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

U.S. Citizenship and Immigration Services

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 17 2004

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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:

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 fumigation company. It seeks to employ the beneficiary permanently in the United States as a pest control worker. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, counsel submits a brief.

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.

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 February 15, 2001. The proffered salary as stated on the labor certification is $16.31 per hour or $33,924.80 per year.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. On January 2, 2003, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from February 15, 2001 to be in the form of copies of annual reports, signed and certified federal tax returns, or audited financial statements. The director also requested that the petitioner provide copies of the beneficiary's Forms W-2, Wage and Tax Statements, for 2000 and 2001 and evidence that the beneficiary possesses the two years of experience as required by the Form ETA 750.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, for fiscal year October 1, 2001 through September 30, 2002, a copy of the petitioner's 2001 Form 100, California Corporation Franchise or Income Tax Return, for fiscal year October 1, 2001 through September 30, 2002, copies of the beneficiary's 2000, 2001, and 2002 Forms 1040, U.S. Individual Income

Tax Return, and copies of the beneficiary's 2000, 2001, and 2002 Forms W-2, Wage and Tax Statements. Counsel also provided a letter confirming the beneficiary's work experience. The income tax return reflected a taxable income before net operating loss deduction and special deductions of -$28,478 and net current assets (current assets minus current liabilities) of $9,825. The beneficiary's Forms W-2 reflected wages of $39,247.50 paid by R&C Fume, Inc in 2001, $39,875.00 paid by R&C Fume, Inc. and $750.00 paid by Bay Cities Termite Service, Inc. in 2002, and $36,562.50 paid by R&C Fume, Inc and $1,000.00 paid by Bay Cities Termite Service, Inc. in 2000. It is noted that both R&C Fume, Inc. and Bay Cities Termite Service, Inc. have the same address as the petitioner but different employer identification numbers (EIN).

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 May 6, 2003, denied the petition.

On appeal, the petitioner provides another copy of its 2001 Form 1120, U.S. Corporation Income Tax Return, a letter from its certified public accountant, and shareholder meeting minutes for the petitioner and F&C Fume, Inc.

The accountant's letter states:

> The 2001 corporate tax return (1120) for AAA Fume, Inc. does show a loss of $28,478, but there is other information you need to know to determine the financial status of the business. The amount on line 20, which is depreciation in the amount of $21,335, should be added back to income since it represents expenses that were incurred in previous years. The owners of the corporation also own the land and building that the business is occupying. The amount on line 16 of $30,000 is rent that the owners pay themselves. Which means that the corporation could have shown an additional $51,335 in income. Also, it is important to note that the corporation files its tax returns on the cash basis and for tax purposes pays all its payables down to zero at the end of the year to lower tax liability. At the time of the 2001 return payables were $0 and accts [sic] receivable were In [sic] excess of $125,000. Most importantly the corporation has been operating profitably since 1988. There is no doubt about the ability of AAA Fume, Inc. to [pay] the proffered wage.
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> The other company that the beneficiary worked for is R & C Fume, Inc. which is owned by the same individual as AAA Fume, Inc. R & C Fume, Inc. was profitable in 2001.

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 provide evidence that it employed the beneficiary in 2000, 2001, or 2002. Other companies, R&C Fume, Inc. and Bay Cities Termite Service, Inc, paid the beneficiary.

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.

CIS may also review the petitioner's net current assets as another means of determining the petitioner's ability to pay the proffered wage. 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 of -$28,478 and net current assets of $9,825. The petitioner could not pay the proffered wage of $33,924.80 per year out of either the taxable income or the net current assets.

Even though the petitioner appears to be the owner of all three corporations mentioned above, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation'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.

The accountant states that the owners own the building and land the corporation occupies and paid themselves $30,000 in rent in the year 2001. This money, he contends, could be used to pay the proffered wage to the beneficiary. However, there is no evidence that the petitioner paid the $30,000 to itself or that the owners actually own the building and land. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). Nevertheless, even if the $30,000 were added back to the taxable income, the result would still be less than the proffered wage ($30,000 + (-$28,478) = $1,522).

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.