

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services



B6

FILE: [REDACTED]
LIN 03 151 53497

Office: NEBRASKA SERVICE CENTER

Date: AUG 12 2005

IN RE: Petitioner: [REDACTED]
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, Director
Administrative Appeals Office

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

The petitioner is a custom log home construction firm. It seeks to employ the beneficiary permanently in the United States as a senior carpenter/log construction. 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 additional evidence and asserts that the petitioner has had the 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 March 26, 2001. The proffered wage as stated on the amended Form ETA 750 is \$27.54 per hour, which amounts to \$57,283.20 per annum. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claims to have worked for the petitioner from November 2000 to April 2001.

On Part 5 of the visa petition, filed in April 2003, the petitioner claims to have been established in September 2000, to have a gross income of \$543,034, a net annual income of \$105,746, and to currently employ five workers. In support of its ability to pay the beneficiary's proposed wage offer of \$57,283.20 per year, the petitioner initially submitted no evidence.

Because the petitioner submitted no initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On August 11, 2003 the director advised the petitioner to submit additional evidence in support of its continuing financial ability to pay the proffered wage as of April 26, 2001 and continuing until the present. Consistent with the regulation at 8 C.F.R. § 204.5 (g)(2), the director instructed the petitioner to provide copies of its 2001 and 2002 annual reports, federal tax returns, or audited financial statements. The director also advised the petitioner to submit copies of the beneficiary's Wage and Tax Statements (W-2s) for 2001 or 2002 if it employed the beneficiary during any of that time, as well as copies of the beneficiary's pay stubs showing year-to-date totals if he is currently employed by the petitioner.

In response, the petitioner supplied copies of its 2001 and 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. These returns indicate that the corporate petitioner files its taxes using a standard calendar year. They contain the following information:

	2001	2002
Net taxable income ¹	\$14,985	- \$ 1,797
Current Assets	\$27,277	\$33,710
Current Liabilities	\$59,135	\$32,854
Net current assets	-\$31,858	\$ 856

As noted above, besides net taxable income, as an alternative method of evaluating a petitioner's ability to pay a proffered salary, CIS will review a petitioner's net current assets. 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 and a possible source out of which a proposed wage offer could be paid.² A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of its federal tax return. If its 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 also provided copies of unaudited financial statements³ covering the same period as the 2001 and 2002 tax returns, a copy of an internally generated, unaudited statement of assets, liabilities and equity covering

¹ For purposes of this review, the petitioner's ordinary income listed on line 21 of the tax return will be treated as its net taxable income.

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

³ According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage and do not constitute a persuasive substitute for the regulatory-prescribed documentation.

the first six months of 2003 ending as of June 30th, a list of various projects that the petitioner named as "Windhorse Inc./Linderoth Log Homes has undertaken since 1998, and copies of two Form(s) 1099, Miscellaneous Income for 2001 and 2002, respectively. The Form 1099 for 2001 reflects that the petitioner paid the beneficiary \$26,513.50 in nonemployee compensation. In 2002, as shown by the corresponding 1099, the petitioner paid \$20,611.55 to the beneficiary as nonemployee compensation. The petitioner also submitted a letter signed by its president and one of the principal shareholders. He states that the beneficiary was initially hired in late November 2000 and that prior to April 2001, the beneficiary was paid "as an employee," but that when it was learned that the beneficiary did not have a valid social security number, the beneficiary purportedly obtained a business license and has worked for the petitioner as a subcontractor. Although Mr. states that copies of time cards are also attached, none appear to have been included. He also claims that although the firm has grown, the lack of qualified available labor has hindered its ability to take on or complete projects at an earlier date. A copy of a letter, dated October 30, 2003, from Ms. as vice-president of the petitioner, was also provided. She states that the petitioner had paid the beneficiary \$41,057 for the first nine months ending September 30, 2003, as a subcontractor.

The director denied the petition on March 20, 2004. He determined that neither the petitioner's net income, nor liquid assets were sufficient to overcome the shortfalls produced in comparing the actual compensation paid to the beneficiary as a subcontractor and the proffered wage as set by the approved labor certification in both 2001 and 2002. The director concluded that the petitioner's evidence had failed to demonstrate that it has maintained a continuing ability to pay the certified wage.

On appeal, counsel provides a copy of the petitioner's 2003 corporate tax return. It shows that the petitioner declared net taxable income of \$66,281. Schedule L reflects that the petitioner had \$27,782 in current assets and \$26,070 in current liabilities, yielding \$1,712 in net current assets. This tax return indicates that the petitioner could cover the beneficiary's proposed wage offer of \$57,283 during this period.

Counsel also asserts on appeal, that for 2001, CIS should prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will use a prorated calculation of the ability to pay the proffered wage if the record contains credible evidence of the petitioner's net income and payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period). In this case, the underlying record does not support the use of such a calculation.⁴

Counsel further maintains that regarding 2002, the corporate petitioner obtained a loan from the petitioner's owner, who took a mortgage on his individual real property in order to supply the cash. Counsel submits copies of various loan documents indicating that the Linderoths borrowed \$61,500 from Greenpoint Mortgage on September 9, 2002. Net amount at closing was \$58,488.38. Counsel also provides a copy of a promissory note,

⁴ Mr. statement distinguishing how the beneficiary was paid as an employee prior to April 2001 and as a subcontractor after this date was not supported by the evidence provided. It is noted that neither the 2001 or 2002 tax return showed any salaries or wages paid on line 8. The 2003 tax return provided on appeal also shows no salaries and wages paid.

dated October 1, 2002, signed by [REDACTED] on behalf of the corporate petitioner as the borrower, payable to Mr. [REDACTED] as an individual. Counsel contends that this overcomes any shortfall resulting from the petitioner's reported -\$1,797 in net taxable income in 2002 and therefore demonstrates its ability to pay the proffered salary in 2002.

This argument is not convincing. If there was an actual distribution of this money to the corporate petitioner in 2002 when the promissory note was signed, it has not been explained where these funds are represented on the petitioner's 2002 corporate tax return. For example, in neither of the tax returns for 2002 and 2003, is there any figure given on the Schedule L balance sheet (line 19) as a loan from a shareholder. As noted above, the petitioner declared a loss of net taxable income of \$1,797 in 2002. Its net current assets were only \$856. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding back funds representing an existent loan that, if distributed, would already be reflected in the balance sheet provided in the tax return or an audited financial statement, and which would be fully considered in the evaluation of the corporation's net current assets. Even if the loan is from a principal shareholder to the corporation, it still represents a potential obligation and liability for a corporate petitioner and does not demonstrate a marked improvement to the petitioner's financial status for the given period.

As noted above, the petitioner is a corporation. Because a corporation 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass. Sept. 18, 2003) also considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, 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 who have no legal obligation to pay the wage."

Counsel also cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in support of the petitioner's position that its evidence sufficiently demonstrates the ability to pay the proffered wage and that if only the petitioner had been able to hire the beneficiary as a permanent employee, its financial profile would have changed significantly. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. In this instance, however, the evidence fails to persuasively establish that the petitioner's employment of the beneficiary as a permanent employee will significantly generate additional net revenue, particularly as here, where there appears that the petitioner had already provided a job to the beneficiary as a full-time "employee" and subsequently as a licensed subcontractor beginning in 2000 through 2003. The regulation at 8 C.F.R. § 204.5(g)(2), issued in 1991, specifies the type of evidence required to establish the continuing financial ability to pay the proffered wage as of the visa priority date. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns of 2001 and 2002, which do not clearly demonstrate the petitioner's ability to pay the proposed wage offer as of the priority date of April 26, 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether a 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. In this case, even if taking the compensation paid to the beneficiary as a dollar for dollar representation of potential wages paid out, in 2001, the difference between the actual compensation of \$26,513.50 paid to the beneficiary and the proffered wage resulted in a shortfall of \$30,769.70. In 2002, the comparison between the actual \$20,611.55 in remuneration received by the beneficiary from the petitioner was \$36,671.65 less than the proffered wage.

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 as reflected on the petitioner's federal income tax returns, if provided, 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). 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.

As noted above, the petitioner's 2001 federal tax return failed to demonstrate that the \$30,767.70 shortfall resulting from the comparison of compensation paid to the beneficiary by the petitioner and the certified wage of \$57,283.20 could be covered by either the petitioner's net income of \$14,985 or its net current assets of -\$31,858. The petitioner has not demonstrated its continuing ability to pay the proffered wage during this period. Similarly, in 2002, neither the petitioner's net income of -\$1,797, nor its net current assets of \$856 was sufficient to cover the \$36,671.65 difference between the proffered wage and the compensation paid to the beneficiary.

As regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay a proffered wage beginning at the priority date, this evidence is not sufficiently convincing to establish this ability during the relevant period under review. 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 as of the 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.