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: NEBRASKA SERVICE CENTER Date: SEP 23 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]

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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

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen or reconsider. The motion will be granted. The AAO's decision of September 11, 2002 shall be affirmed. The petition will be denied.

Counsel's motion to reconsider qualifies as a motion to reconsider under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

The petitioner is an auto and truck engine and transmission repair shop. It seeks to employ the beneficiary permanently in the United States as a diesel mechanic. 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. The AAO affirmed the director's decision.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is $849.60 per week, which amounts to $44,179.20 annually. The AAO's recent decision dated September 11, 2002, sufficiently described the procedural aspects of the record of proceeding prior to its decision.

The director denied the petition because he determined the petitioner's net income, as reflected on its tax returns, was less than the proffered wage and thus failed to demonstrate the petitioner's ability to pay the proffered wage.

On appeal, the petitioner's counsel submitted an appellate brief with additional evidence consisting of an unnotarized letter from [redacted], of JNL, an illegible word, Services, Ltd., dated January 22, 2002. [redacted] does not state his title or capacity from which he is writing the letter. He states only the following, a quote which contains the entire text of his letter:

> It is my opinion that [the petitioner] is in a position to hire and pay a mechanic. Presently [the petitioner] has only one mechanic; owner/employee Jeff Mustafoff. Because of limitations of

> time and manpower only so much work can be done by one individual. Additional work has to be turned away. With the hiring of an additional qualified mechanic, [the petitioner] will double their sales with the same operating expenses. The only increase in cost will be to parts and labor.

Additionally, counsel submitted an unnotarized letter from President & Chief Executive Officer, of Supreme Lobster and Seafood Company, dated January 23, 2002, to the petitioner, which states the following, a quote which contains the entire text of the letter:

> We are strongly considering your offer to provide maintenance on our fleet of light duty refrigerated trucks. Per your proposal, the expected annual costs will [sic] a minimum of $50,000 but will not exceed $100,000.
>
> Thank you for your proposal.

Counsel also submits a notarized letter signed by Jeff Mustafoff (Mr. Mustafoff), "owner and sole shareholder" of the petitioner, dated November 21, 2001, who personally guarantees "payment of any additional funds necessary by personal contribution to insure said compensation to the beneficiary." No evidence pertaining to Mr. Mustafoff's personal assets and financial situation is in the record of proceeding.

Additionally, a printed case from the Office of Administrative Law Judges was submitted on appeal. Highlighted text states, in the context of proving an employer's ability to pay a proffered wage, that an "[e]mployer could have included a sworn statement from its accountant, an affidavit, inventory and bank statements, attestations by its accounting firm and its bank regarding its financial worth," with a citation to "Ohsawa America, 88-INA-240 (Aug. 20, 1988)."

The AAO's September 11, 2002 affirmance of the director's denial analyzes the petitioner's tax figures of its reported gross receipts, gross profits, compensation of officers, salaries paid, and net income. Additionally, the AAO considered counsel's argument that the petitioner's employment of the beneficiary will "enable the petitioner to leverage current operations by making it possible for the petitioner to accept the substantial business opportunities which previously had to be declined because the petitioner had only one mechanic." The AAO noted that no corroborative evidence was provided detailing how the beneficiary's employment with the petitioner would result in more income for the petitioner's business. Additionally, the AAO noted that the personal guarantee from the president of the petitioning entity was not persuasive because the petitioning entity is a corporation and thus, any assets of individual stockholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. The AAO properly cited to *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958) to underscore this elementary principle.

In his motion to reconsider, counsel for the petitioner states that the AAO's decision was incorrect because it "incorrectly assumes that revenue from business operations would remain fixed, rather than increase due to the additional work that can be undertaken which the petitioner currently must decline." Counsel does not quote the AAO's decision for his first assertion because the AAO did not state what he claims. The AAO stated there was no corroborative evidence submitted into the record of proceeding to substantiate counsel's assertion that the petitioner's business needed the beneficiary's employment for additional income to be realized. There are many problems with this assertion. First of all, the petitioner never makes a statement that it requires the beneficiary's employment to increase its revenues. Only counsel makes such an assertion. The assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). "The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any

evidentiary weight." *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). Additionally, the AAO's reasoning on this point is affirmed because there is no evidence in the record of proceeding to corroborate counsel's assertions. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel makes general statements concerning the economy and nature of business transactions, and sets forth another uncorroborated "factual" assertion, leaving the AAO to quizzically ponder the nature of counsel's role in this proceeding and whether or not he should be sworn as a witness, as follows:

> In the current economy, potential customers are interested in reducing their repair and maintenance expenses by entering into contracts for comprehensive services and establishing relationships with a single service provider rather than utilizing several service providers. The petitioner has been unable to actively pursue or enter into large long-term commitments for additional work with these potential customers because of the beneficiary's uncertain status and lack of permanent authorization for employment.

Counsel goes on to assert that the AAO ignored the corroborating evidence in the record of proceeding, although the AAO referenced both letter and the personal guarantee from Counsel states that Mr. s a "certified public accountant" for the petitioner and bases his opinion on "business and accounting principles and analysis of the structure of the petitioner's business." Nothing in letter or other evidence in the record of proceeding corroborates the "facts" asserted by counsel that is a certified public accountant and based his very brief opinion on "business and accounting principles and analysis of the structure of the petitioner's business." Counsel then states that the petitioner made a decision to hire the beneficiary after consulting with There is no such statement from the petitioner in the record of proceeding. Again, absent independent corroborating evidence, the assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N at 534; *Matter of Ramirez-Sanchez*, 17 I&N at 506; *INS v. Phinpathya*, 464 U.S. at 188-89 n.6; and *Matter of Treasure Craft of California*, 14 I&N at 190.

It is also noted on additional review that Citizenship & Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). letter does not pass evidentiary scrutiny on a very basic level. There is no proof concerning who is, his credentials, and whether or not, if he actually is a certified public accountant, he actually signed that letter, since his letter's content was not sworn to by before an officer that has confirmed his identity and administered an oath.

Counsel next states that the AAO ignore letter, which counsel states was submitted to prove the "substantial business opportunities available to the petitioner" if the beneficiary's services could be obtained. Counsel states that the proposal mentioned with letter is a "contract representative of the work . . . which the petitioner has had to decline due to the current uncertainty regarding the beneficiary's status." Counsel also states that:

> [t]he petitioner had contacted company in anticipation of the additional work that could be accepted with permanent authorization for the employment of the beneficiary as a second mechanic. The petitioner has been unable to accept such work due to the limits on the amount of work that perform by himself.

At the outset, letter, as a piece of evidence, also fails evidentiary scrutiny on a very basic level, since again, there is no proof concerning credentials and whether or not, if he is who he says he is, he actually signed the letter, since his letter's content was not sworn to by before an officer that has confirmed his identity and administered an oath. Additionally, the same problems arise with counsel's embellishment of the content of letter as arose with letter. Counsel expands upon the evidence without authority – presenting "factual" circumstances unproven aside from his assertions. There is no evidence a financial transaction with did not go through with the petitioner; that multiple business proposals were declined by the petitioner; and that business proposals were declined by the petitioner at all and particularly with a nexus to hiring the beneficiary. The content in letter merely states that a proposal has been received and is being considered. There is no corroborative independent evidence to verify counsel's assertions that this business transaction is one of many that was thwarted by the decision made by CIS and the AAO to deny the instant visa petition. Counsel criticized the AAO's September 11, 2002 decision for stating that the assertions made by him concerning the evidentiary submissions were merely his unproven opinion, yet he continues on motion to assert "facts" that are simply not proven. Again, counsel is reminded that absent independent corroborating evidence, the assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N at 534; *Matter of Ramirez-Sanchez*, 17 I&N at 506; *INS v. Phinpathya*, 464 U.S. at 188-89 n.6; and *Matter of Treasure Craft of California*, 14 I&N at 190.

Counsel again addresses the personal guarantee made by pay the proffered wage out of his personal income if the petitioner cannot pay it. As noted above, the AAO's reasoning is affirmed as the personal assets of owners or shareholders of a corporation cannot be used to prove the ability to pay the proffered wage. *See Matter of Tessel*, 17 I&N at 631; *Matter of Aphrodite Investments Limited*, 17 I&N at 530; and *Matter of M-*, 8 I&N at 24. Counsel asserts that the elementary principle that a corporate veil may not be pierced should be set aside since is the sole proprietor of the petitioner. The petitioner has no additional shareholders. Although the petitioner is a corporation for tax reasons and for purposes of limiting legal liability, the finances of the petitioner and the sole proprietor of the petitioner cannot reasonably be considered to be separate." Counsel's assertion is inexplicable and without citation to legal authority. Regardless of the number of shareholders of a corporation, as counsel himself states, chose to structure the business as a corporation for purposes of limiting legal liability, namely, limiting creditors' access to personal assets if the business ran into trouble. Thus, the converse is also true and personal assets will not be considered in this matter. Even if the corporate veil could be pierced in this matter, there is no corroborative evidence contained in the record of proceeding concerning personal assets to prove he could pay the proffered wage. *See Matter of Treasure Craft of California*, 14 I&N at 190. Additionally, personal guarantee is dated November 21, 2001. The petition was filed on June 5, 2001 with a priority date in 1998. Thus, this prospective pledge to pay the proffered wage cannot be accepted of the petitioner's continuing ability to pay the proffered wage from the date of the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Finally, counsel also asserts that a case he cited to, "Ohsawa America, 88-INA-240 (Aug. 20, 1988)," which was quoted above, supports his proposition that pledges from shareholders should be accepted as evidence of a petitioning entity's ability to pay the proffered wage. However, the case counsel submitted with highlighted text to the citation he quotes states that such pledges could be accepted concerning a petitioning entity's financial worth, not that one shareholder's pledge to use personal assets may be accepted as proof of a petitioner's ability to pay the proffered wage. In any event, counsel has not demonstrated that the Department of Labor (DOL) case he cited to is binding precedent on the AAO.

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 did not establish that it employed and paid the beneficiary the full proffered wage in 1998, 1999, or 2000. Thus, the petitioner did not make a *prima facie* case of its ability to pay the proffered wage.

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.

As properly noted by the director and the AAO's prior decisions, the petitioner's reported net income for 1998 through 2000, $26,567, $20,267, and $18,377, respectively, were too low to cover the proffered wage of $44,179.20 per year.

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.[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

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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.

petitioner did not provide complete tax returns with all schedules and attachments. The petitioner merely provided its first page and one additional page with abbreviated data. Thus, it is impossible to evaluate the petitioner's net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998 through 2000. The petitioner has not demonstrated the ability to pay the proffered wage out of its net income or net current assets in any year from 1998 through 2000. 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 1998 through 2000.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998 or subsequently during 1999 or 2000. 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 must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has not met that burden.

ORDER: The decision of the AAO, dated September 11, 2002, is affirmed.