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

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 23 2004

IN RE: Petitioner: [redacted]

Beneficiar[redacted]

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.[1] 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 asserts that the petitioner's financial data demonstrates its 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.

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 $23,712 per annum. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

Part 5 of the petition shows that the petitioner claims to have been established in 1980, have a gross annual income of approximately $358,000, an unknown net annual income, and to currently employ ten workers.

In support of its ability to pay the beneficiary's proposed annual wage of $23,712, the petitioner initially submitted a copy of its business checking account statement for December 31, 2002 showing an ending balance of $5,285.45, a copy of its business checking account statement showing an ending balance of $2,138.90 as of January 31, 2003, and a copy of its Form 1120S U.S. Income Tax Return for an S Corporation for 2000 and 2001.

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[1] The labor certification gives the employer's name as "Mexican Restaurant & Lounge dba Pepitos." The visa petitioner is "Mexico Lindo, Inc., dba Pepitos Mexican Restaurant and Lounge." The AAO accepts that this is the same employer.

They reflect that the petitioner files its tax returns using a fiscal year running from November 1st to October 31st of the following year. Thus, the petitioner's 2000 tax return reflects the petitioner's financial status from November 1, 2000 to October 31, 2001. As the priority date of the petition is April 27, 2001, the information contained within this tax return is relevant. The petitioner's tax returns contain the following information:

	2000	2001
Net income	$ 6,355	-$10,051
Current Assets	$15,689	$ 9,800
Current Liabilities	$ 4,587	$ 4,972
Net current assets	$11,102	$ 4,828

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 March 12, 2003, the director requested additional evidence pertinent to that ability. The director instructed the petitioner to submit copies of the beneficiary's Wage and Tax Statements (W-2s) or other payroll records if it had employed the beneficiary during the relevant period, monthly balance sheets, and copies of the petitioner's most recent quarterly federal tax form and unemployment compensation report that identifies each employee by name and social security number. Inexplicably, despite evidence that the petitioner is organized as a corporation, the director also requested various documents relevant to a sole proprietorship or individual employer.

In response, the petitioner, through counsel, submitted copies of its federal quarterly tax return for the quarters ending March 2002, June 2002, and March 2003. Both the March 2002 and March 2003 returns reflect that the petitioner reported fifteen employees during those quarters. The state supplemental wage reports, included in counsel's response, do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. The internally generated comparative monthly balance sheet submitted by the petitioner shows net income monthly losses and current monthly liabilities exceeding current monthly assets during each month in 2002.

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 30, 2003 denied the petition. The director found that the petitioner's net income as reflected on the petitioner's 2000 and 2001 tax returns was insufficient to support the beneficiary's proffered annual salary of $23,712. The director observed that the petitioner had failed to provide its 2002 tax return. For the reasons discussed below, the AAO concurs with the director's conclusion, but would note that the petitioner's 2002 tax return would not have been available to be submitted at the time of the petitioner's response to the director's request for additional evidence, as its fiscal year had not yet concluded.

On appeal, counsel asserts that the individual real and personal assets of the principal shareholder should have been included in considering the petitioner's continuing ability to pay the proffered wage.

Counsel's reliance on the individual assets of the principal shareholder is not persuasive. As noted above, the petitioner is a corporation. 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 that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

Counsel also suggests that the petitioner's gross receipts and sales of $310,326 and other wages/salaries paid of $72,810 should have been considered in the evaluation of the petitioner's ability to pay the beneficiary's proposed wage offer.

Counsel's assertion is not persuasive. In reviewing a petitioner's ability to pay the proffered wage, CIS will first examine whether a petitioner may have employed and paid wages to a beneficiary. If fully documented, these wages will be reflected in the relevant tax return and CIS will consider whether any shortfall between the wages paid to a designated alien beneficiary and the proffered wage can be paid out of the net income figure reported on the federal tax return. If a petitioner may have already paid the full proffered wage to a beneficiary during the relevant period, it will be considered as *prima facie* evidence of a petitioner's ability to pay the proffered wage. In this case, the record does not reflect that the petitioner has employed the beneficiary. The additional expense of her wages would have to be paid out of the petitioner's net income.

In reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net income 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. Thus, consideration of a petitioner's gross income without including the expenses incurred in order to generate that income is not logical. In this case, as noted by the director and the figures set forth above, the petitioner's net income of $6,335 in 2000 and -$10,051 in 2001 was insufficient to meet the proffered salary of $23,712.

CIS will also review a petitioner's net current assets as a measure of liquidity and as a resource out of which the ability to pay the proffered wage would be reasonably evident. We reject, however, counsel's 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. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal

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[2] 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

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 during 2000 and 2001 however, were $11,102 and $4,828, respectively. Neither amount was sufficient to cover the proffered wage. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

In the context of the financial records contained in the record, counsel suggests that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. That case relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner had been in business for over 11 years and was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. 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, which parallel those in *Sonegawa.* The petitioner in this case submitted only two years of complete tax returns. They do not establish a framework of profitable years, but rather show that the petitioner's net income, as reported on its 2000 and 2001 federal tax returns declined from $6,255 to -$10,051 and its net current assets declined from $11,102 to $4,828.

Based on the evidence contained in the record and after consideration of the arguments presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its ability to pay the proffered as of the priority date of the petition and continuing until the present.

Beyond the decision of the director, it is noted that the labor certification requires that the alien beneficiary have two years of experience in the job offered. Pursuant to 8 C.F.R. § 204.5(g)(1), this means that the employer's letter must establish that she has had two full years of experience as a chef. In a letter dated April 18, 2001, Mrs. Reina Mazariegos de Garcia of Guatemala City, Guatemala, confirmed that she employed the beneficiary from 1995 to 1999, and states that the beneficiary "worked in my [C]ompany in the kitchen department." This does not sufficiently describe the beneficiary's duties or corroborate that she has accrued the requisite experience as a chef.

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.

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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.