form 1120)
Net Income	-$10,598	-$4,406	-$1,883
Current Assets	$22,385	$4,812	$1,855
Current Liabilities	$8,356	-0-	-0-
Net Current Assets	$14,029	$4,812	$1,855

The director issued a second request for additional evidence on June 13, 2003. He instructed the petitioner to submit copies of its state quarterly wage reports for the last five years for all employees. In response, the petitioner submitted state quarterly wage reports that summarize cumulative wages paid to its employees during the period from 1998 to 2002. The beneficiary's name appeared among those listed as the petitioner's employees.

With regard to the amount of wages paid to the beneficiary during this period, the quarterly wage reports contain the following information:

Year	1st quarter	2nd quarter	3rd quarter	4th quarter	Total	(NP=Not Provided)
1998	$990	-0-	NP	-0-	$990	
1999	$766	$1,988	-0-	$2,314	$5,068	
2000	NP	$1,909	$2,007	$1,471	$5,387	
2001	$140	$595*	$2,776	$1,440	$4,951	*(already provided)
2002	$2,850	$2,573	$2,971	NP	$8,394	

The director denied the petition on September 21, 2003. He concluded that the evidence failed to establish that the petitioner had the continuing ability to pay the certified wage as of the January 9, 1998, priority date.

On appeal, the petitioner submits a statement from one of the principal shareholders, [redacted]." Mr. [redacted] asserts that the firm is solvent despite some of the information appearing on the tax returns. He claims that a change in accounting methods from the accrual method to the cash method, as well as a change in corporate status from an S corporation to a standard corporation have had an impact on the petitioner's tax returns. He does not explain exactly how this impact has manifested itself and cites no authority by which the election of a particular accounting method should be determinative of a petitioner's ability to pay the proffered wage. Precedent does not distinguish the results of a petitioner's tax returns based upon its election of an accounting methodology.

[redacted] also describes the petitioning business as being held by two couples as the only shareholders. He asserts that the tax returns reflect their attempt to minimize corporate taxes. He further claims that the petitioner has not missed a payroll and that the beneficiary receives wages and benefits exceeding the proffered wage. [redacted] emphasizes that the petitioner's gross income reflected on its tax return is the most important number and that the petitioner has shown steady growth. Finally he states that if necessary, he will guarantee the proffered wage.

[redacted] offer to guarantee payment of the proffered wage cannot be considered as persuasive evidence of the corporate petitioner's ability to pay the proposed wage offer. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Citizenship and Immigration Services (CIS) need not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Further, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, a guarantee is a future promise of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether a petitioner employed and paid the beneficiary during a the relevant 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. If a petitioner may have employed an alien beneficiary, consideration may be given the amount of wages paid. If the difference between the actual wages paid and the proffered wage can be covered by either a petitioner's net income or net current assets during a given period, the petitioner is deemed to have the ability to pay the full proffered wage during that time.

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 returns, 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). Showing that the petitioner's gross receipts or gross income exceeded the proffered wage is insufficient. Gross income may constitute one measure of a petitioner's growth, as the petitioner claims in this case, but consideration of the expenses incurred in order to produce the gross receipts or revenue must also be part of the review of a petitioner's continuing ability to pay a proffered salary. Similarly, showing that the petitioner regularly paid wages to others in excess of the proffered wage, or always met its payroll, 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 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Besides net income, CIS will also 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.[1] A corporation's year-end current assets and current liabilities are shown on Schedule L of its corporate tax return. 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 as they represent a readily available resource out of which a proffered salary could be paid.

In the instant case, the petitioner provided evidence of some compensation paid to the beneficiary, but the record fails to show that it has ever reached the level of the proffered salary of $32,604, as set forth in the approved labor certification. As noted above, the petitioner's quarterly wage reports indicate that the beneficiary's highest annual wages of $8,394 was earned in 2002. This represents approximately one quarter of the proffered annual salary of $32,604. The shortfall of $24,210 could not be covered by either the petitioner's declared net income of -$1,883 or its 2002 net current assets of $1,855. A similar analysis applies to the subsequent years since the priority date of January 9, 1998. In 1998, the difference between the actual wages of $990 and the proffered wage was $31,614. This sum could not be provided by either the petitioner's net income of -$10,598 or its net current assets of $14,029. In 1999, the actual wages of $5,068 was $27,536 less than the proffered salary. Neither the petitioner's net income of $9,991, nor its net current assets of $6,803 could cover this amount. In 2000, the difference between the actual wages paid and the proffered salary was $27,217. This was well short of the petitioner's net income of $5,561, or its net current assets of $12,636. Finally, in 2001, the difference between the beneficiary's actual wages and the proposed wage offer

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[1] 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.

was $27,653, which could not be paid out of either the petitioner's net income of -$4,406 or its net current assets of $4,812.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a continuing ability to pay the proffered wage, as certified on the ETA 750A, by providing either federal tax returns, annual reports or audited financial statements. In this case, the petitioner elected to submit its tax returns. They failed to show that it had the ability to pay the full proffered wage during any of the relevant years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, it is noted that the letter from the Pisa Construction and Equipment, provided in support of the beneficiary's qualifying three years of prior work experience as a stonemason, does not specifically distinguish how much of the time he spent as a stonemason. Rather it describes a general maintenance type of position, which included "working with cement flooring, and several others." Moreover, the English translation certification, appearing on the face of the letter, does not comply with the requirements of 8 C.F.R. § 103.2(b)(3).[2]

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.

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[2] The translator must certify the translation as complete and accurate, and by her certification that she is competent to translate from the foreign language into English.