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

U.S. Citizenship and Immigration Services

[redacted]

ATTENTION: [redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 0 8 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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director
Administrative Appeals Office

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 remanded to the director for entry of a new decision.

The petitioner is a gas station. It seeks to employ the beneficiary permanently in the United States as a manager of its automobile service station. 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, counsel submits a brief.

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 July 24, 1998. The proffered wage as stated on the Form ETA 750 is $20.34 per hour, which amounts to $42,307.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.[1]

On the petition, the petitioner claimed to have been established in March 1997, to have a gross annual income of $2,645,000, and to currently employ three workers. In support of the petition, the petitioner submitted a copy of its quarterly federal tax return for the quarter ending September 30, 2002 demonstrating that the petitioner paid $9540.00 in total wages to its employees during that quarter.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, in January 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director

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[1] On his Form G-325A, Biographic Information, submitted with his application to adjust status to lawful permanent resident, the beneficiary indicates that he works for Sigma Technologies as a System Engineer since April 2001.

specifically requested the petitioner's tax returns from 1998 through 2001 and any evidence that the petitioner has actually employed and paid the beneficiary during that time.

In response, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for the years 1998-2001. The tax returns reflect the following information for the following years:

	1998	1999	2000	2001
Net income[2]	$24,275	$25,440	$26,445	$40,047
Current Assets	$57,280	$60,558	$51,700	$62,875
Current Liabilities	$0	$0	$6,416	$9,912
Net current liabilities	$57,280	$60,558	$45,284	$52,963

In addition, counsel submitted a compiled balance sheet of "Westland Petro, Inc."[3]; and resubmitted a copy of the petitioner's quarterly wage reports for the quarter ending September 30, 2002. The quarterly wage report does not show that the petitioner paid any wages to the beneficiary.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 29, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's cash at hand, depreciation, and a reduction in the petitioner's owner's salary should be considered as available funds to pay the proffered wage. Additionally, counsel cites case law to support her assertions.

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The petitioner's owner's salary reduction will not be considered. Counsel's reliance on the assets of the petitioner's owner, Mohammed Rafi, is not persuasive. 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). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998, 1999, 2000, or 2001.

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[2] Ordinary income (loss) from trade or business activities as reported on Line 21.

[3] Presumably this is a typographical error or the "doing business as" name of the gas station. The remainder of the balance sheets has a heading with the petitioner's name.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.[4] 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 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 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. The petitioner's net income for each year is too modest to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 petitioner's net current assets during the years in question, 1998 through 2001, were greater than the proffered wage. Thus, the petitioner has established its ability to pay the proffered wage from its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998 through 2001. In 1998, the petitioner shows a net income of only $24,275, but has net current assets of $57,280, which is greater than the proffered wage of $42,307.20 and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. Based on the copy of the tax returns in the record of proceeding, the petitioner has shown the ability to pay the proffered wage during 1998.

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[4] Thus, counsel's assertion to add back depreciation will not be accepted.

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In 1999, the petitioner shows a net income of only $25,440, but has net current assets of $60,558, which is greater than the proffered wage of $42,307.20 and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. Based on the copy of the tax returns in the record of proceeding, the petitioner has shown the ability to pay the proffered wage during 1999.

In 2000, the petitioner shows a net income of only $26,445, but has net current assets of $45,284, which is greater than the proffered wage of $42,307.20 and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. Based on the copy of the tax returns in the record of proceeding, the petitioner has shown the ability to pay the proffered wage during 2000.

In 2001, the petitioner shows a net income of only $40,047, but has net current assets of $52,963, which is greater than the proffered wage of $42,307.20 and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. Based on the copy of the tax returns in the record of proceeding, the petitioner has shown the ability to pay the proffered wage during 2001.

Based on the copy of the tax returns in the record of proceeding, the petitioner submitted evidence sufficient to demonstrate that it has the ability to pay the proffered wage during 1998 and subsequently. However, based upon discrepancies among the evidence and material factual assertions presented in the record of proceeding as will be discussed below, the director is instructed to request that the petitioner obtain from and submit certified copies of the petitioner's tax returns from 1998 through 2001 from the Internal Revenue Service (IRS).

Beyond the decision of the director, there are discrepancies concerning the beneficiary's qualifying employment experience and validity of the employment offer. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 30, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of gas station manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	Blank
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant for the proffered position must also have two years of training in order to perform the job duties listed in Item 13, which states:

> Manage automobile service station; plan, develop and implement policies for operation station, including hours of operation, workers required and duties, scope of operations, and prices for products and services; hiring and training workers, prepare work schedules, and assign workers to specific duties, including customer service, automobile maintenance or repair work; and order, receive and take inventory of gasoline, oil, automobile accessories and parts. Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B, which he signed and declared as true under penalty of perjury. The beneficiary indicated that he completed a bachelor of science degree in electrical engineering at the University of Engineering & Technology in Lahore, Pakistan in June 1982. The beneficiary also indicated that he was enrolled at the University of Detroit Mercy in Detroit, Michigan, for an electrical engineering degree as of January 1998. CIS records confirm that the beneficiary entered the United States in visitor status, from which he changed status to F-1 student to study computer information systems. CIS records further show that the beneficiary changed his status from F-1 to an H-1B, specialty worker, in March 2001.

On Part 15, eliciting information of the beneficiary's work experience, he noted that he has been an unemployed student from May 1997 through the filing of the labor certification application. Prior to that, the beneficiary stated that he worked as a service station manager (retail) from February 1993 through May 1997 for Mian Tariq Mahmood Filling Station in Gujrat, Pakistan for forty hours per week. The responsibilities listed mirror almost exactly the responsibilities listed for the proffered position on Item 13 of the ETA-750A. Prior to that, the beneficiary stated that he worked as a senior engineer for Satellite Ground Station in Islamabad, Pakistan from May 1988 through February 1993.

With the initial petition, the petitioner submitted a letter written in English on Mian Tariq Mahmood Filling Station letterhead, dated May 31, 1997 and signed by Mian Tariq Mahmood, apparently the owner and proprietor of the gas station. The letter details the dates of employment and lists the responsibilities exactly as they are itemized on the Form ETA-750B for the past employment as well as on the Form ETA-750A, Item 13, for the proffered position.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The letter submitted as evidence of the beneficiary's qualifying employment experience provided the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The discrepancy in this case has to do with other forms submitted by the beneficiary in connection with his application to adjust status to lawful permanent resident. In connection with that application, the beneficiary submitted a Form G-325, Biographic Information sheet with information concerning his employment for the past five years. On that portion of the Form G-325, the beneficiary indicated that he has been a system engineer for Sigma Technologies since April 2001, apparently in connection with his H-1B sponsorship, and that prior to that, he was a student and the University of Detroit from January 1998 through August 2000. The problem that arises, however, is the beneficiary's response to the question concerning his last occupation outside of the United States. On that portion of the form, the beneficiary indicates that he worked as a senior engineer with Suparco Islamabad from May 1983 through May 1997. This form is also signed by the beneficiary above a statement warning him that there are severe penalties for knowingly and willfully falsifying or concealing a material fact. It is unclear how the beneficiary could work for both Suparco Islamabad as a senior engineer from May 1983 through May 1997 and Mian Tariq Mahmood Filling Station as a gas station manager from February 1993 through May 1997 for forty hours per week. The director should obtain additional information and documentation concerning the beneficiary's claimed past employment experiences and explain these overlapping jobs and discrepancies.

Also in connection with the beneficiary's application to adjust status to lawful permanent resident, the beneficiary received an employment authorization document (EAD) permitting him to work in the United States. The director should obtain information and documentation from the beneficiary pertaining to which employer he has selected to work for with his EAD – the proffered position at the gas station or as an engineer with Sigma Technologies or a third party employer. Presumably the petitioner is not in need of a systems engineer for its gas station and presumably Sigma Technologies is not in need of a gas station manager so an explanation concerning the beneficiary's chosen educational and professional background is needed to validate the job offer and the beneficiary's qualifications for the proffered position.

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.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Additionally, CIS data indicates that the beneficiary has another file number, [redacted] CIS data also shows that the petitioner filed an additional immigrant visa petition on behalf of the beneficiary. The director is requested to review the content of those files and determine if there is any evidence relevant to the instant petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Based on discrepancies contained within the record of proceeding, the petitioner has not clearly met that burden.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issue stated above. The director may request any additional evidence considered

pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.