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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUN 16 2005
EAC 02 256 53625

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Other Worker pursuant to § 203(b)(3)(A)(iii) of the Immigration
and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii).

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.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a specialty restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook, foreign. 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 and no additional evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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 May 26, 1995. The proffered wage as stated on the Form ETA 750 is \$450 per week, which amounts to \$23,400 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on May 3, 1994, to have a gross annual income of \$586,803, and to currently employ four workers. In support of the petition, the petitioner submitted:

- A Form G-28;
- A non-original (photocopy) of the certified Form ETA 750;
- Copies of the petitioner's 1995–1997 and 2000 Form 1120S tax returns; and,
- Copies of the beneficiary's 1999–2001 Form 1040 tax returns.

On July 23, 2003, the director sent a request for evidence (RFE) seeking additional evidence pertaining to the ability to pay the proffered wage. 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. Specifically, the RFE asked for additional evidence of ability to pay from the priority date, May 26, 1995, to the present. It also noted the tax returns submitted for 1997 and 2000 showed fewer assets or less income than the proffered wage. It asked for other evidence of ability to pay, including Form W-2 statements issued to the beneficiary, and audited or reviewed financial statements that accompany “annual reports for 1995 and 2002.”

In response, the petitioner submitted:

- The petitioner’s 2002 Form 1120S return for the year 2002;
- A CPA’s letter dated October 8, 2003, asserting that [REDACTED] the petitioner’s sole shareholder, had had “sufficient personal assets to pay the salary of \$23,400 to the employee” in 1995, 1997 or 2000, and could currently do so;
- A financial statement, neither audited nor reviewed, but compiled by a CPA showing that as of October 31, 2000 [REDACTED] had a personal net worth of \$1.27 million;¹ and,
- A May 24, 1995 letter from a Mexican restaurant confirming that it had employed the beneficiary as a cook from October 1991 to February 1995.

The submitted tax returns reflect the following information for the following years:

	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>2000</u>	<u>2002</u>
Net income	-\$20,401	\$28,923	\$14,567	\$20,338	-\$10,620
Current Assets	\$10,810	\$42,466	\$35,794	\$24,096	\$24,060
Current Liabilities	\$31,427	\$36,973	\$26,049	\$23,589	\$36,116
Net current assets/liabilities	-\$20,617	\$5,493	\$9,745	\$507	-\$12,056

On January 22, 2004, 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 accordingly denied the petition.

On appeal, counsel asserts that the denial is “inconsistent” in that “the petitioner with the letter dated October 16, 2003² [sic] established the ability to pay [sic] wage to the beneficiary.”

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 continuously from the priority date of May 26, 1995.

¹ [REDACTED] estimated the business value of the Senor Swanky’s, Inc. to be \$500,000.

² Apparently this refers to [REDACTED] October 14, 2003 letter included in the petitioner’s response to the RFE.

As the regulation at 8 C.F.R. § 204.5(g)(2) makes clear, the petitioner must establish its ability to pay for every year from the priority date forward. Counsel failed to submit a Form 1120S return for the years 1998, 1999 or 2001, with the result that the evidence does not establish the petitioner's continuing ability to pay the proffered wage.

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 exceeded the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the legacy 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. Here, the amounts of the petitioner's net income reported on the submitted returns, in each instance except the one for 1996, were either negative or else less than the proffered wage and thus did not establish the ability to pay.

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, if any, do not equal at least the amount of the proffered wage, CIS will review the petitioner's assets. 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(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. However, as is clear from the above listing of the petitioner's net current assets/liabilities for the years in question, the amounts are either negative or are less than the proffered wage.

Counsel's response to the RFE included the unaudited statement about the financial condition of the petitioner's sole shareholder as of October 31, 2000, apparently submitted to establish the ability to pay of the petitioner's sole shareholder in lieu of its own. Counsel is implicitly asserting that the sole shareholder's assets are a substitute for the assets or net income of the corporation that is the petitioner.

The petitioner is a corporation, a legal entity that is separate and distinct from its owners or stockholders, however. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else.⁴ As the owners, stockholders, and

³ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence

others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds. Counsel's reliance on the assets of [REDACTED] 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 that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 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. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Beyond the decision of the director, this office notes that the petitioner has submitted a photocopy of the Form ETA 750 labor certification instead of the original, as required by 8 C.F.R. § 204.5(l)(3)(ii)(B). Failing to submit the original ETA 750 is another basis for the director's denial of the petition. An application or petition that fails to comply with the technical requirements of the law may be denied on appeal by the AAO even if the director 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).

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1995 or thereafter. In 1995, the petitioner shows a net loss of \$20,401, negative net current assets of \$20,617, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 1995, or continuously thereafter.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 1995 or subsequently during 1996–2002. 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.

appears in the record to indicate that the general rule is inapplicable in the instant case.