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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

B6

PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 10 2006
EAC 04 165 50459

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.

Robert P. Wiemann, Director
Administrative Appeals Office

6

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 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.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $18.89 per hour, which amounts to $39,291.20 annually. On the ETA 750, the beneficiary did not indicate that he had been employed by the petitioner.[1]

On the petition, the petitioner indicated it was established in August 1998, had 17 employees, and a gross annual income of $386,021. With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the years 2001 and 2002. These documents indicated the petitioner had taxable income before net operating loss deduction and special deductions of -$11,544 in 2001 and -$6,117 in 2002. The petitioner also submitted two W-2 Forms for the beneficiary that showed he earned $10,712 in both 2001 and 2002. The employer for the beneficiary was identified as 449 Restaurant, Inc.

---

[1] Form G-325A, submitted with the beneficiary's I-485, indicates that the beneficiary worked for the petitioner as a cook since January 2000 and identified the petitioner's address as

On October 19, 2004, the director denied the petition. The director stated that the petitioner's 2001 tax return indicated that it had a taxable income of -$11,524, and a "current position "of $10,457.[2] With regard to the petitioner's 2002 tax return the director stated the petitioner had taxable income of -$46,117, and a "current position" of $3,818. Based on these figures, the director determined that the petitioner had not established its ability to pay the proffered wage. The director noted that the petitioner had submitted W-2 Forms for the beneficiary, but the director stated that the forms were from another corporation. Finally, the director stated that the petitioner failed to provide evidence of the beneficiary's prior work experience as a cook.

On appeal, counsel asserts that the beneficiary is replacing workers who no longer are employed by the petitioner and submits additional W-2 Forms. In an additional letter submitted on appeal, the petitioner identifies four workers that the beneficiary will replace, namely, and nd states their combined salaries in 2001 is $44,512.[3] Counsel then submits 2002 and 2003 W-2 Forms for four workers, namely, The combined salaries of these four workers for tax years 2002 is $41,140, and for tax year 2003 is $43,450. The employer identified on these W-2 Forms is Finally, the petitioner states that the beneficiary has been working for the petitioner since 2000 and earned $10,712 in tax years 2001, 2002, and 2003. The petitioner submits the beneficiary's W-2 Forms for these three years, which identify the employer as The petitioner states that the beneficiary is working "at the other business restaurant, named located at doing the same business as

While the petitioner has provided W-2 Forms for the beneficiary, and W-2 Forms for the employees whom he states will be replaced by the beneficiary, it is noted that the beneficiary works for one corporation, 449 Restaurant Inc., while the four other employees work for another corporation, namely, Restaurant Corporation. The W-2 Forms submitted to the record show two different employer identification numbers (EID) for these two businesses. Based on the petitioner's EID identified on its IRS 1120, and the EID numbers identified on the W-2 Forms submitted to the record, the petitioner did employ the four workers that the petitioner stated would be replaced by the beneficiary; however, the beneficiary presently is employed by a separate corporation, namely, 449 Restaurant Inc.

On appeal the petitioner appears to say that these two businesses are one and the same; however, the petitioner provided no further documentation to further substantiate this assertion. The assertions of counsel or of the petitioner do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The two businesses have different identification numbers, and as such, the wages paid to the employees of one corporation cannot be used to establish another petitioner's ability to pay the proffered wage. Because a

---

The figure that the director identified as the petitioner's "current position" is the petitioner's net current assets. The AAO will discuss how the petitioner's current net assets are calculated further in these proceedings.

The 2001 W-2 Form for s not found with the other 2001 W-2 Forms. The beneficiary's W-2 for 2001 is included with the other three employees. The combined salary for the three employees whose W-2 Forms are found in the record is $34,840.

corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the 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. As stated previously, on the Form ETA 750, the beneficiary indicated that he had not worked for the petitioner, and the petitioner has submitted the W-2 Forms for another business to establish wages paid to the beneficiary in 2001, 2002 and 2003.[4] The petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 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 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, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner is structured as a corporation. For a corporation, taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return. The petitioner's taxable income for 2001 is -$11,544 and in 2002 is -$6,117. These figures are not sufficient to establish the petitioner's ability to pay the proffered wage of $39,291.20.

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. In addition, 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.

---

[4] As previously stated, the beneficiary's I-485 petition indicates that he worked for the petitioner, identified as However, none of the documentation submitted by the petitioner, namely the W-2 Forms or the Form ETA 750 support this statement.

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 tax returns reflect the following information for the following years:

	2001	2002
Taxable income[6]	$ -11,544	$ -6,117
Current Assets	$ 19,892	$ 10,817
Current Liabilities	$ 9,435	$ 6,999
Net current assets	$ 10,457	$ 3,818

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of -$11,544, and net current assets of $10,457, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of -$6,117 and net current assets of $3,818, and has not, therefore, demonstrated the ability to pay the proffered wage. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the 2001 priority date to the present. In addition, the petitioner has not shown any additional funds that can be used to pay the proffered wage of $39,291.20. As stated previously, the wages paid to other employees in a separate business cannot be used to establish the petitioner's ability to pay the proffered wage.[7]

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

It is also noted that the director in his decision determined that the petitioner had not established whether the beneficiary had the requisite two years of work experience as a cook stipulated on the Form ETA 750 prior to the April 30, 2001 priority. The record still not does not reflect any documentary evidence of such employment, such

---

[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.

[6] Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

[7] Although wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present, the petitioner did identify four workers employed by a second business who would be replaced by the beneficiary. However, as previously stated, the wages paid to the employees of one corporation cannot be used to establish another petitioner's ability to pay the proffered wage.

as a letter on letterhead from the beneficiary's previous employer, stating the beneficiary's job duties and title, period of time worked, and wages.

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.