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U.S. Citizenship and Immigration Services

[redacted]

B-6

FILE: WAC 03 012 53002 Office: CALIFORNIA SERVICE CENTER Date: AUG 02 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.

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 sustained. The petition will be approved.

The petitioner is a 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 additional evidence and asserts that the petitioner has the continuing financial ability to pay the proffered salary.

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 August 26, 1999. The proffered wage as stated on the Form ETA 750 is $11.62 per hour, which amounts to $24,169.60 annually.

With the petition, the petitioner submitted no evidence of its ability to pay the proffered wage of $24,169.60.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 24, 2003, and again on June 12, 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 also instructed the petitioner to provide the last four state quarterly wage reports that it filed, a copy of its Transmittal of Wage and Tax Statement (W-3) from 1999 to 2002, copies of its current business licenses, and

copies of the beneficiary's individual tax returns with Wage and Tax Statements (W-2s) from July 1994 to the present.

In response, the petitioner, through counsel, submitted copies of the petitioner's federal corporate tax returns for the years 1999 through 2002.

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

	1999	2000	2001	2002
Net income	-$ 3,591	$ 3,590	-$12,582	-$21,988
Current Assets	$27,327	$24,138	$21,457	$24,886
Current Liabilities	$ 1,865	$ 1,269	$ 1,703	$ 5,620
Net current assets	$25,462	$22,869	$19,754	$19,266

In addition, counsel submitted copies of the W-2s that the petitioner issued to the beneficiary in 1999, 2000, 2001 and 2002. They show that the petitioner paid the beneficiary $4,312.64 in 1999, $7,988.10 in 2000, $10,748.07 in 2001, and $8,400.52 in 2002.

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 February 18, 2004, denied the petition.

On appeal, counsel submits copies of the individual tax returns of the petitioner's owners from 1999 through 2002. She asserts that the combined income of the petitioner and its owners establishes the petitioner's ability to pay the proffered salary.

Counsel's reliance on the individual tax returns of the petitioner's owners is not persuasive. The petitioner is a corporation. 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, (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. To the extent that a petitioner employed a beneficiary at a wage less than the annual proffered salary, consideration will be given to the amounts paid in evaluating a petitioner's ability to pay the beneficiary's proposed wage offer.

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). 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.

If the difference between the actual wages paid to the beneficiary and the proffered wage results in a shortfall, then CIS examines whether the petitioner's net income or its net current assets can cover the difference. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets may be shown on Schedule L of Form 1120, U.S. Corporation Income Tax Return or may appear on Part III of Form 1120-A, U.S. Corporation Short-Form Income Tax Return. 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.

In this case, as shown above, the petitioner's net current assets of $25,462 were sufficient to pay the proffered wage of $24,169.60 in 1999. In 2000, the difference between the $7,988.10 in actual wages paid to the beneficiary and the proffered wage of $24,169.60, was $16,181.50. Although this shortfall could not be met by the petitioner's net income of $3,590, the petitioner's net current assets of $22,869 provided a sufficient source out of which to pay the difference. Similarly, in 2001, the difference of $13,421.53 between the wages actually paid to the beneficiary and the proffered wage could be covered by the petitioner's net current assets of $19,754. Finally, in 2002 the difference between the proffered wage of $24,169.60 and the wages received by the beneficiary was $15,769.08. This sum could be paid from the petitioner's net current assets of $19,266. Thus, based on the evidence provided by the corporate tax returns, the petitioner has established its continuing ability to pay the proffered wage.[2]

The petitioner's 1999-2002 federal tax returns show that it has had sufficient resources to pay the proffered wage. Therefore, the petitioner has 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 sustained. The petition is approved.

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

[2] The director simply miscalculated the petitioner's net current assets in 2000 and 2001.