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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 26 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]

PUBLIC COPY

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 statement 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 March 9, 2001. The proffered wage as stated on the Form ETA 750 is $11.62 per hour, which amounts to $24,169.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of October 1999.

On the petition, the petitioner claimed to have been established in October 1999, to have a gross annual income of $178,000, and to currently employ ten workers. In support of the petition, the petitioner submitted individual income tax returns of James and Brenda Campanis and state quarterly wage reports for Longball Incorporated for the first half of 2002 and last quarter of 2001, without explanation of their relationships to the petitioner. The wage reports reflect that Longball Incorporated paid wages in the amounts of $4,372.68 in 2002 and $2115.65 in 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 11, 2003, 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 also noted receipt of the individual tax returns and state quarterly wage reports and requested clarification and explanation.

In response, the petitioner submitted letters from the petitioner's current and former owners explaining that when the petitioning entity was sold to he incorporated under the name Longball Incorporated, which reports taxable income to the IRS for the petitioner. Business certificates corroborate the explanation provided. Additionally, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001 as well as individual income tax return for 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 12, 2003, the director issued a notice of intent to deny the petition. The director stated that the record of proceeding contained the beneficiary's Form W-2 for the year 2001[1] which shows that the beneficiary was only paid $8,537.40 in that year, and coupled with its tax returns that show ordinary losses and no assets, the petitioner has not demonstrated its ability to pay the proffered wage.

In response to the director's notice of intent to deny the petition, the petitioner submitted its Forms 1120S, U.S. Income Tax Returns for an S Corporation for the years 2001 and 2002. The tax returns reflect the following information for the following years:

	2001	2002
Net income[2]	-$38,680	-$41,768
Current Assets	$0	$0
Current Liabilities	$0	$0
Net current liabilities	$0	$0

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 June 16, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's gross revenues received and gross wages paid, as well as wages already paid to the beneficiary, reflects its ability to pay the proffered wage. Counsel resubmits tax returns and state quarterly wage reports previously submitted, as well as the petitioner's internally-generated compensation detail reports, apparently providing wage expense information of each of the petitioner's employees. No new information is provided concerning the actual employment of and wages paid by the petitioner to the beneficiary from the compensation detail reports.

Counsel's reliance on the assets of Mr. Campanis 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). Thus, Mr. Campanis's individual income tax returns will not be considered.

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[1] The compiled record of proceeding reviewed by the AAO does not reflect receipt of the beneficiary's W-2 form at this point in the petition's case history. However, there is a copy of a Form W-2 issued to the beneficiary by the petitioner for the year 2001 as part of the beneficiary's application to adjust status to lawful permanent resident. The W-2 form corroborates the director's figure.

[2] Ordinary income (loss) from trade or business activities as reported on Line 21.

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 established that it employed and paid the beneficiary wages of $8,537.40 in 2001 and $6,488.33 in 2002. Subtracting those amounts from the proffered wage, the petitioner must demonstrate it can pay remaining wages of $15,632.20 in 2001 and $17,681.27 in 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). Contrary to counsel's appellate assertions, 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 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 petitioner's reported negative net income in 2001 and 2002 cannot cover the remaining wages of $15,632.20 in 2001 and $17,681.27 in 2002. Thus, the petitioner cannot prove its continuing ability to pay the proffered wage in 2001 or 2002 out of its net income.

Nevertheless, 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.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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

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[3] 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's net current assets during the year in question, however, were zero. As such, the petitioner cannot prove its continuing ability to pay the remaining wages out of its net current assets in 2001 or 2002.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001 or 2002. In 2001 and 2002, the petitioner shows a negative net income and no net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net 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 the salient portion of 2001 or 2002.

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 subsequently during 2002. 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.