

**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



B6

FILE: WAC 03 040 56500 Office: CALIFORNIA SERVICE CENTER Date: **MAR 10 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:

SELF-REPRESENTED

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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general contracting company. It seeks to employ the beneficiary permanently in the United States as a reinforcing metal worker. 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, the petitioner 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 21, 2001. The proffered wage as stated on the Form ETA 750 is \$9.92 per hour, which amounts to \$20,633 annually.

With the petition, the petitioner submitted documentation of the beneficiary's education and work experience, of the placement of a job advertisement in a Guam newspaper and a certification posting, and of the petitioner's business status, including its incorporation in 2000. The petitioner also submitted copies of six contracts for residential housing construction projects signed by the respective parties in 2002. In a cover letter, the petitioner stated it was a general contractor and that it built custom homes, apartments, commercial building, tract and community housing, as well as the repair and renovation of existing structures. The petitioner stated that it employed a total of five persons, and also had to subcontract its construction work due to the lack of skilled workers. The petitioner stated it held six major construction contracts worth \$980,000, and was in the process of establishing four additional construction projects worth an estimated \$500,000. The petitioner also submitted the

first page of its 2001 federal income tax return, along with an income statement and balance sheet dated June 30, 2002.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 10, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, federal tax returns for 2001 and 2002, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested any accompanying schedules or attachments. In response, the petitioner submitted its federal income tax forms for 2001 and 2002 with schedules, as well as income statements and balance sheets for each tax year.

On June 30, 2003, the director again requested additional evidence. The director again 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 also requested a copy of the petitioner's job offer letter to the beneficiary, as well as the petitioner's monthly bank statements for 2002 and the last six months of 2003. The petitioner resubmitted its federal income tax returns for 2001 and 2002, along with income statements and balance sheets for these two years. It also submitted monthly bank statements from January to December 2002.

The 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 September 15, 2003, denied the petition.¹ The director stated that the petitioner's net profit for 2001 and 2002 was far below the proffered salary, and that it did not appear that the petitioner had the ability to pay the salary.² The director also noted that the petitioner had asserted it had five employees; however, the petitioner's employer quarterly state wage report reflected that the petitioner had only paid the salaries of three employees.³ Finally the director noted that the petitioner had recently petitioned for five additional beneficiaries. The director listed the beneficiaries, and stated that since the wage report did not indicate that these beneficiaries were presently working for the petitioner, the salaries of the five additional workers would be an additional expense for the petitioner. Based on the petitioner's 2002 federal tax return, which established that petitioner's net profit as \$2,071, the director determined that the petitioner could not pay the salaries of the additional workers, if they were to be paid the same basic rate of pay as the beneficiary.

On appeal, the petitioner states that it only employed the president of the company, and a vice president. The petitioner states that in the beginning of 2003, it hired three additional employees to assist in transporting materials to each job site; however, these three workers had left the petitioner's employ. The petitioner states that since its establishment, it has experienced steady and strong growth. The petitioner resubmits its federal income tax returns, as well as quarterly Gross Receipts and Use Tax Return documents for the first three quarters of 2003.

¹ The dates noted in the director's decision with regard to his requests for further evidence are inaccurate, and perhaps reflect the dates of a similar petition submitted by the petitioner.

² Although the director identifies \$2,071 as the petitioner's net profit, on IRS Form 1120, this figure is more accurately identified as net or taxable income (Line 28).

³ The record of proceedings for the instant petition contains no Quarterly Wage Report. Apparently the director refers to another petition submitted by the petitioner that contained this documentation.

These documents indicate that the petitioner has engaged in contracting activities worth \$45,660 in the first quarter of 2003, \$68,295 in the second quarter of 2003, and \$119,892 in the third quarter of 2003. The petitioner also submits monthly bank statements from its business checking account for January to September 2003. Finally the petitioner submits copies of construction contracts signed by the parties in question in either 2000 or 2003 with accompanying building permits.

The director, in his second request for further evidence, requested that the petitioner submit its bank statements for 2002. Despite the director's request, this office does not find bank statements to be persuasive evidence. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. The petitioner submitted its federal income tax returns, which is a type of evidence outlined in 8 C.F.R. § 205.5(g)(2). While this regulation allows additional material "in appropriate cases," the director in this case did not provide any explanation as to why the documentation submitted by the petitioner and specified at 8 C.F.R. § 204.5(g)(2) was inapplicable or otherwise painted an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

The director's analysis of the petitioner's ability to pay the proffered wage, solely based on an examination of the petitioner's net income, is incomplete. 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. The petitioner did not claim to have employed the beneficiary as of the priority date. Thus, the petitioner cannot establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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). Although the petitioner, on appeal, submits documentation as to its gross receipts for the first three quarters of 2003, 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 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, now CIS, should have considered income before expenses were paid rather than net income. With regard to the instant petition, as correctly noted by the director, the petitioner's net income in 2002 was \$2,701. For 2002, the petitioner's net income was \$3,306. Neither of these figures is sufficient to pay the proffered wage of \$20,663.

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. In addition, 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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. The tax returns reflect the following information for the following years:

	2001	2002
Taxable income ⁵	\$ 3,306	\$ 2,701
Current Assets	\$ 29,228	\$ 18,094
Current Liabilities	\$ 469	\$ 9,525
Net current assets	\$ 28,759	\$ 8,569

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$3,306 and positive net current assets of \$28,759, and therefore demonstrated the ability to pay the proffered wage, as of the priority date, namely, March 21, 2001. However, as noted by the director, CIS records reflect that the petitioner submitted I-140 immigrant petitions for six additional employees, in total. If these petitions were for additional skilled workers at the basic wage level as the beneficiary, the petitioner's net current assets for 2001 would not be sufficient to cover the wages of all the beneficiaries.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of \$2,701 and net current assets of \$8,569. This sum would not be sufficient to cover the proffered wage of the beneficiary, much less the wages of any additional beneficiaries. Although the petitioner submits evidence on appeal as to ongoing business activities, increased monthly average balances in its banking account, and increased gross profits, as previously stated, this documentation does not establish that the petitioner is capable of paying the proffered salary. Thus, the petitioner has not established that it had the ability to pay the proffered wage during 2002. In addition, the petitioner has not established that it has further assets with which to

⁴ 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.

⁵ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

pay the proffered wage for the beneficiary, or any other additional beneficiaries. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present.

The director in his decision noted that the petitioner had submitted an additional five I-140 petitions. CIS records indicate that three of these petitions have been approved. However, the records for these particular petitions are not found in the record. The director's decision does not indicate whether he reviewed the prior approvals of the other immigrant petitions. If the previous immigrant petitions were approved based on the same documentation contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, the petitioner in its responses to the director's request for further evidence and on appeal, has asserted that it is able to pay the proffered wage because it would be employing its own workers as opposed to the subcontracted workers it has previously used to fulfill construction projects. However, without more persuasive evidence, the record is not clear that the petitioner's employment of workers such as the beneficiary with specific skills in reinforcing metal would necessarily eliminate the need for other skilled construction workers, such as brick masons. The petitioner submits no further evidence to further substantiate this assertion. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). As a consequence, it is not clear that the financial resources that the petitioner presently puts into subcontracted workers would necessarily be available to pay the proffered wage of the beneficiary, or any additional workers.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.