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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

NOV 30 2004

FILE: EAC-02-182-50373 Office: VERMONT SERVICE CENTER Date:

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]

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a contractor. It seeks to employ the beneficiary permanently in the United States as a stone mason. 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 26, 2001. The proffered wage as stated on the Form ETA 750 is $23.00 per hour, which amounts to $47,840 annually.

With the petition, the petitioner submitted a 2001 Form W-2 Wage and Tax Statement indicating that the petitioner paid the beneficiary $27,221.28 during 2001. The petitioner submitted Form 1120S Corporate tax returns for 2000. The tax return reflects the following information:

	2000
Net income	-$8,358
Current Assets	$102,437
Current Liabilities	$145,089
Net current liabilities	-$42,652

The AAO notes that the petitioner's financial figures for the year 2000 are not necessarily dispositive of the its ability to pay the proffered wage during the year 2001, the year the petition was approved.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 14, 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. The director specifically requested the petitioner's tax return in 2001 or other evidence of its ability to pay the proffered wage in that year.

In response, the petitioner submitted a letter from counsel who states that the petitioner's president is willing to reduce his compensation in order to pay the proffered wage and that the petitioner's president's wife as the other officer of the petitioner is willing to do. Counsel submitted Form 1120S for the year 2001 reflecting a net income of -$81,924 and net current liabilities of -$65,600. Counsel submitted the petitioner's 2001 depreciation schedule and the petitioner's president's Form W-2 Wage and Tax Statements for the years 1998 through 2001.

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 27, 2003, denied the petition.

On appeal, counsel asserts that the petitioner is only obligated to pay the beneficiary the prorated portion of the proffered wage not paid during 2001 from the priority date. Counsel states that Citizenship and Immigration Services (CIS) failed to consider depreciation or compensation of officers as well as the petitioner's shareholder's assets in determining the petitioner's ability to pay the proffered wage. Counsel further states that the petitioner's bank statements reflect an ending balance each month, which could be used to pay the proffered wage. Counsel states that the petitioner could be reasonably expected to continue business even though 2001 was not a good year. Counsel cited *Matter of Sonegawa* I&N Dec. 612 (Reg. Comm. 1967) as applicable precedent.

The petitioner submits its commercial bank statements for the years 2001, 2002 and the first four months of 2003, the beneficiary's 2002 Form W-2 reflecting earnings paid by the petitioner of $29,229.50, IRS materials, several unpublished AAO decisions and evidence previously submitted.

Counsel's reliance on *Matter of Sonegawa* , 12 I&N Dec. 612 (Reg. Comm. 1967) is misplaced. It relates to a petition filed during uncharacteristically unprofitable or difficult years but only within 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 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 and 2002 were uncharacteristically unprofitable years for the petitioner.

Counsel's reliance on the balances in the petitioner's bank account 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.

The petitioner has not submitted any documentary evidence establishing just how much in wage concessions its president and, or wife are willing to take in order to pay the proffered wage. The record contains no written agreements, factual accounting or financial documents or wage contracts effecting any such compensation deductions. Further, the petitioner has not accounted for the fact that such compensation deductions were not made during 2001 or 2002. Therefore, counsel's statements that the owners compensation will be reduced in order to pay the proffered wage must be viewed as too speculative for these proceedings. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if eligibility is expected at a subsequent time. *See Matter of Katigbak,* 14 I&N Dec. 45,49 (Comm. 1971).

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). Additionally, while an S Corporation provides a tax through system for its shareholders', federal taxes, " in terms of legal characteristics under state law", the "S" Status corporation is no different than any other regular corporation. *See Black's Law Dictionary* 342 (6th Ed. 1990). Thus, counsel's assertion that the petitioner's primary shareholder's assets should be considered to establish the petitioner's ability to pay the proffered wage is without merit. The petitioner's primary shareholder is still shielded from liability since the petitioner is structured as a corporation and has a financial obligation to pay the proffered wage.

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, counsel submits evidence on appeal that the petitioner paid one [redacted] $81,600 during 2000 and $57,600 during 2001. This individual is not the beneficiary.

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. Contrary to counsel's assertion, 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 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. The petitioner's net income in 2001 and 2002 was negative and thus the petitioner cannot establish its ability to pay the proffered wage out of its 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. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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] 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 negative, and thus the petitioner cannot establish its ability to pay the proffered wage out of its net current assets.

The petitioner has not demonstrated that it paid the full proffered wage. In 2001, the petitioner shows a net income of only -$8,358, and negative 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.

The petitioner has not demonstrated that it paid the full proffered wage. In 2002, the petitioner shows a net income of -$81,924, and negative net current assets, and has not, therefore, demonstrated the ability to pay 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.

difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 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.