

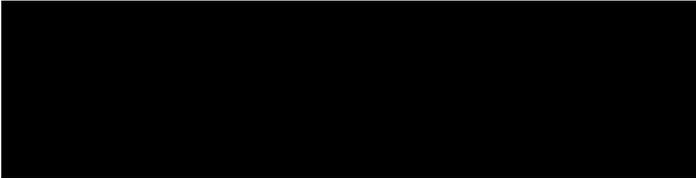
**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



BG

FILE: SRC 03 103 50824 Office: TEXAS SERVICE CENTER Date: MAR 25 2005

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

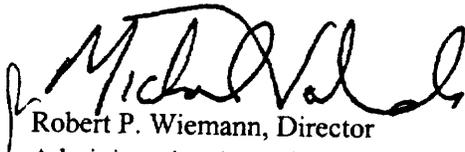
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 service center director denied the employment-based visa petition, and the petitioner submitted a motion to reopen the decision to the director that was subsequently denied. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery and restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty pastry chef/manager. 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 states that the petitioner does have the ability to pay the proffered salary and submits new 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.

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 10, 2002. The proffered wage as stated on the Form ETA 750 is an annual salary of \$35,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 15, 2002.

On the petition, the petitioner claimed to have been established in 2000 and to have a gross annual income of \$211,000. The petitioner indicated that it had seven employees. In support of the petition, the petitioner submitted a letter of support along with evidence as to the beneficiary's qualifications, as well as a business plan with cash flow projections and business advertising for the petitioner. 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 July 14, 2003, the director requested evidence to establish the petitioner's ability to pay the proffered wage from July 2002 to the present. She specifically requested a copy of the petitioner's 2001 corporate income tax return, and a copy of the beneficiary's IRS Form W-2 for 2002. The

director also requested any additional documentation that would establish the petitioner's ability to pay the proffered wage. In response, the petitioner submitted a letter from [REDACTED] stated that since the petitioner's inception in May 2000, her corporation had kept the petitioner's books and prepared all taxes, sales tax, payroll tax and income tax for the petitioner. Ms. [REDACTED] stated that the petitioner had gone through its start-up period without any financial problems, and had turned into a stable and profitable business with predicted further growth due to an increase in new businesses opening in its vicinity that included Home Depot and Penn Dutch. The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 2001, the beneficiary's Form 1040 income tax return for 2002, and the beneficiary's W-2 form for 2002. This latter document indicated the beneficiary was paid \$18,865.04 in 2002.

On August 25, 2003, the director denied the petition. In his denial of the petition, the director noted that the petitioner had paid \$42,547 in salaries and \$6,390 in compensation of officers. The director also noted that the petitioner had not reported any costs of labor. The director also stated that the petitioner's profit in 2001 was \$3,052. The director further stated that the evidence submitted did not show that the beneficiary had been paid the proffered wage since the petitioner employed him in 2002, or that the petitioner had sufficient funds to pay the difference between the actual wage and the proffered wage. The director then stated that no other financial documents were submitted.

The director also stated that the petitioner had not submitted sufficient evidence to support the statements made by the petitioner's accountant as to future growth. In conclusion, the director stated that the documents submitted did not clearly establish that the petitioner had the ability to pay the beneficiary the proffered wage.

On September 25, 2003, the petitioner filed an appeal without completing Form I-1290B, and as a consequence, the director stated that the petitioner's submission was considered a motion to reopen the decision. In the motion, counsel indicated that the grounds for the CIS denial of the motion were based on the four issues: First, that no costs of labor were reported on the employer's tax return; second, that the beneficiary was paid \$18,865 in 2002; third, that the petitioner's accountant, while indicating that the petitioner's business was predicted to grow very rapidly, did not submit any evidence to support the growth prediction; and fourth, that the beneficiary was not paid the proffered wage.

Counsel stated that the petitioner had reported costs of labor on its tax return by reporting salaries and wages as well as compensation of officers on page 1 of the petitioner's tax return. Counsel submitted Form I-9, the beneficiary's employment eligibility verification to establish that the beneficiary began his employment with the petitioner on February 16, 2002, and Form ETA 9035, to establish that the beneficiary had received the wage outlined in his H-1B labor condition application.

To further substantiate the assertions made by the petitioner's accountant as to future growth, counsel submitted a newspaper article on new retail openings in and around the petitioner's location in Margate, and a brochure from Broward Credit Union announcing its opening in Margate. With regard to the petitioner's ability to pay the proffered wage, counsel also submitted a letter from [REDACTED] President, Coral Springs, Florida, that states the petitioner's owner was in the process of obtaining a \$200,000 business loan to cover expenses associated with expansion of the petitioner's

business; a monthly statement from the [REDACTED] Miami Lakes, Florida, that indicated a balance of \$44,774 as of April 28, 2003; client statements from the petitioner's owners' account with the Smith Barney brokerage from July 2002 to June 2003; an account summary for a Home Depot employee Stock purchase plan for one of the petitioner's owners; and a profile of a [REDACTED] savings account for [REDACTED] that indicates a balance of \$20,699.

On October 14, 2003, the director dismissed the motion. The director addressed the issues identified in the petitioner's motion to reopen with regard to the non-reporting of labor costs in the petitioner's 2001 tax return and the payment of the proffered wage to the beneficiary while the beneficiary has been in the petitioner's employ. The director did not clarify as to whether counsel's comments on the costs of labor were correct, but did state that there is no requirement that the petitioner pay the proffered wage if the beneficiary is currently working with the petitioner. With regard to the petitioner's future growth, the director stated that there was no analysis of the petitioner's past performance that could predict future profits, and that the evidence submitted did not clearly establish how the petitioner's business would expand significantly. The director did not find the letter from the mortgage company or from the petitioner's bookkeeper sufficient to establish that the petitioner's business was expected to grow significantly. Finally the director stated that the bank statements submitted appear to be for the accounts of [REDACTED] the presumed owners of the petitioner. The director stated that a corporation is a separate and distinct legal entity from its owners or stockholders, and that assets of shareholders cannot be considered in determining the corporation's ability to pay the proffered wage.

On November 13, 2003, counsel submits an appeal to the director's denial of the instant petition. Counsel states that the petitioner has the ability to pay the proffered wage based on the petitioner's available funds in its BankUnited bank account. Counsel submits a letter from the [REDACTED], Financial Services Banker, BankUnited, that stated the petitioner has had an account with BankUnited since February 15, 2002, and that the balance as of November 12, 2003 was \$175,780. Counsel also submits the petitioner's balance sheet dated August 31, 2002 and August 31, 2003. Counsel submits an additional letter from Garsoza Services, dated November 7, 2003 that reiterates that the new tenants will be opening in the mall in which the petitioner presently has its business, and that the expected traffic will be heavy. Counsel also submits another letter dated November 11, 2003 from the petitioner's accounting and bookkeeping service that explains how the petitioner reports its salaries and wages in its income tax returns. The petitioner's bookkeeper also submitted filing instructions from the IRS on how to report wages and salaries on Form 1120S. Finally counsel submits a letter from the petitioner and resubmits the business plan dated September 2001 that was originally submitted with the initial petition.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L

that will be considered below in determining the petitioner's net current assets. With regard to the petitioner's financial report for 2002, the line for cash assets indicates some \$6,992 in checking/savings assets which includes BankUnited assets, and not the \$175,000 mentioned in [REDACTED] letter. The petitioner's balance sheet compiled as of August 2003, indicates the petitioner's checking and savings assets with BankUnited as -\$4,376.

On motion, counsel also submitted bank statements, brokerage account statements and profit-sharing documents for Clement and/or [REDACTED] identified as president and vice president of operations in the petitioner's business plan. Counsel's reliance on the assets of the two officers 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 at 3 (D. Mass. Sept. 18, 2003). In addition, although on appeal, the petitioner's banker states that the petitioner has \$175,780 in available funds, the petitioner provided no further substantiation of this assertion. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore as previously stated, the AAO does not view bank statements as persuasive evidence.

It is noted that the director requested the petitioner's 2001 federal income tax returns, although the priority date for the ETA 750 is July 10, 2002. The petitioner's 2001 federal income tax return is not dispositive in these proceedings. In addition, the director's and counsel's comments with regard to whether the petitioner identified wages and salaries in its federal income tax return on page one or on page two as "costs of labor" are also not dispositive in this proceeding.

On appeal, the petitioner submitted included unaudited balance sheets as proof of the ability to pay the proffered wage. The unaudited financial statements 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. In addition, even if the petitioner's financial statements were considered persuasive evidence, the total current assets identified in the 2002 balance sheet are \$9,952, which is not sufficient to pay the proffered wage.

The director did not specifically request the petitioner's 2002 federal income tax return, although he did request documentation to establish the petitioner's ability to pay the proffered wage from July 2002 to the present. The petitioner did not provide its 2002 federal income tax return prior to the denial of the initial petition in August 2003. Since no other federal income tax returns are in the record, the AAO cannot fully analyze whether the petitioner is capable of paying the proffered wage from July 2002 to the present. However, the AAO will examine the petitioner's 2001 federal income tax return to further explain its method of analysis of the petitioner's ability to pay the proffered wage.

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. The petitioner established that the beneficiary began work with the petitioner as of February 16, 2002, and the submitted W-2 salary statement for the beneficiary for 2002 and the beneficiary's IRS Form 1040 clearly establish that the beneficiary was paid \$18,865 for his work from February 2002 to December 2002. Thus, the petitioner did not establish that it paid the proffered wage to the beneficiary in 2002. Although counsel appears to regard the director's comments in the initial denial as indicating the petitioner had to pay the beneficiary the proffered wage before the actual certification of the ETA 750, this interpretation of the director's comments is not correct. As stated previously, if the petitioner paid the beneficiary the proffered wage as of the priority date, namely July 2002, the petitioner could have established that it had the ability to pay the proffered wage, namely, \$35,000. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002 and onward.

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. 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. As noted previously, the director did not request the petitioner's 2002 federal income tax return. Nor did the petitioner provide its 2002 federal income tax return. While the 2001 documentation is not dispositive in these proceedings, the AAO will examine this federal income tax return for further clarification of how the petitioner could establish its ability to pay the proffered wage.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001 shows the following amount of ordinary income: \$3,052. This figure fails to establish the ability of the petitioner 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.¹ 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. The petitioner submitted the following information for tax year 2001:

	2001
Ordinary Income	\$ 3,052
Current Assets	\$ 8,437
Current Liabilities	\$ 6,057
Net current assets	\$ 2,380

In 2001, the petitioner shows a net income of \$3,052, and net current assets of only \$2,380. If the priority date for the ETA-750 had been in 2001, and the petitioner had not employed the beneficiary in 2001, the petitioner could not have demonstrated the ability to pay the proffered wage out of its net income or net current assets.

As stated previously, the petitioner's 2002 federal income tax returns, or other relevant financial records such as audited financial reports or annual reports for 2002 are not found in the record. Therefore, the AAO cannot analyze whether the petitioner had sufficient net income or net current assets in 2002 to pay the part of the proffered wage that was not covered by the beneficiary's salary in 2002, namely, \$16,135.² As noted previously, the assets of the shareholders are not viewed as corporate assets. Therefore, 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 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage as of the priority date to the present.

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.

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

² The beneficiary's W-2 form established that the petitioner paid him \$18,865 in 2002. The proffered wage is \$35,000. The proffered wage minus the actual wage is \$16,135.