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

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 2 0 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: 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: SELF-REPRESENTED

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

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Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

**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 an Indian cuisine restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian cuisine cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor. 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.

In the proceedings before the director the petitioner was represented by counsel. However, on appeal the petitioner is self-represented. On appeal, the petitioner 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

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 May 1, 2002. The proffered wage as stated on the Form ETA 750 is $25,400.00 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1997 and to have a gross annual income of $400,000.00. The item on the petition for stating its current number of employees is blank.

The evidence submitted with the petition which is relevant to the petitioner's ability to pay the proffered wage consisted of an unaudited income statement of the petitioner for the eleven-month period ending November 30, 2002.

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 January 27, 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 requested bank account records, monthly balance sheets and copies of the petitioner's quarterly federal tax returns and state unemployment compensation tax returns.

In response counsel submitted a letter dated April 16, 2003 and the following documents: a letter dated April 16, 2003 from the petitioner's majority owner stating her ownership interest in the petitioner and in a corporation which owns the building in which the petitioner is located; a letter dated April 2, 2003 from a firm named Betters and Associates, S.C., accompanied by unaudited financial statements of the petitioner for the year 2002 prepared by that firm; a copy of a general ledger of the petitioner for December 2002; copies of monthly bank statements of the petitioner for the period May 2002 through February 2003; copies of unaudited monthly balance sheets of the petitioner for the period June 2002 through February 2003; copies of the petitioner's Form 941 employer's quarterly federal tax returns for second, third and fourth quarters of 2002 and the first quarter of 2003; copies of the petitioner's Wisconsin quarterly wage reports for the second, third and fourth quarters of 2002 and first quarter of 2003, and a copy of the petitioner's Form 940-EZ Employer's Annual Federal Unemployment (FUTA) Tax Return for 2002.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits a brief and the following additional evidence: a fax copy of an undated financial statement for the petitioner's majority owner and her husband, with fax date of April 2, 2003; copies of W-2 wage and tax statements for 2002 for the petitioner's majority owner and her husband; copies of Form 1040 U.S. individual income tax joint returns of the petitioner's majority owner and her husband for 2001 and 2002; and copies of Form 1120S U.S. income tax returns for an S corporation of the petitioner for 2001 and 2002.

The petitioner states on appeal that the petitioner is a family-owned S corporation, and that the majority owner and her husband had substantial income and substantial assets during the relevant time period which should be considered in evaluating the petitioner's ability to pay the proffered wage. The petitioner also states that salary paid to the petitioner's majority owner should be treated as a profit to the petitioner, and that depreciation expenses should also be treated as a profit to the petitioner.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary. The beneficiary did not claim on the Form ETA 750B that she had worked for the petitioner and the petitioner's quarterly wage statements in the record show no payments of wages to the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. In the case of a petitioner which is a corporation, CIS will also consider the

petitioner's net current assets as shown on its federal income tax returns. However, in the instant case the evidence submitted prior to the decision of the director included no copies of the petitioner's income tax returns.

The petitioner submitted unaudited financial statements as evidence of its ability to pay the proffered wage. However, unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2). That regulation neither states nor implies that an *unaudited* document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

The petitioner also submitted copies of bank statements for the period May 2002 through February 2003. However, bank statements are not among the three types of evidence specified in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Also, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Similarly, figures for average monthly closing bank balances cannot be considered in the aggregate, as any funds used to pay the proffered wage in one month would not be available to pay the wage in subsequent months.

In the instant case, the petitioner's monthly closing bank balances do not show increases of at least the amount of the monthly proffered wage, which is $2,116.67. In fact, the closing balances declined from a closing balance of $7,340.78 for May 2002 to a closing balance of $4,408.68 for February 2003. For the above reasons, the petitioner's bank statements also fail to establish the petitioner's ability to pay the proffered wage during the relevant period.

The evidence submitted prior to the director's decision also included a letter dated April 16, 2003 from the petitioner's majority owner stating that she and her husband are the owners of the limited liability company which owns the building and premises occupied by the petitioner and which receives rent for those premises from the petitioner. However, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. It is further noted that there is nothing in the governing regulation at 8 C.F.R. § 204.5 that allows CIS to consider the assets or resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar v. Ashcroft,* 2003 WL 22203713 at *3 (D. Mass. Sept. 18, 2003).

In his decision the director correctly discussed the failure of the petitioner to submit income tax returns as evidence, and correctly found that the evidence submitted by the petitioner consisting of unaudited financial statements, quarterly tax returns, state quarterly wage reports and bank statements failed to establish the ability of the petitioner to pay the proffered wage. The director also correctly rejected consideration of evidence of the personal financial resources of the petitioner's majority owner. The decision of the director to deny the petition was therefore correct, based on the evidence submitted prior to the director's decision.

On appeal the petitioner submits additional evidence, including copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for 2001 and 2002. The petitioner makes no claim that the

newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two above.

In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies and by the RFE issued by the director on January 27, 2003. For the foregoing reasons, the evidence submitted on that issue for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director.

If the petitioner's income tax returns had been submitted prior to the decision of the director they would have been an acceptable form of evidence. 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence in the record indicates that the petitioner is an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the following amounts for ordinary income: -$32,731.00 for 2001; and -$53,253.00 for 2002. Since the priority date is May 1, 2002 the petitioner's ordinary income for 2001 is not directly relevant. But, in any event, since the petitioner's ordinary income figures for both 2001 and 2002 are negative, those figures fail to establish the ability of the petitioner to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -$13,274 for the end of 2001; and -$22,404.00 for the end of 2002. Since each of those figures is negative, they also fail to establish the ability of the petitioner to pay the proffered wage.

The other evidence submitted for the first time on appeal pertains to the personal financial situation of the petitioner's majority owner and her husband. The petitioner asserts that those personal financial resources should be considered as evidence of the petitioner's ability to pay the proffered wage. However, as noted above, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner or of other enterprises or corporations to satisfy the corporation's ability to pay the proffered wage. *See Matter of M*, 8 I&N Dec. 24; *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530; *Matter of Tessel*, 17 I&N Dec. 631; *Sitar v. Ashcroft,* 2003 WL 22203713 at *3.

For the foregoing reasons, even if the evidence submitted on appeal were properly before the AAO, it would fail to overcome the decision of the director.

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.