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: TEXAS SERVICE CENTER Date: SEP 24 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, Texas Service Center. The petitioner filed a motion to reopen and to reconsider, which the director dismissed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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.

Part 2 of the Form I-140 petition lists seven different petition types, including "[a] skilled worker or professional" and "[a] member of the professions holding an advanced degree or an alien of exceptional ability." Box "d" beside the latter category was checked. Documentation accompanying the petition, however, included letters from counsel and the petitioner requesting classification pursuant to Section 203(b)(3) of the Act. The director adjudicated the case under the classification requested in the accompanying letters.

The petitioner is a Mexican Restaurant. It seeks to employ the beneficiary permanently in the United States as a financial specialist. 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 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 July 14, 2003. The proffered wage as stated on the Form ETA 750 is $31,350 annually.

With the petition, the petitioner submitted a letter from [redacted] Vice-President, La Fiesta Mexican Restaurant, stating: "Our approximate gross annual income is $721,288.00." No further evidence of the petitioner's ability to pay was provided.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 15, 2004, 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.

In response, the petitioner submitted Form 1120S, U.S. Income Tax Return for an S Corporation, for the tax year beginning October 1, 2002, and ending September 30, 2003.

The tax return reflected the following information for the tax year ending September 30, 2003:

Net income	$12,194
Current Assets	$ -4,731
Current Liabilities	$24,092
Net current liabilities	$28,823

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 February 24, 2004, denied the petition.

On motion, the petitioner submitted tax returns for the tax year ending September 30, 2003 for La Fiesta of [redacted]d La Fiesta Brava of Columbus, Inc. The petitioner's reliance on the financial resources of other corporations (with different employer identification numbers than that of the petitioning entity) is misplaced, as those corporations have no legal obligation to pay the beneficiary's wage [redacted], [redacted]f Columbus, and La Fiesta South are separate and distinct legal entities. Citizenship and Immigration Services (CIS) may not "pierce the corporate veil" and look to the assets of other corporations to satisfy the petitioning entity's ability to pay the proffered wage. *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 business entities that have no legal obligation to pay the proffered wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, at *3 (D. Mass. Sept. 18, 2003).

The director determined that the evidence presented on motion did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 5, 2004, dismissed the motion.

On appeal, counsel argues that the petitioner, "a substantial restaurant business with over $733,403 of gross receipts, gross profits of $359,170, building and other depreciable assets of $195,971 less accumulated depreciation and net assets of $146,651, and related businesses with gross profits of over $1,000,000, has shown the ability to pay the $31,350 annual salary of the beneficiary."

In determining the petitioner's ability to pay the proffered wage during a given period, 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 2003.

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). Counsel's reliance on the petitioner's gross receipts and gross profit is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the 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 CIS should have considered income before expenses were paid rather than net income.

We agree with counsel that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. If the net income the petitioner demonstrates it had available for a certain year, if any, added to the wages paid to the beneficiary during that same year, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. 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. Counsel cites a recent policy memorandum from William R. Yates, Associate Director for Operations, entitled *Determination of Ability to Pay Under 8 C.F.R. § 204.5(g)(2)* (May 4, 2004). Counsel states: "Associate Director Yates listed 'Net Income,' 'Net **Current** Assets,' and 'Employment of the Beneficiary' in his list of evidence on the petitioner's ability to pay. If you apply the test stated in Associate Director Yates' own memo, the $146,651 **total** net assets of the petitioner conclusively prove the petitioner's ability to pay." [emphasis added]

Counsel has mistakenly equated the term "Net Current Assets" as listed in the Yates memorandum with "total net assets." Therefore, counsel's assertion that evaluation of the petitioner's "total net assets" is an adequate means of determining ability to pay in accordance with the Yates memorandum is incorrect. The petitioner's total assets of $146,651as indicated on line 15 of Schedule L of the tax return 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. Therefore, in accordance with existing policy, CIS will consider "net current assets," rather than total 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 asset amount during the year ending September 30, 2003, however, was negative and resulted in a net current liability of $28,823.

Counsel argues that *Full Gospel Portland Church v. Thornburg*, 730 F. Supp. 441 (D.D.C. 1988), "offers a common sense approach on how to decide the issue of the petitioner's ability to pay." That case, however, involved a non-profit organization (rather than an S Corporation) that provided three years of financial statements (rather than only one year of financial statements as in the present case). Here, the petitioner has provided only a single tax return for the year ending September 30, 2003. Therefore, in this case, in contrast to *Full Gospel Portland Church v. Thornburg*, there is no financial history on which a reasonable expectation of increased business for the petitioner can be based. Moreover, in *Full Gospel Portland Church v. Thornburg*, the petitioner was able to demonstrate income from other sources such as parishioner pledges to the church and financial support from its national organization, Assemblies of God Korean District Council of the United States. In this case, however, the petitioner has not shown any additional financial resources available to pay the beneficiary's wage. In regard to the tax returns from La Fiesta of Cottondale and La Fiesta Brava of Columbus, as stated previously, CIS will not consider the financial resources of individuals or business entities that have no legal obligation to pay the proffered wage. *See Sitar Restaurant v. Ashcroft.*

In sum, the petitioner has not demonstrated that it paid any wages to the beneficiary during 2003 or that it paid the full proffered wage. For the tax year ending September 30, 2003, the petitioner shows a net income of only $12,194 and negative net current assets (or a net current liability) of $28,823, and has not, therefore, demonstrated the ability to pay the proffered wage beginning on the petition's priority date and continuing to present.

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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[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.