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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

BC

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FILE: [REDACTED]
EAC 05 079 51516

Office: VERMONT SERVICE CENTER

Date: DEC 29 2006

IN RE: Petitioner:
Beneficiary: [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:



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
Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a Japanese sushi bar. It seeks to employ the beneficiary permanently in the United States as a Japanese specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence in support of the petitioner's continuing financial ability to pay the proffered salary.

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) provides:

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. 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 [Citizenship and Immigration Services (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 April 16, 2001. The proffered wage as stated on the Form ETA 750A is \$13.50 per hour, which amounts to \$28,080 per annum. On the Form ETA 750B, signed by the beneficiary on April 4, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on January 14, 2005, the petitioner claims to have been established in 1998, to currently employ five workers, and to have a gross annual income of four million dollars. In support of its ability to pay the beneficiary's proposed wage offer of \$28,080 per year, the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 2001 and 2002. They indicate that the petitioner files its taxes

using a fiscal year running from December 1st to November 30th. Thus, the 2001 and 2002 returns reflect the petitioner's financial information from December 1, 2001 to November 30, 2003. They contain the following information pertinent to taxable income before the net operating loss (NOL) deduction and special deductions, current assets and liabilities, and net current assets.

	2001	2002
Taxable Income before NOL	\$15,128	\$ 10,434
Deduction (Form 1040)		
Current Assets (Sched. L)	\$333,011	\$407,190
Current Liabilities (Sched. L)	\$326,275	\$402,712
Net current assets	\$ 6,736	\$ 4,478

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.¹ Besides net taxable income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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 director denied the petition on March 16, 2005. He reviewed the petitioner's financial data contained within its 2001 and 2002 tax returns and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the visa priority date of April 16, 2001.

On appeal, counsel merely submits additional documentation including a letter from the petitioner's accountant, a letter from the petitioner's principal shareholder, and a copy of the petitioner's corporate tax return for 2003. It covers the period from December 1, 2003 to November 30, 2004 and contains the following:

	2003
Taxable Income before NOL	\$13,744
Deduction (Form 1040)	
Current Assets (Sched. L)	\$334,223
Current Liabilities (Sched. L)	\$307,736
Net Current Assets	\$ 26,487

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.

The petitioner's accountant [REDACTED] submits a letter, dated April 14, 2005. He merely states that the petitioner is sound and that it has steadily grown over the years.

A letter, dated April 14, 2005, signed by [REDACTED] "the petitioner's principal shareholder has also been provided on appeal. [REDACTED] states that the petitioner has grown to over 150 different locations. He does not explain how this has been managed by the five employees claimed on the visa petition, but he emphasizes that gross sales are three times higher than in 2001. [REDACTED] also vouches for the beneficiary's character and skills and expresses hope that the petition may be approved. He further states his willingness to provide a personal guarantee to support the beneficiary's proposed wage offer and sacrifice his own salary.

These assurances are not persuasive. Relevant to [REDACTED] willingness to provide financial support to petitioner if needed, it is noted that as a corporation, the named petitioner is a separate and distinct legal entity from its owners and shareholders, the 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. The debts of the corporation are not the debts of the shareholders or owners. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). As the named corporate petitioner in the visa petition, it must establish its own financial ability to pay the proffered wage of \$15,750 per year. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) affirmed the rejection of the offer of the petitioner's director to personally pay the proffered wage stating "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Moreover, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits an individual willingness to provide additional funds or guarantee future payment to be utilized in lieu of proving the petitioner's own ability to pay through the prescribed financial documentation set forth in 8 C.F.R. § 204.5(g)(2). A future promise of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary for this period. In this case, as noted above, the record does not show that the petitioner has employed and paid wages to the beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross income or gross sales is not reasonable because it excludes consideration of the expenses incurred to produce that income. 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.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

As noted above, the petitioner's financial data set forth on its tax returns shows that neither the petitioner's net income of \$15,128, nor its net current assets of \$6,736 could cover the proffered wage in 2001. In 2002, each of the petitioner's net income of \$10,434 and the net current assets of \$4,478, was not sufficient to pay the proposed wage offer of \$28,080. Similarly, in 2003, neither the net income of \$13,744, nor the petitioner's net current assets of \$26,487 was sufficient to pay the certified wage.

While the growth of the petitioner's business may be considered as a factor in its favor, it does not outweigh the evidence provided, which shows that the figures given for net current assets or net income on the three tax returns provided were modest. It is further noted that financial documentation that specifically covers the priority date of April 16, 2001, has not been provided. The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate a *continuing* ability to pay a certified wage beginning at the priority date. Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered salary as of the April 16, 2001, priority date of the petition.

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.