U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

AUG 0 6 2007

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

WAC 05 195 51178

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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that 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 (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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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.

8 C.F.R. § 204.5(g)(2) states:

> *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 either 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 the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $675 per week, which equals $35,100 per year.

The Form I-140 petition in this matter was submitted on June 28, 2005. On the petition, the petitioner stated that it was established on August 1, 2000. The petition states that the petitioner's gross annual income is $453,903. The petitioner left blank the spaces provided for it to report its net annual income and the number

or workers it employs. On the Form ETA 750, Part B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Corona del Mar, California.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

In the instant case the record contains (1) copies of the 2001 and 2002 Form 1120-A U.S. Corporation Short-Form Income Tax Returns of [redacted] Cuisine of India, (2) an unaudited profit and loss statement, (3) a letter dated April 27, 2005 from the petitioner's president and owner, and (4) a letter dated November 10, 2005 from the petitioner's financial consultant. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record also contains copies of the petitioner's owner's 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Returns.

The tax returns of [redacted], Cuisine of India give the same address given as the petitioner's on the Form ETA 750 and the Form I-140 submitted in this matter. This office finds that that corporation is the petitioner in this matter. The petitioner's tax returns show that it is a corporation, that its sole owner is Anju Sami, that it incorporated on August 1, 2000, and that it reports taxes pursuant to accrual convention accounting and a fiscal year running from October 1 of the nominal year to September 30 of the following year.

During its 2001 fiscal year, which ran from October 1, 2001 to September 30, 2002, the petitioner reported taxable income before net operating loss deductions and special deductions[2] of $0. At the end of that year the petitioner's current liabilities exceeded its current assets.

During its 2002 fiscal year, which ran from October 1, 2002 to September 30, 2003, the petitioner reported taxable income before net operating loss deductions and special deductions of $13,658. At the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's owner's April 27, 2005 letter states that the petitioner is able to pay the proffered wage. This office notes that, pursuant to 8 C.F.R. § 204.5(g)(2), in the case of a company that employs 100 or more workers, self-certification of ability to pay the proffered wage may suffice. The instant case, however contains no evidence that the petitioner employs 100 or more workers.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] For the purpose of the inquiry into the petitioner's ability to pay the proffered wage during a given year, the petitioner's taxable income before net operating loss deduction and special deductions is considered to be its net income.

The petitioner's financial consultant's November 10, 2005 letter states that as the petitioner's owner is its sole shareholder her personal income and assets are available to pay the proffered wage. The financial consultant cites a decision of the State Board of Equalization of the State of California for the proposition that "shareholders and offices [sic] are personally liable for any outstanding taxes and debts [of a corporation]."

The director denied the petition on January 19, 2006. On appeal, counsel argued that certain positions at the petitioner's restaurant are dispensable, specifically noting waiters, and that the wages paid to the incumbents in those positions might feasibly be diverted to pay the wage proffered in the instant case.

Counsel cited the petitioner's unaudited profit and loss statement as evidence of its ability to pay the proffered wage and asserted that its depreciation deductions during various years represent additional funds available to pay wages. Further, counsel stated that the petitioner was established during 1984 and has been a successful restaurant business for over 20 years; and cites favorable critical reviews as evidence that the petitioner has a successful future.

Finally, stated "Due to unrelated negotiations with the Internal Revenue Service regarding filing of tax returns for the years 2003-2005, Petitioner [redacted] is unable to provide additional evidence in the form of tax returns or financial statements that would, on their face, support the Petitioner's contention that it is and has been able in fact to pay the proffered wage to the Beneficiary."

Counsel's assertion that the petitioner is engaged in some unspecified type of negotiation with IRS does not alter the petitioner's obligation to demonstrate its continuing ability to pay the proffered wage beginning on the priority date consistent with the requirements of 8 C.F.R. § 204.5(g)(2). Further, counsel's mere assertion, absent evidence, that the tax returns are unavailable, is insufficient excuse the petitioner's failure to provided them or to otherwise demonstrate its continuing ability to pay the proffered wage beginning on the priority date within the strictures of 8 C.F.R. § 204.5(g)(2).

Counsel's assertion that the petitioner employs superfluous workers, other than cooks, who could be dismissed in favor of the beneficiary, is unconvincing. In deducting the wages paid to those other employees the petitioner has represented them to be necessary to its business. 26 USC Subtitle A, Chapter 1, Subchapter B, Part VI, Sec. 162. The mere assertion that the beneficiary could dismiss a number of employs as necessary to pay the proffered wage is insufficient to sustain the burden of proof in this matter.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of

a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.[3] Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage."

In her November 10, 2005 letter the petitioner's financial consultant stated that this, the most basic law of corporations, has been overturned. The case to which the financial consultant cites is a case in which the California Equalization Board pierced the corporate veil, that is, disregarded the general rule of limited liability of corporate shareholders. In individual cases, cases in which corporation is severely undercapitalized, for example, a court or other judicial body is able to disregard that general rule. This is common where, as was true in the case the financial consultant cited, that undercapitalization appears to have been an intentional tactic taken to avoid a legitimate debt or obligation.[4] Further, even if the Equalization Board's holding were as abstract as the proposition for which the financial consultant cited it, this office notes that it is not bound by decisions of the California Equalization Board.

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[3] Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

[4] In the case cited, the corporation claimed inability to meet a tax and penalty obligation of $10,604.95, although it had loaned $74,899 to its owners during the appeal year and paid them cash distributions of $106,200 during the following year.

No such reason exists to pierce the corporate veil in the instant case and the general rule that a corporation's owner or owners are not liable for its debts and obligations appears to apply. As the owners, stockholders, and others are not obliged to pay the petitioner's debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds. The petitioner's owner's individual tax returns, and any other evidence pertinent to her personal income and assets, are irrelevant to this matter and will not be considered.

Counsel argues, further still, that the petitioner has operated successfully for 20 years[5] and cites favorable critical reviews, apparently as an indication that the petitioner is, or will be, able to pay the proffered wage. Initially, this office notes that the petitioner stated on the Form I-140 that it was established on August 1, 2000 and on its tax returns that it incorporated on that date. The only indication in the record of earlier operation is counsel's assertion.

The assertions of counsel 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); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. This office will not consider counsel's assertion that the petitioner has been in operation since before 2000. Further, pursuant to 8 C.F.R. § 204.5(g)(2), the relative success of the petitioner's operations must generally be demonstrated with copies of annual reports, federal tax returns, or audited financial statements, rather than merely alleged by counsel.

If counsel were able to demonstrate that the petitioner has a reasonable expectation of substantially increasing profits, then this office might overlook its failure to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements in keeping with the holding in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Sonegawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. That petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured

[5] The regulation at 8 C.F.R. § 204.5(g)(2) indicates that an exception may exist to the need to demonstrate the ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements in the case of a petitioner who employs 100 or more workers. No such exception exists for companies in existence for more than 20 years. Although the petitioner's longevity, if demonstrated, might be a factor to consider, it would not, in itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. The petitioner's favorable critical reviews are the only evidence to which counsel cites in support of the assertion that the petitioner's fortunes will improve. The record contains no evidence that the petitioner's receipt of those reviews is a recently emerging phenomenon, rather than business as usual. Further, counsel did not demonstrate that favorable reviews necessarily, or even typically, presage greatly increased profits. No reason exists to believe, based on the favorable reviews, that the petitioner's profitability will improve, rather than remain flat. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[6] shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is $35,100 per year. The priority date is April 30, 2001.

The priority date fell within the petitioner's 2000 fiscal year, which ended on September 30, 2002. The **record contains no reliable evidence pertinent to the petitioner's finances during that fiscal year.** The petitioner has not demonstrated the ability to pay the proffered wage from April 30, 2001 until September 30, 2002.

During its 2001 fiscal year, which ran from October 1, 2001 to September 30, 2002, the petitioner reported taxable income before net operating loss deductions and special deductions of $0. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during its 2001 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during its 2001 fiscal year.

During its 2002 fiscal year, which ran from October 1, 2002 to September 30, 2003, the petitioner reported taxable income before net operating loss deductions and special deductions of $13,658. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of

[6] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during its 2002 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during its 2002 fiscal year.

The petition in this matter was submitted on June 28, 2005. On that date the petitioner's fiscal year 2003 tax return would ordinarily have been available. Counsel's mere assertion, absent evidence, that it is legitimately unavailable is insufficient to excuse the failure to provide it. The petitioner has failed to demonstrate the ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2) during its 2003 fiscal year.

The petitioner's 2004 fiscal year ended on September 30, 2005, and was unavailable when the visa petition was filed. On October 13, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's fiscal year 2004 had ended, but its tax return was not yet due,[7] and may have been unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during its 2004 fiscal year and later fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during the period from April 30, 2001 to September 30, 2002. The petitioner also failed to demonstrate the ability to pay the proffered wage during its 2001, 2002, and 2003 fiscal years. 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[7] A corporate taxpayer's Form 1120, 1120-A, or 1120S is ordinarily due the 15th day of the third month after the end of its tax year. In the instant case the petitioner's 2004 fiscal year ended on September 30, 2005, so its 2004 return was due December 15, 2005.