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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 15 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]

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a Thai chef. 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[1] asserts that the evidence establishes that the petitioner has had the continuing ability to pay the proffered wage.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 18, 2001. The proffered wage as stated on the Form ETA 750 is $25,000 per annum. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since August 1996.

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[1] Two Notices of Entry of Appearance (Form G-28) have been submitted to the record from the same office. The earlier G-28 clearly designates the individual as a licensed attorney. The G-28 submitted with the appeal does not identify whether the individual is a representative or an attorney for the petitioner. This decision will refer to both collectively as counsel for the petitioner.

On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of approximately $180,000, and to currently employ eight workers. In support of the petition, the petitioner submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation.

Because the tax returns did not provide sufficient evidence of the petitioner's continuing ability to pay the proffered wage beginning as of April 18, 2001, on February 24, 2003, the director requested additional evidence pertinent to that ability. The director advised the petitioner that the evidence must include 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 requested that petitioner provide a copy of the beneficiary's 2002 Wage and Tax Report (W-2) or Form 1099, if it employed the beneficiary.

In response, the petitioner submitted copies of its Form 1120S for 2001 and 2002. The tax returns reflect the following information for the following years:

	2001	2002
Net income	$ 1,171	$ 3,206
Current Assets	$14,239	$10,728
Current Liabilities	$ 2,094	$ 2,116
Net current assets	$12,145	$ 8,612

In addition, the petitioner re-submitted copies of its 1998-2000 corporate tax returns, copies of the 2001 and 2002 federal tax returns of the Aochi corporation, and a copy of the individual federal tax return of the two principal shareholders of the petitioner, along with copies of their 2002 W-2s, issued by the petitioner. With this documentation, the petitioner submitted a letter, dated May 15, 2003, signed by [redacted] who identifies himself as an owner. It is unclear if he is the same individual as [redacted] identified on the 1998 corporate tax return as a 50% shareholder in petitioner.[2] In his letter, Mr. [redacted] states that his other corporate entity, the Aochi Corporation, owns the building where the petitioner is located. He claims that the equity in the building exceeds $500,000, and that he expects to rent one half of the building to another commercial enterprise. Mr [redacted] also states that the petitioner will increase seating capacity in 2004 and expects an increase in revenue.

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 July 25, 2003, denied the petition. The director based his decision on a review of the financial data contained within the petitioner's 2001 and 2002 federal tax returns.

On appeal, counsel asserts that the petitioner's rent of approximately $60,000 per year, which is paid to the sole shareholders through their other corporation is available to pay the proffered wage and should have been considered, along with the personal assets of the sole shareholders.

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[2] The petitioner's subsequent corporate tax returns identify "Jintana S. Charernsook" as the principal shareholder.

Counsel indicates on appeal, that a brief and/or evidence will be submitted to the AAO within thirty days. As of this date, nothing further has been received to the record.

At the outset, it is noted that 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 may have 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 failed to submit any evidence of employment or payment of wages to the beneficiary.

As noted by the director, CIS will also 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. Similarly, the AAO rejects counsel's assertion that the rental expense paid to another corporation should be added back to the net income of the petitioner, or that the petitioner's expansion will automatically produce an increase of net income. As noted by the director, eligibility must be established at the time of filing, not projected to a future date after a petitioner becomes eligible under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971).

Nevertheless, CIS will also review a petitioner's net current assets as a measure of its continuing ability to pay the beneficiary's proposed wage offer of $25,000 per year. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets and liabilities are shown on Schedule L of its federal tax return. 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 of $12,145 in 2001 and $8,612 in 2002, as shown above, were not sufficient to cover the proffered salary of $25,000 during either of those two years. As such, the director's failure to specifically consider the petitioner's net current assets did not prejudice the petitioner's cause.

Counsel's reliance on the assets of individual shareholders 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

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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.

1958; A.G. 1958). CIS will not consider the financial resources of individuals or other entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

As set forth above, neither the petitioner's net income of $1,171, nor its net current assets of $12,145, was sufficient to pay the proffered salary during 2001. Similarly, neither the petitioner's net income of $3,206, nor its net current assets of $8,612, was enough to pay the beneficiary's proposed wage offer in 2002. Pursuant to the regulatory requirements set forth in 8 C.F.R. § 204.5(g)(2), the AAO concludes that the evidence contained in the record fails to demonstrate that the petitioner had the continuing ability to pay the proffered wage as of the visa 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.