B6

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:
WAC-03-114-50257

IN RE: Petitioner: [redacted]
Beneficiary:

NOV 26 2004

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

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
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 provides landscaping services. It seeks to employ the beneficiary permanently in the United States as a stonemason. 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 provides 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.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is $24.39 per hour, which amounts to $50,731.20 annually.

In support of the petition, the petitioner submitted its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation; its owner's individual income tax return for 2000[1]; an unaudited balance sheet for the period ending December 31, 2001; copies of the petitioner's bank statements; copies of state and federal quarterly wage reports; copies of internally-generated payroll records; a Form W-2, Wage and Tax Statement issued to the beneficiary from the petitioner reflecting that the petitioner paid the beneficiary $6,300 in wages in 2001; and documents relating to the petitioner's general business.

---

[1] The petitioner apparently incorporated in 2001 and previously operated as a sole proprietorship. No evidence was submitted concerning the date of incorporation, which is blank on the petitioner's tax returns as well as the form supporting the petition. However, the inclusion of the petitioner's owner's individual income tax return shows an accompanying Schedule C, Profit or Loss Statement from Business, thus enabling the AAO to extrapolate this possible factual conclusion. The 2000 individual income tax return is irrelevant to these proceedings, however, as it precedes the 2001 priority date and thus is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage as of the priority date.

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 29, 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 specifically requested signed and completed tax returns from 2001 to the present and W-2 forms issued to the beneficiary since his employment commenced with the petitioner in 1999.

In response, the petitioner submitted a signed and complete Form 1120S U.S. Income Tax Return for an S Corporation for the year 2002. The petitioner also submitted the petitioner's owner's individual income tax return for 2002.

The tax returns submitted initially and in response to the director's request for evidence reflect the following information for the following years:

	2001	2002
Net income[2]	$27,616	$27,894
Current Assets	$0	$0
Current Liabilities	$0	$0
Net current liabilities	$0	$0

In addition, counsel submitted Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2001 and 2002 as well as internally-generated payroll records. The Forms W-2 Wage and Tax Statements reflect wages of only $6,300 in 2001, which is $44,431.20 less than the proffered wage; and $6,950 in 2002, which is $43,781.20 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 September 24, 2003, denied the petition.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) made a factual mistake and erred by concluding that the petitioner cannot pay the proffered wage to the beneficiary. Counsel states that she will send a brief and/or evidence within 30 days to the AAO, but to date, more than a year later, no additional evidence or brief has been received in this matter. Thus, the record of proceeding is considered complete as it is concurrently constituted.

Counsel's submission of and apparent 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.

---

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

Counsel's submission of the petitioner's owner's individual income tax return for 2002 and apparent 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). Thus, the petitioner's owner's 2002 tax return will not be considered.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 establish that it employed and paid the beneficiary the wages of $6,300 in 2001, which is $44,431.20 less than the proffered wage; and $6,950 in 2002, which is $43,781.20 less than the proffered wage. Thus, the petitioner must demonstrate its ability to pay the remaining proffered wage in each year to establish its continuing ability to pay the proffered wage as of the priority date.

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). 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 net income was $27,616 and $27,894 for 2001 and 2002, respectively, both amounts which are less than the remaining wages in each year. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income in either 2001 or 2002.

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 petitioner's net current assets during the years in question, 2001 and 2002, however, were zero. As such, the petitioner cannot demonstrate its ability to pay the proffered wage out of its net current assets in 2001 or 2002.

The petitioner has not demonstrated that it paid the full proffered wage in 2001 or 2002. In 2001, the petitioner shows a net income of only $27,616 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. In 2002, the petitioner shows a net income of only $27,894 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 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.

---

[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.