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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 28 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: SELF-REPRESENTED

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
for Administrative Appeals Office

PUBLIC COPY

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

**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 building and landscaping contractor. It seeks to employ the beneficiary permanently in the United States as a landscape designer and installer. 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, the petitioner submits additional evidence in support of its ability to pay the proffered wage.

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 February 22, 2001. The proffered wage, as stated on the Form ETA 750, is $24.00 per hour, which amounts to $49,920 annually. The visa petition indicates that the petitioner was established in 1986 and has two employees. Part B of Form ETA 750, signed by the beneficiary, states that the petitioner has employed the beneficiary since 1999.

With the petition, the petitioner submitted a letter from an accountant, accompanied by unaudited financial statements representing the petitioner's financial data from March 1, 2002 to September 1, 2002. The petitioner also provided a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It indicates that the petitioner files its taxes using a fiscal year running from June 1st to May 31st of the following year. Thus, the 2001 tax return represents the petitioner's financial data from June 1, 2001 to May 31, 2002. It shows that the petitioner reported net income of $6,370. Schedule L of the tax return also reflects that the petitioner declared $26,634 in current assets and $1,461 in current liabilities, resulting in $25,173 in net current assets. Besides reviewing a petitioner's net income during a given period, CIS will also examine a petitioner's net current assets as an alternative method of evaluating a petitioner's ability to pay the proffered wage. Net current assets represent a petitioner's liquidity at a given date and are the difference between current assets and current liabilities. 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. To the extent that a petitioner has paid wages to a beneficiary, credit will be given to those amounts. If either the petitioner's net income or net current assets can cover the difference between the amounts paid as wages and the proffered salary, then the petitioner is deemed to have the ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 4, 2003, the director requested additional evidence pertinent to that ability. The director requested original Internal Revenue Service (IRS) computer records reflecting the petitioner's tax return data from 2001 to the present. The director also instructed the petitioner to submit copies of the beneficiary's Wage and Tax Statements (W-2s) from 2001 to the present.

In response, the petitioner provided copies of the beneficiary's W-2s for 2001 and 2002. They show that the petitioner paid the beneficiary $8,568 in 2001 and $10,284 in 2002. The IRS computer records reflect that for the fiscal year ending May 31, 2001, the pertinent tax return shows that the petitioner declared -$14,540 in net income. The petitioner also reported total assets of $23,478 and current liabilities of $500. Even assuming all the assets listed were current assets, the petitioner reported nor more than $22,978 in net current assets. In addition to the IRS records, the petitioner also submitted a copy of one of its payroll records for the period from March 3, 2003 to March 14, 2003. It shows that it paid the beneficiary $1,200 for 80 hours, which equals $15.00 per hour or $9.00 an hour less than the proffered wage.

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 April 23, 2003, denied the petition.

On appeal, the petitioner submits two copies of statements of an annuity account, dated March 30, 2001 and March 31, 2003, respectively, held on behalf of "The Tlamco Inc.Trust." It shows a balance of approximately $33,000 in 2001 and $23,500 in 2003. The petitioner also provides statements of another account held in the name of the "Tlamco Inc. Retirement Trust," from March 31, 2001 and May 8, 2003. It shows a balance of approximately $13,300 in 2001 and $44,700 in 2003. Finally, the petitioner provides copies of annuity accounts held individually by the petitioner's president. By letter on appeal, the petitioner's president submits these assets for consideration in support of the petitioner's ability to pay the proffered wage and extols the beneficiary's abilities to perform his job and his value to the company.

At the outset, it is noted that the unaudited financial statements that the petitioner 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. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The petitioner's reliance on the individual assets of its president is also not probative of the petitioner's ability to pay the proffered salary. 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, *3 (D. Mass. Sept. 18, 2003). Similarly, there is no proof presented that the entities presented as the Tlamco Inc.Trust or the Tlamco Inc. Retirement Trust on the account statements, submitted on appeal, have any legal obligation to pay the beneficiary's proffered wage. [1]

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, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage as of the priority date or anytime subsequently. As noted above, the amounts actually paid to the beneficiary will be included in the evaluation of the petitioner's ability to pay the proffered wage.

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.

In this case, the $8,568 paid to the beneficiary in 2001 was $41,352 short of the proffered wage. The beneficiary's 2002 wages of $10,284 was $39,636 less than the proffered wage of $49,920. As set forth on federal tax returns contained in the record, neither the petitioner's net income or net current assets could cover the shortfall in either year, even when considering an adjustment made for fiscal year reporting of income and calendar year reporting of wages.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or during the subsequent period. 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.

---

[1] It is noted that a qualified annuity trust must comply with the basic statutory requirements of I.R.C. § 664. *Black's Law Dictionary,* 783 (Abridged 5th ed. 1983).