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

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] WAC-03-062-54338 Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2005

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

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a marble, granite, stones, and tile store. It seeks to employ the beneficiary permanently in the United States as a sales manager. 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 submits a brief and submits previously submitted 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 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 $42.22 per hour, which amounts to $87,817.60 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 on September 9, 1998, to have a gross annual income of $580,000, and to currently employ no workers. In support of the petition, the petitioner submitted the petitioner's bank records and the petitioner's owner's individual income tax return for 2001, which showed he derived income from the petitioner, which is structured as an S corporation.

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 April 28, 2003, the director issued a notice of intent to deny pertinent to that ability. The director cited 8 C.F.R. § 204.5(g)(2) and noted that the adjusted gross income of $49,044 reported on the individual income tax return in the record of proceeding was less than the proffered wage.

In response, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for the petitioner for the year 2001. The tax return reflects the following information:

	2001
Net income[1]	$43,468
Current Assets	$66,352
Current Liabilities	$82,249
Net current assets	-$15,897

In addition, counsel submitted copies of the petitioner's checking account statements for the period from January 2001 through December 2001. Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1987) as applicable precedent and asserts that the petitioner's bank funds should be considered as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also states that the petitioner is structured as a sole proprietorship and thus the petitioner's owner's personal assets should be considered and he re-submits a copy of the petitioner's owner's individual income tax return for 2001. Counsel also submits copies of a savings account statement, a home equity loan statement, and an account balance from [redacted] all in the name of [redacted] the petitioner's owner and petition signatory, along with a letter from [redacted] stating that he has lines of credit with other bank accounts that he could use to pay the proffered wage.

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 June 11, 2003, denied the petition. The director adjudicated the petition as a sole proprietorship and noted that neither the adjusted gross income on the petitioner's owner's individual income tax return nor his bank funds were sufficient to cover the proffered wage.

On appeal, counsel asserts that the petitioner's owner's personal assets are sufficient to cover the proffered wage. The petitioner submits evidence previously submitted.

At the outset, counsel has misled Citizenship and Immigration Services (CIS) concerning the structure of the petitioner's business entity. The petitioning entity is an S corporation not a sole proprietorship. While the petitioner's owner may be the S corporation's sole owner, he is not a sole proprietor and the business entity is not a sole proprietorship. Both the director and counsel erred in proceeding with that understanding. The petitioner presented tax returns on Form 1120S, which is the form used by businesses structured as S corporations. The petitioner's owner's individual income tax returns also show that he derives income from the petitioning entity, which is structured as an S corporation.[2]

Thus, counsel's reliance on the assets of [redacted] 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);

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[1] Ordinary income (loss) from trade or business activities as reported on Line 21.

[2] See Schedule E to Form 1040, U.S. Individual Income Tax Return for 2001, of [redacted] which indicates nonpassive income of $43,468 earned from an "S" corporation, listed as the petitioning entity, under Part II. Also, there is no Schedule C, Profit or Loss from Business, which typically accompanies a sole proprietor's individual income tax return filed on Form 1040. A Schedule C-EZ, Net Profit or Loss from Business (Sole Proprietorship) accompanies the [redacted] individual income tax return filed on Form 1040 showing tha[redacted] earned $6,000 in gross receipts for a management job. Counsel makes it clear that [redacted]s the petitioner's owner, not Dror. The numbers from Schedule SE match the Form 1120S and thus it is unequivocally concluded that the petitioner is an S corporation.

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 who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Thus, the personal assets of the [redacted] will not be considered to demonstrate the petitioner's continuing ability to pay the proffered wage as of the priority date.

Counsel's reliance on the balances in the petitioner's bank accounts is also misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 2001.

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. The petitioner's net income of $43,468 is less than the proffered wage of $87,817.60 and thus does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date out of its net income.

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.[3] 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 assets during the year in question, 2001, however, were negative. As such, the petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of only $43,468 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. 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 the salient portion of 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and the petition will be denied accordingly.

Beyond the decision of the director, the record of proceeding does not contain any evidence of the beneficiary's qualifications to perform the duties of the proffered position.[4] The director's failure to address this critical requirement does not alleviate the petitioner's burden of proving its case. According to 8 C.F.R. § 204.5(l)(3), the petitioner is required to produce evidence of the beneficiary's qualifying employment experience.[5]

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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.

[4] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

[5] The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience,

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is April 27, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of sales manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	Blank
	Grade School	Blank
	High School	4
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states the following:

> Manage the sales activities of the business. Motivate and establish sales guidelines, strategy, policy & philosophy. Control, guide & manage sales persons in their training and performance and evaluate them. Direct & conduct sales meetings in order to establish and nominate sales territories, sales quotas, goals and sales methods/techniques. Analyze the market as regards customer requirements, pricing, and related matters and thereafter determine strategies to increase existing markets and open new ones. Prepare sales reports as regards salesperson quotas and profit/loss and recommendations to management regarding improving profitability with particular reference to eliminating unprofitable items. Approval/rejection of budgetary issues as they relate to sales promotion. Assisting in sales promotion.

Item 14 also provides that a qualifying candidate may have two years of experience in the related occupation as a sales agent or as an assistant sales manager. Item 15 indicates that there are no special requirements.

> and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he was unemployed from January 2000 to the date of filing the ETA and was employed at [redacted] Israel as a sales person/agent from December 1997 to January 2000, for which he engaged in the following activities:

> The selling of the product of the business. The familiarization with the product in all aspects and thereafter the calling on customers of the business to promote and sell the product. The obtaining of orders and supplying them to the company for delivery. The discussing price/quality/usage, etc with customers. Persuadinf [sic] customers to purchase & use products[.]

The petitioner failed to provide a letter from [redacted] hat meets the requirements of at 8 C.F.R. § 204.5(l)(3) and clearly illustrating the beneficiary's qualifications for the proffered position. For this addition reason, the petition may not be approved.

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.