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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC 03 086 54257 Office: CALIFORNIA SERVICE CENTER Date: DEC 02 200

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 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 skilled worker. The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a night store manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and asserts that the petitioner's continuing ability to pay the proffered wage has been established.

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) also provides 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [Citizenship and Immigration Services (CIS)].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the petition's priority date is June 6, 1997. The beneficiary's salary as stated on the labor certification $13.06 per hour, which amounts to $27,164.80 per year. On Part 5 of the visa petition, the petitioner claims that it was established in 1991, employs twenty-one workers, has a gross annual income of approximately 6.2 million dollars and a net annual income of about $22,200. Form ETA 750B, signed by the beneficiary, does not indicate that the petitioner has employed the beneficiary.

The petitioner, through counsel, initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for the years 1997 through 2000 as evidence of its ability to pay the proffered wage of $27,164.80 per annum. The corporate tax return indicates that the petitioner files its returns based on a standard calendar year. Schedule L of the tax returns show petitioner's current assets and current liabilities. The difference between

current assets and current liabilities is the value of the petitioner's net current assets at the end of the year.[1] 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:

	1997	1998	1999	2000	2001
Taxable income before net operating loss (NOL) deduction	$74,711	$110,513	-$27,283	$ 20,457	$ 31,078
Current Assets	$507,075	$154,189	$93,699	$196,537	$256,662
Current Liabilities	$897,133	$126,114	$98,314	$214,255	$156,808
Net current assets	-$390,058	$ 28,075	-$ 4,615	-$ 17,718	$ 99,854

The petitioner also initially submitted copies of several unaudited financial statements covering the nine-month period ending September 30, 2002. One appears to be for the "Bilal Corporation," another balance sheet and income statement appears to be the petitioner's, a third appears to be for the "Ultramar and Rental Divisions" of the petitioning business, and a fourth appears to be for the [redacted] division. A letter from the petitioner's accountant, [redacted] dated December 20, 2002, accompanies these documents. Ms [redacted] indicates that petitioner's tax returns are not a good indicator of the petitioner's ability to pay the proposed wage offer due to tax avoidance planning such as the distribution of officer bonuses and salary and further states that the construction of a new building is being depreciated over 15 years and generating a deduction of $13,000 per month.

On June 3, 2003, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. The director instructed the petitioner to submit annual reports, federal tax returns, or audited financial statements to establish the petitioner's ability to pay the proffered salary from the priority date until the beneficiary obtains lawful permanent resident status. The director also advised the petitioner that the tax returns for 1999 and 2000 do not show sufficient taxable income or net current assets to pay the beneficiary's proffered salary.

In response, counsel resubmitted copies of the petitioner's corporate tax returns noted above and additionally provided a copy of its 2002 corporate tax return. It shows that the petitioner declared a taxable income before the NOL deduction of $46,375. Schedule L reflects that it had $332,383 in current assets and $294,514 in current liabilities, resulting in $37,869 in net current assets. In a letter dated July 10, 2003, the petitioner's accountant summarizes the depreciation and other deductions the petitioner has taken in order to minimize its tax liability and asserts that the petitioner has demonstrated its ability to pay the proffered wage. Accompanying this letter are copies of the petitioner's unaudited financial statements for the three-month period ending March 31, 2003, as well as copies of the Juan Pollo and Ultramar and Rental Divisions' unaudited financial statements for the same period.

The director denied the petition, concluding that the petitioner's 1999 and 2000 corporate tax returns failed to establish that it has had a continuing ability to pay the beneficiary's proffered salary. The director noted that neither the petitioner's taxable income, nor its net current assets could cover the proffered wage in either year.

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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.

At the outset, it is noted that evidence contained in the record included unaudited financial statements submitted as proof of the ability to pay the proffered wage. Unaudited financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. 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. By their own terms, the financial statements are compilation reports of the petitioner's financial status and are based on the representations of management. They are not audited as required by the 8 C.F.R. § 204.5(g)(2). Unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner's taxable income figure used by the director does not represent the appropriate figure to calculate the petitioner's ability to pay the proffered wage because it does not reflect the petitioner's gross profit or sales and receipts. Although net income and taxable income may, in some cases, represent different figures, CIS uses a corporate petitioner's taxable income before the net operating loss deduction (line 28 of the corporate tax return) as a basis to evaluate its ability to pay the proffered wage in the year of filing because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, CIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing to pay the proffered 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. In the instant case, it is noted that the ETA 750B reflects that the beneficiary reports that he worked for the Bilal Corporation, located at [redacted] from June 1995 until May 21, 1997, the date that the ETA 750B was signed. It is unclear if this is the same entity as mentioned above, or whether it is a completely separate legal entity from the petitioner as suggested by its individual corporate designation. 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). In this case, the record contains no credible documentary evidence that the petitioner has employed the beneficiary.

Counsel cites the petitioner's accountant's opinion that the depreciation expense and other deductions taken by the petitioner should be added back to the petitioner's net income because they were merely tax avoidance strategies. No legal authority is cited in support of this proposition and the AAO does not find this assertion persuasive. 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 review 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 or expended other monies such as

bonuses or officers' compensation in excess of the proffered wage is insufficient, as is claimed here. It is not reasonable to consider gross revenue without out also reviewing the expenses incurred in order to generate that income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos,* 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

Counsel also maintains that the petitioner has approximately $276,000 in its savings account and submits a copy of a bank statement, dated September 30, 2003, on appeal. Counsel states that the petitioner has maintained this account through 1999 and 2000. It is noted that no bank statements from these two years have been submitted. It is further noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. No evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that has already been considered in determining the petitioner's net current assets.

Counsel has also submitted a letter, dated September 19, 2003, from [redacted] 50% shareholder of the petitioning business, as well as copies of Mr [redacted] individual income tax returns for 1997 through 2002. Mr. [redacted] states that he would have pledged his own income to pay the proffered wage. This cannot be considered as persuasive evidence of the corporate petitioner's ability to pay the proposed wage offer. 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). As noted above, CIS need not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft, supra.* Further, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee to be utilized in lieu of proving ability to pay through prescribed regulatory financial documentation.

Eligibility for the visa classification must be established at the time of filing the petition. A petitioner cannot establish a priority date for visa issuance when at the time of making the job offer and the filing of the petition with CIS, the petitioner could not pay the wage as stated in the labor certification. *Matter of Great Wall,* 16 I&N Dec. 142, 145. (Acting Reg. Comm. 1977). The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered salary beginning as of the visa priority date. In this case, as noted by the director, neither the petitioner's taxable income before the NOL deduction, nor its net current assets reflect its ability to pay the proffered wage in either 1999 or 2000.

In the context of the financial records contained in the record, counsel argues 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. The AAO cannot conclude that sufficiently analogous circumstances have been shown to exist in this case, which parallel those in *Sonegawa.*

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.