

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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

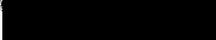


U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

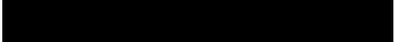


B6

FILE:   
EAC-02-102-53330

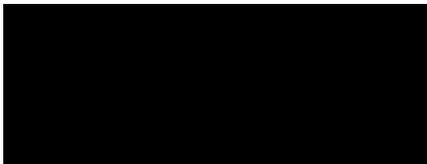
Office: VERMONT SERVICE CENTER

Date: **JUL 19 2005**

IN RE: Petitioner:   
Beneficiary: 

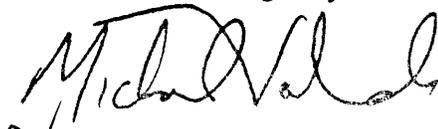
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal<sup>1</sup>. The appeal will be dismissed.

The petitioner is a fabricator of customized specialty rugs. It seeks to employ the beneficiary permanently in the United States as a carpet and rug sculptor. 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 additional 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour, which amounts to \$20,800 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. However, on a Form G-325, Biographic Information sheet submitted with his application to adjust status to lawful permanent resident, the beneficiary indicated above a penalty warning against knowingly and willfully falsifying or concealing a material fact that he worked for the petitioner since August 1997<sup>2</sup>.

On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$277,047, and to currently employ 15 workers. In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date.

---

<sup>1</sup> The petitioner filed a prior similar petition that was denied for failure to establish its continuing ability to pay the proffered wage beginning on the priority date.

<sup>2</sup> *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

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 15, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's tax returns from 1997<sup>3</sup> onwards.

In response, the petitioner submitted its Form 1120S corporate tax return for 1998 and an IRS extract for 1997<sup>4</sup>. Although counsel's accompanying letter states that he was submitting the petitioner's 1999 and 2000 tax returns, along with payroll records showing that the beneficiary was employed and paid by the petitioner, none of that evidence is in the record of proceeding.

The petitioner's 1998 tax return reflects the following information:

	<u>1998</u>
Net income <sup>5</sup>	-\$31,559
Current Assets	\$25,469
Current Liabilities	\$97,042
Net current assets	-\$71,573

The acting 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 October 2, 2003, denied the petition, noting the petitioner's failure to submit its tax returns for 1997, 1999, or 2000. Subsequently, on January 10, 2003, the director issued a similar denial decision.

On appeal, counsel asserts that he submitted the tax returns and payroll records to the director and has a mail receipt to prove it. The petitioner submits its corporate tax returns for 1999 and 2000, and processed paychecks issued to the beneficiary in the aggregate amounts of \$400.54 in 1998, \$291.92 in 1999, \$387.36 in 2000, \$421.72 in 2001, \$392.26 in 2002, and \$2,345.82 in 2003.

The petitioner's tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2000</u>
Net income <sup>6</sup>	\$6,196	-\$64,014
Current Assets	\$40,758	\$40,416
Current Liabilities	\$102,729	\$141,060
Net current assets	-\$61,971	-\$100,644

<sup>3</sup> Evidence preceding the priority date in 1998 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

<sup>4</sup> See note 3, *supra*.

<sup>5</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>6</sup> See note 5, *supra*.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 any relevant year. The petitioner established that it employed and paid partial wages in the amounts of \$400.54 in 1998, \$291.92 in 1999, \$387.36 in 2000, \$421.72 in 2001, \$392.26 in 2002, and \$2,345.82 in 2003, which means it is obligated to demonstrate that it can pay the difference between the wages actually paid and the proffered wage in each year which is \$20,399.46 in 1998, \$20,508.08 in 1999, \$20,412.64 in 2000, \$20,378.28 in 2001, \$20,407.74 in 2002, and \$18,454.19 in 2003.

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.

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.<sup>7</sup> 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.

---

<sup>7</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in any relevant year. In 1998, the petitioner shows negative net income and negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and 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 1998.

In 1999, the petitioner shows a net income of only \$6,196, which is less than \$20,508.08, the difference between the wage paid and the proffered wage in that year, and negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and 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 1999.

In 2000, the petitioner shows negative net income and negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and 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 2000.

The petitioner did not provide regulatory-prescribed evidence pertaining to its ability to pay the proffered wage beginning on the priority date in 2001, 2002, or 2003, so the AAO cannot analyze whether or not it could pay the difference between the wages it paid the beneficiary and the proffered wage out of its net income or net current assets or some other viable source.

On appeal, in a document titled "Documents Requested by [CIS] in I-797 dated April 15, 2003," a reference is made to the petitioner's owner and his wife investing \$262,300 of their personal funds into the petitioner's business and cancelled checks that were submitted to corroborate \$110,200 of investments made over various years. Beneath that reference, a citation is made to *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441, 499 (D.D.C. 1988) with the request that CIS consider "other reasonable sources of income" in determining a petitioning entity's continuing ability to pay the proffered wage.

The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages for its proffered position. Here, the assertion that CIS should consider the petitioner's owner's personal assets is without merit because the petitioner is incorporated. 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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."

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, 2002, or 2003. 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 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.