U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 149 53207 Office: VERMONT SERVICE CENTER Date: AUG 1 6 2004

IN RE: Petitioner: [redacted]

Beneficiary: MOHAMMED K. UDDIN

PETITION: Immigrant Petition for Alien Worker as an Other Worker 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian specialty 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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $12.00 per hour, based on a 40-hour week, which amounts to $24,960 annually.

With the petition, counsel submitted a copy of the petitioner's principal shareholder's individual tax return for 2000 and a copy of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2000. The petitioner's corporate tax return shows that the petitioner files its taxes using a standard calendar year. In 2000, it declared $43,816 in net income. Schedule L of the tax return reflects that the petitioner had $6,450 in current assets and $2,331 in current liabilities, resulting in $4,119 in net current assets. In addition to reviewing a petitioner's net income, CIS will also consider a petitioner's net current assets as a source out of which the beneficiary's offered salary may be paid. 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 of its corporate

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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

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.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 18, 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. The director advised the petitioner that it had more than one petition for an alien worker pending with Citizenship and Immigration Services (CIS) and that its ability to pay a proffered wage must support both beneficiaries. The director also specifically instructed the petitioner to submit a copy of its 2001 federal tax return and informed the petitioner that it may wish to designate which petition it would prefer to have approved, if its financial data did not demonstrate a sufficient ability to pay more than one beneficiary.

In response, the petitioner, through counsel, submitted a copy of its Form 1120S corporate tax return for 2001. It shows that the petitioner reported a net income of $50,362. Schedule L indicates that it had $10,500 in current assets and $6,893 in current liabilities, yielding $3,607 in net current assets.

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 November 15, 2002, denied the petition. The director noted that another visa preference petition (EAC0217553264) had been approved with a proposed wage offer of $39,291.20. The director determined that after subtracting that beneficiary's proposed salary expense from the petitioner's net income shown on its 2001 tax return, the remaining $11,070.80 was insufficient to pay a second beneficiary.

On appeal, counsel asserts that the figures reflected on the petitioner's 2001 corporate tax returns are sufficient to support both beneficiaries. Counsel maintains that the petitioner's gross receipts of $398,392, its total declared assets of $52,049, retained earnings of $67,054.92, depreciation of $1,291, and cash balance of $3,635 all support its ability to pay the proffered wages to both beneficiaries. Counsel additionally claims that the principal shareholder has sufficient other personal and corporate assets to support the petitioner's ability to pay the proffered wages. Counsel also offers a compiled financial report compiled by the petitioner's accountants. It purports to present the petitioner's financial position as of October 31, 2002.

The unaudited financial statements that counsel submitted on appeal 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. An unaudited statement, such as a compiled report, is the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel's reliance on the personal assets of the principal shareholder 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.

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

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).

Where a petitioner has applied for multiple beneficiaries, it must demonstrate that it has the continuing ability to pay all of the beneficiaries for whom it has petitioned. In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, there is no indication that the petitioner has employed the alien beneficiary.

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. If it reflects a sufficient amount to pay the proffered wage, then the petitioner's ability to pay the proposed wage offer is demonstrated for that period. 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). Counsel's reliance on the petitioner's gross receipts is misplaced. Showing that the petitioner's gross receipts, standing alone, reached a certain level or exceeded 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.

Counsel's suggestion that the petitioner's retained earnings should also be considered in support of its financial ability to pay the beneficiary's wage offer is also unpersuasive. Counsel cites no authority for this proposition. It is noted that the court in *Sitar v. Ashcroft, supra,* specifically rejected this line of reasoning, concluding that CIS had sufficiently considered the petitioner's assets as reflected on the Schedule L balance sheet of the petitioner's tax return.

As noted previously, if the petitioner's net income is insufficient to cover the proffered wage of a beneficiary, CIS will review the petitioner's assets. We reject, however, counsel's claim that the petitioner's total assets of $52,049 should have been considered in the determination of the ability to pay the proffered wage. 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, as noted previously, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage because they represent a more readily available asset out of which a proposed wage may be paid.

In this case, the director accurately represented the petitioner's 2001 net income and net current assets. Consideration of the petitioner's cash on hand is included in a calculation of the petitioner's net current assets set forth on Schedule L of its tax return. Nevertheless, neither the petitioner's 2001 net current assets of $3,607, nor its net income of $11,070.80 remaining after deducting the other beneficiary's proffered salary of $39,291.20, are sufficient to pay this beneficiary's proffered wage of $24,960.

In the context of the financial records contained in the record, counsel asserts that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. That case relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner had been in business for over 11 years and was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In the instant matter, the record contains only two years of corporate tax returns, which do not constitute the kind of framework referenced by *Sonegawa.* There is nothing to indicate that the unique circumstances have been shown to exist in this case, which parallel those in *Sonegawa.*

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage of the beneficiary named in the instant case, in addition to the other beneficiary's proffered wage approved in EAC0217553264. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage as of the visa 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.