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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

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 dismissed.

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as a dentist. 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.

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 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 2, 1999. The proffered wage as stated on the Form ETA 750 is $46.18 per hour, which amounts to $96,054.40 annually.

With the petition, the petitioner submitted Forms W-2, Wage and Tax Statement issued by the petitioner to the beneficiary from 1999 through 2001. The Forms W-2 reflected wages paid in the amount of $33,249.60, $33,249.60, and $16,624.80 in 2001, 2000, and 1999, respectively.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 25, 2002, 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.

In response, the petitioner submitted its Forms 1120S U.S. Income Tax Return for an S Corporation for the years 1999 through 2001. The tax returns reflect the following information for the following years:

	1999	2000	2001
Ordinary income	$6,656	$28,370	$29,122
Gross receipts or sales	$1,176,780	$1,371,214	$1,450,060
Compensation of officers	$372,000	$403,500	$480,000
Salaries and wages	$440,821	$540,294	$554,289
Current Assets	$5,878	$11,829	$30,801
Current Liabilities	$6,483	$715	$100
Net current assets	-$605	$11,114	$30,701

The petitioner also provided financial statements with accountant's compilation report as of December 31, 1999, 2000, and 2001, as well as Forms W-2, Wage and Tax Statements, previously submitted, as well as one for 2002 indicating the petitioner paid the beneficiary $33,249.60 that year.

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 March 7, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's business is an S corporation and akin to a sole proprietorship since its principal employees are the owners who share the risks and profits of the business. The petitioner submits the two employees/shareholders' individual income tax returns for 1999 through 2001. The two employees/shareholders are Drs. Daniel Wang and Trangming Hung.

Counsel's reliance on the assets of Drs. Daniel Wang and Trangming Hung 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 who 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, even if pursuant to a compilation. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS (Citizenship and Immigration Services) 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 beneficiary's salary. In the present matter, the petitioner did not establish that it paid the full wages to the beneficiary. Instead, it demonstrated that it paid partial wages in each year. Thus, the remainder of the proffered wage is the current obligation of the petitioner in order to show its ability to pay the proffered wage. The remaining wages for 1999, 2000, and 2001 are $79,429.60, $62,804.80, and $62,804.80, respectively.

As an alternative means of determining the petitioner's ability to pay, CIS will next examine the petitioner's net income figure as reflected on the 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*, the court held that the 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

As the petition's priority date falls on July 2, 1999, CIS must examine the petitioner's tax return for 1999. The petitioner's IRS Form 1120S for calendar year 1999 presents a net taxable income of $6,656. The petitioner could not pay a remaining wage of $79,429.60 a year out of this income. We concur with the director's finding in this regard. Since the petitioner has an obligation to demonstrate a continuing ability to pay the proffered wage, CIS must also examine the petitioner's tax returns for 2000 and 2001. The petitioner's IRS Forms 1120S for calendar years 2000 and 2001 present a net taxable income of $28,370 and $29,122, respectively. The petitioner could not pay a remaining wage of $62,804.80 a year out of this income. We concur with the director's finding in this regard.

If the petitioner does not have sufficient net income to pay the proffered salary, CIS will then review 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 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 CIS is satisfied that 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.

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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.

According to the petitioner's 1999 IRS Form 1120S balance sheet (Schedule L), the petitioner had net current assets in the amount of -$605. It is apparent that the petitioner could not pay a remaining wage of $79,429.60 a year out of the petitioner's net current assets of -$605 during 1999. According to the petitioner's 2000 IRS Form 1120S balance sheet (Schedule L), the petitioner had net current assets in the amount of $11,114. It is apparent that the petitioner could not pay a remaining wage of $62,804.80 a year out of the petitioner's net current assets of $11,114 during 2000. According to the petitioner's 2001 IRS Form 1120S balance sheet (Schedule L), the petitioner had net current assets in the amount of $30,701. It is apparent that the petitioner could not pay a remaining wage of $62,804.80 a year out of the petitioner's net current assets of $30,701 during 2001.

Counsel also suggests that the case holding in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) applies to the facts of the instant petition. *Sonegawa,* however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1999, 2000, or 2001 were uncharacteristically unprofitable years for the petitioner.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999, 2000, or 2001. 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.