

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[Handwritten signature]

MAY 21 2004

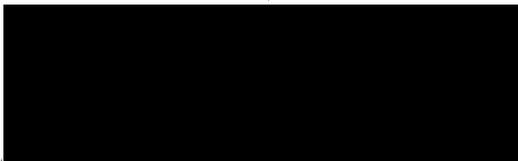


FILE: EAC 02 203 55616 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other Worker 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.

[Handwritten signature]
for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a unskilled worker. The petitioner is a tortilla and Mexican products manufacturer. It seeks to employ the beneficiary permanently in the United States as a tortilla maker. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and maintains that the petitioner has demonstrated its financial ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii) provides employment based visa classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . 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)].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is September 3, 1998. The beneficiary's salary as stated on the labor certification is \$12.10 per hour or \$25,168 per year, based on a 40-hour week. The visa petition indicates that the petitioning business was established in 1994 and has eight employees. The record reflects that it is organized as a corporation and has employed the beneficiary since January 1998.

As evidence of its ability to pay, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for the years 2001, as well as a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001. The W-2 reflects that the petitioner paid the beneficiary \$24,200 in wages during 2001. The corporate tax return indicates that the petitioner files its returns based on a standard calendar year. In 2001, the petitioner declared taxable income before the net operating loss (NOL) deduction and special deductions of \$4,927. Schedule L of the return shows that it had \$228,837 in current assets and \$99,395 in current liabilities, resulting in \$129,442 in net current assets. CIS will consider net current assets as well as a petitioner's net income because it

reflects the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. The difference between the proffered wage of \$25,168 and the actual wages paid to the beneficiary in 2001 is \$968. For this year, the petitioner established its ability to pay the proffered salary because it could pay the \$968 out either its taxable income or its net current assets.

On December 6, 2002, the director requested additional evidence from the petitioner to support its continuing ability to pay the proffered wage since September 3, 1998. The director also specifically instructed the petitioner to submit a copy of the petitioner's federal tax return for 1998 and a copy of the beneficiary's 1998 W-2.

In response, the petitioner, through counsel, submitted copies of its corporate tax returns for 1999, and 2000. The tax returns contained the following information:

Year	Current Assets	Current Liabilities	Net Current Assets	Taxable Income Before NOL and Special Deductions
1999	\$ 215,729	\$ 37,273	\$ 178,456	\$ 18,121
2000	189,883	45,975	143,908	3,298

The petitioner did not submit its 1998 corporate tax return or other financial information for that year. Following a review of the federal tax returns, the director denied the petition, concluding that the petitioner had failed to establish its continuing ability to pay the proffered wage. The director noted that the petitioner failed to submit its 1998 federal tax return or the beneficiary's 1998 W-2 or other evidence of the petitioner's ability to pay the proffered wage in the year of filing. The AAO concurs with the director's decision, although notes that the petitioner's net current assets established that it could pay the proffered salary in 1999 and 2000.

Counsel submits one page of the petitioner's 1998 corporate tax return on appeal and asserts that its gross receipts that year establishes the petitioner's ability to pay the proffered wage. The AAO will not consider this evidence. As noted above, the director specifically requested this evidence from the petitioner. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 74 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

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.