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

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 22 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:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

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

The petitioner is a Turkish restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food 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)(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 April 24, 2001. The proffered wage as stated on the Form ETA 750 is $2,000 per month, which amounts to $24,000 annually.

With the petition, the petitioner submitted Form 1065, U.S. Return of Partnership Income of Palm Café, LLC, for the year 2001. The return indicates that the Palm Café is located at 93 Pike Street, Suite 204, Seattle, Washington 98101 and has the employer identification number 91-1924010.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 23, 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, counsel for the petitioner submitted a letter that stated that "the petitioner was unable to provide his 2001 income tax return for his business corporation, No Boundaries Café. As soon as we receive the income

taxes we will re-file the I-140 petition." The petitioner submitted Combined Excise Tax Returns for No Boundaries Café, located at 93 Pike Street, Suite 204, Seattle, Washington 98101-2091 from January 2001 through October 2002.

The tax return for Palm Café reflects the following information for 2001:

	2001
Ordinary income	$18,537
Current Assets	$1,288
Current Liabilities	$-38,722
Net current assets	$-37,434

Counsel also submitted copies of the petitioner's checking account statements for the period from January 1, 2001 through September 30, 2002. In addition, the petitioner submitted an unaudited letter on "No Boundaries Café" letterhead with the title "Sales records since ownership." The unaudited letter indicates that No Boundaries Café produced gross sales in the amounts of $36,593.79; $116,115.55; $131,783.12; $158,856.66; and $190,034.88, for the years 1998 through 2002, respectively, and was signed by the petitioner's owner.

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 25, 2003, denied the petition.

On appeal, counsel asserts that Palm Café LLC and No Boundaries Café are the same entity; that the totality of circumstances should be assessed including emphasis upon gross sales receipts and wages paid; that the petitioner's owner has substantial assets separate from the petitioning entity's business on which to rely upon to pay the proffered wage; and that future expectations of profit evidence the petitioner's ability to pay the proffered wage. The petitioner re-submits the Form 1065 Palm Café tax return; a name change certificate evidencing that Palm Café LLC changed its name to No Boundaries Café, LLC on November 16, 2000; a letter from the petitioner's accountant; a letter from the petitioner's owner; business documentation related to the petitioner's owner's assets and business interests separate from the petitioner; and a copy of a decision issued by the AAO in 1989 and minutes from an American Immigration Lawyers Association (AILA) teleconference in 1990.

The AAO accepts the documentation as sufficient evidence that No Boundaries Café is the same entity as the Palm Café LLC as the name change certificate illustrates the change in 2000. Thus, this portion of the director's decision has been overcome. The AAO will now analyze whether the petitioner has demonstrated its ability to pay the proffered wage.

The unaudited financial statement titled "Sales records since ownership" of No Boundaries Café, submitted by the petitioner in response to the director's request for evidence, is 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.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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 will be considered below in determining the petitioner's net current assets.

Counsel's reliance on the assets of the petitioner's owner 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). While the AAO acknowledges that the petitioner is structured as a limited liability corporation (LLC), the same principles concerning distinct legal identities and responsibilities between a business entity and shareholders and owners apply.

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 in 2001 or 2002.

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). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of 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.

Nevertheless, counsel is correct that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. 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, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] An LLC's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If an LLC'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 petitioner's net current assets during the year in question, 2001, however, were negative.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows an ordinary income of only $18,537, which is less than the proffered wage, and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its ordinary income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

Counsel asserts that *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), applies to the petitioner's situation. *Matter of Sonegawa,* however, relates to petitions filed during uncharacteristically unprofitable or difficult years 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 2001 was an uncharacteristically unprofitable year for the petitioner.

Counsel also argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes that the petitioner has more than adequate ability to pay the proffered wage. The

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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.

petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. Counsel relies upon *Masonry Masters Inc. v. Thornburgh*, 742 F. Supp., 682 (D.D.C. 1990), for the assertion that "the [petitioner's] alien cook, particularly in the context of the highly competitive specialty restaurant business, can contribute substantially to the reasonable profit expectation." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In support of counsel's assertion that the petitioner's future profits will prove its ability to pay the proffered wage, the petitioner submits a letter on appeal that states the following:

> [The petitioner] is located in a very famous tourist attraction center of Seattle where values like ethnic food is very much appreciated. We have been serving the public at the above-mentioned location since 1998. I realize the vast potential of our products and the service we offer to the public. [The petitioner] experienced a 40% growth in business in a downturn economy during 2002 with limited resources. I expect that this fact coupled with the tremendous upward business potential, our sales volume can double. Our growth plan calls for greatly increasing our menu offerings. It is for this reason that I would very much like to employ [the beneficiary], who is a very experienced and talented resource in Turkish food preparation and presentation. He will assist this organization in realizing our long-term growth and profitability plan as well as enrich this very famous tourist location of Seattle by presenting the world famous Turkish cuisine offerings.
>
> I have been a long-time member of the Seattle business community and own other businesses. [The petitioner] is currently financially self-sufficient to pay [the beneficiary] his wages. The 40% increase in sales and profitability in 2002 in further proof that [the beneficiary's] wages will be paid without any problems. His contributions will tremendously benefit the business, further ensuring his monetary compensation.

However, no corroborating objective evidence was submitted with the petitioner's owner's letter to evidence the purported 40% growth in business or the potential future impact of hiring the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without more, the petitioner's letter amounts to mere speculation.

In addition, counsel submits a letter from the petitioner's accountant on appeal that states the following:

> I consider the [petitioner] to be a profitable business, and one that is located in a very active area of the City of Seattle. The café is located in the popular Pike Place Market, which is located in the heart of downtown Seattle, is [sic] a popular attraction for Seattle visitors. The Pike Place Market is the oldest continually operating farmers market in the country. It is a world famous gathering place where people shop, mingle and eat. The [petitioner] fits perfectly in its location with its ethnic cuisine and friendly atmosphere. The café went through a major remodel [sic] in the year 2000 and has been growing ever since. The sales increased by 15% between 2000 and 2001 and another 24% between 2001 and 2002. In addition the profits of the business also increased by 48% between 2001 and 2002. Considering both the reputation of the [petitioner] and the economics of the greater Seattle, WA. Area, the restaurant has a reasonable expectation of increased business profits in the future.

No corroborating evidence was submitted with this letter to evidence the petitioner's remodeling, sales and profits increases, prime location, or future expectation of profit. *See Matter of Treasure Craft, supra.* The accountant's letter is an advisory opinion. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Finally, counsel submits copies of an unpublished AAO decision and minutes of an AILA teleconference in support of his assertion that the ability to pay analysis should consider the "overall viability" of a business or the "totality of circumstances." While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Even considering the petitioner's overall viability or the totality of circumstances in this case, however, the petitioner has still not produced objective and independent evidence of its financial strength.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 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.