U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC 02 092 54273 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) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a Japanese restaurant. It seeks to employ the beneficiary as a restaurant cook. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on April 25, 2001. The proffered salary as stated on the labor certification is $11.55 per hour, which equals $24,024 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, showing a taxable income before net operating loss deduction and special deductions of $9,556 and net current assets of -$20,090. The director considered this documentation insufficient, and, on March 21, 2002, he requested additional evidence pertinent to the petitioner's ability to pay the proffered wage from the priority date and continuing to be in the form of copies of annual reports, complete federal tax returns, or complete audited financial statements. The director specifically requested a copy of the petitioner's 2001 federal tax return and copies of the petitioner's California Employment Development (EDD) Form DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California.

In response, counsel provided a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, showing a taxable income before net operating loss deduction and special deductions of $3,094 and net current assets of -$6,172. Counsel also submitted copies of the petitioner's Quarterly Wage Reports for

the period June 30, 2001 through March 31, 2002. The petitioner did not employ the beneficiary during those quarters.

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 July 16, 2002, denied the petition.

On appeal, counsel submits another copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, and a compiled financial statement for the period ended December 31, 2001. Counsel states:

> In order to establish the petitioner's ability to pay wage to the beneficiary, we have enclosed [redacted]s financial statements audited by a certified public accountant for the year of 2001. [redacted] in the fiscal year of 2001, operated two Japanese restaurants in Southern California, one is [redacted] and the other is Sushi on El Camino. As the financial statement shows, [redacted] the restaurant where the beneficiary will be employed, had Gross Sales of $753,962. [redacted] had Gross Sales of $411,631 and net loss of $71,238. [redacted] actually had net income of $73,962 which is well over the wage offered to the beneficiary which is $11.55 per hour, or $24,024.00 per year; thus the employer has the ability [to] pay wage to the beneficiary. Sushi of El Camino which claimed net loss for the year of 2001 was, in fact, sold on July 2002 in order to avoid the loss of [redacted]
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> In addition, a U.S. Corporation Income Tax Return (Form 1120) for 2001 shows, officers of [redacted] received $99,900 as compensation. Although Honda-Ya, Inc. does not anticipate such situation since they sold [redacted] even if Honda-Ya, Inc. does not have sufficient fund[s] to pay wage to the beneficiary, they can and are willing to reduce the amount of officers' compensation and pay wage to the beneficiary.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no

precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

A further means of determining the petitioner's ability to pay the proffered wage includes reviewing the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of $3,094 and net current assets of -$6,172. The petitioner could not pay the proffered wage in 2001 from either its taxable income or its net current assets.

Counsel asserts that he submitted an audited financial statement for 2001. However, the accountants clearly state that the financial statements were compiled, and, as such, the statements are limited to presenting information that is the representation of management. The accountants go on to state that they have not audited or reviewed the financial statements, and, accordingly, "do not express an opinion or any other form of assurance on them." Therefore, these statements are of little evidentiary value because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2). This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. In addition, there is no evidence on the tax returns, either for 2000 or 2001, that show that [redacted] is comprised of two entities.

Counsel also asserts that the officers of the corporation would be willing to take less compensation in order to pay the proffered wage is the need arose. However, a corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of its stockholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). In addition, the officers of the corporation are not obliged to pay the beneficiary the wage, and there is nothing in the record which corroborates counsel's claim that the officers would take less pay in order to meet the beneficiary's salary. The assertions of counsel 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).

In summary, the petitioner has not established that it had the ability to pay the proffered wage at the priority date and continuing.

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[1] A petitioner's "current assets" consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner's balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner's "current liabilities" are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner's accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.

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.