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U.S. Citizenship
and Immigration
Services

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FILE: WAC-02-201-50307 Office: CALIFORNIA SERVICE CENTER Date: FEB 24 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.


Robert P. Wiemann, Director
Administrative Appeals Office

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 an agricultural farm. It seeks to employ the beneficiary permanently in the United States as a vegetable farming supervisor. 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 January 9, 1998. The proffered wage as stated on the Form ETA 750 is \$17.02 per hour, which amounts to \$35,401.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 1989.

On the petition, the petitioner claimed to have been established in 1950, to have a gross annual income of \$2.1 million, and to employ workers on a seasonal basis. In support of the petition, the petitioner submitted its balance sheet, without evidence of auditing, for 2001 along with a letter from [REDACTED] dated March 12, 2002, who states that his firm has been providing tax and accounting services for the petitioner since 1992 and is current on its federal and state income tax returns, property tax returns and payroll tax returns.

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, on October 2, 2002, 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.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the petitioner for the years 1998, 1999, 2000, and 2001. The tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income ¹	\$3,146	\$7,779	-\$5,800	-\$45,167
Current Assets	\$73,550	\$65,904	\$29,122	\$46,678
Current Liabilities	\$5,542	\$5,419	\$99,699	\$99,477
Net current assets	\$68,008	\$60,485	-\$70,577	-\$52,799

In addition, counsel's accompanying letter stated that "[a]lthough the [petitioner's] book or tax income is low, for income tax purposes, cash flow and assets are enough to show the ability to pay the beneficiary's salary . . ." Counsel also stated that the petitioner's depreciation deduction covers the proffered wage and the petitioner's owners own the property and buildings that the petitioner rents and could reduce the rental amount to cover the proffered wage as well.

Because the director again deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 5, 2003, the director requested additional evidence pertinent to that ability. The director specifically sought the petitioner's tax return for 2002.

In response, the petitioner submitted a copy of its Form 1120 Corporate tax returns for the petitioner for the year 2002 which reflected that the petitioner's net income was -\$111,074 and net current assets were \$11,376. The petitioner's owner also submitted a letter stating the following:

Due to low market prices at the time, we made the choice to store our alfalfa harvest instead of promptly selling it. Our decision though unusual proved to be wise, for we made a profit of \$160,000 as a result of recently selling it after the alfalfa prices have gone back up.

An excerpt from the petitioner's general ledger on its alfalfa account was submitted in response to the director's request for evidence but does not appear to be audited.

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 August 29, 2003, denied the petition.

On appeal, counsel asserts that the director erred by failing to consider depreciation assets as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner submits a copy of an unpublished AAO decision issued in May 2003.

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. Thus, the balance sheet submitted with the initial petition and general ledger on its alfalfa account submitted in response to the director's second request for evidence will not be considered.

Counsel's reliance on the assets of the petitioner's owner 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

¹ Net income before net operating loss deduction and special deductions as reported on Line 28.

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). Thus, the petitioner's assertion that its owner could reduce its rental charge to the petitioner to result in additional funds to pay the proffered wage is unacceptable as it relies upon the petitioner's owner's assets.

Additionally, counsel refers to a decision issued by the AAO but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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, 2001, or 2002, despite the beneficiary's indication on Form ETA 750B that he has been working for the petitioner since 1989.

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, contrary to counsel's assertion. 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 incomes for 1998, 1999, 2000, 2001, and 2002, were only \$3,146, \$7,779, -\$5,800, -\$45,167, and -\$111,074, respectively, which are all lower than the proffered wage and thus cannot demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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.² 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, 1999, 2000, 2001, and 2002, were \$68,008, \$60,485, -\$70,577, -\$52,799, and \$11,376. Thus, the petitioner has sufficient funds in 1998 and 1999 to demonstrate its ability to pay the proffered wage but not in 2000, 2001, or 2002. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998, 1999, 2000, 2001, or 2002. In 1998, the petitioner shows a net income of only \$3,146, but sufficient net current assets, and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 1998.

In 1999, the petitioner shows a net income of only \$7,779, but sufficient net current assets, and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 1999.

In 2000 and 2001, the petitioner shows a loss and negative net current assets, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not shown the availability of any other sources of funds to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2000 or 2001.

In 2002, the petitioner shows a loss and net current assets of only \$11,376, an amount less than the proffered wage, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not shown the availability of any other sources of funds to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002.

Despite its demonstration of sufficient funds to pay the proffered wage in 1998 and 1999, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000, 2001, or 2002. Therefore, the petitioner has not established that it 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.

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.