

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

BG



FILE: [REDACTED]
EAC-04-027-51422

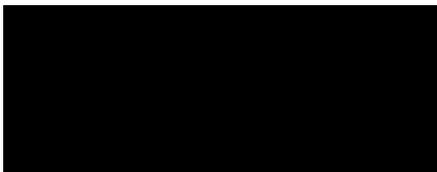
Office: VERMONT SERVICE CENTER

Date: NOV 03 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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. The appeal will be dismissed.

The petitioner is a construction and restoration company. It seeks to employ the beneficiary permanently in the United States as a bricklayer. 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.

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 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) 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$36.22 per hour for a 35-hour work week, which amounts to \$65,920.40 annually. On the Form ETA 750B, signed by the beneficiary on April 10, 2001, the beneficiary claimed to have worked for the petitioner beginning in July 1999 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on November 4, 2003. On the petition, the petitioner claimed to have been established on May 3, 1999. The items on the petition for the petitioners current number of employees, its gross annual income and its net annual income were left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated January 13, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on April 6, 2004.

In a decision dated July 1, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits an appeal statement as an attachment to the I-290B notice of appeal. Counsel also submits two sets of duplicate copies of documents submitted previously for the record. No new evidence is submitted on appeal.

Counsel states on appeal that that copies of bank statements and contract documents of the petitioner in the record show that the petitioner has substantial financial resources. Counsel also states that the beneficiary will be taking over the bricklaying duties now performed by the petitioner's president and will also be replacing outside contractors doing bricklaying work for the petitioner. Counsel further states that a letter from a certified public accountant in the record finds that the petitioner had the ability to pay the proffered wage during the relevant period.

Since no new evidence is submitted on appeal, the AAO will evaluate the director's decision based on the evidence submitted prior to the director's decision.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. 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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 10, 2001, the beneficiary claimed to have worked for the petitioner beginning in July 1999 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for the years 1999, 2000, 2001 and 2002. The beneficiary's Form W-2's show compensation received from the petitioner as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
1999	\$2,750.00	not applicable	not applicable
2000	\$13,340.00	not applicable	not applicable
2001	\$13,800.00	\$65,920.40	\$52,120.40
2002	\$11,400.00	\$65,920.40	\$54,520.40

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1999, 2000, 2001 and 2002. The petitioner's tax return for 1999 is marked as an initial return, and it states that the petitioner was incorporated on May 3, 1999. The petitioner's 1999 return covers the period from May 3, 1999 to April 30, 2000. The petitioner's other tax returns are for tax years which begin on May 1 and end on April 30 of the following year.

The record before the director closed on April 6, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was not yet available. Therefore the petitioner's tax return for 2002 is the most recent return available. The 2002 return covers the period from May 1, 2002 until April 30, 2003.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1999	\$3,751.00	not applicable	not applicable
2000	-\$16,425.00	not applicable	not applicable
2001	\$2,014.00	\$52,120.40*	-\$50,106.40**
2002	\$2,967.00	\$54,520.40*	-\$51,553.40**

* Crediting the petitioner with the compensation actually paid to the beneficiary in 2001 and 2002.

** Comparing the petitioner's net income for its tax year, from May through April of the following year, with the beneficiary's actual compensation during the calendar year, from January through December.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
1999	\$0.00	\$13,000.00	not applicable
2000	\$13,000.00	-\$6,820.00	not applicable
2001	-\$6,820.00	-\$6,410.00	\$52,120.40*
2002	-\$6,410.00	-\$5,553.00	\$54,520.40*

* Crediting the petitioner with the compensation actually paid to the beneficiary in 2001 and 2002.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 or in 2002.

The record contains a copy of a letter dated March 30, 2004 from a certified public accountant. The accountant states that in his professional opinion as of April 16, 2001 and continuously to the present, the petitioner has been financially able to pay the beneficiary an annual salary of \$65,920.00. The accountant states that the petitioner's president has been spending about one third of his time on bricklaying, and that the petitioner intends that beneficiary take over those duties. The accountant states that one third of the president's annual compensation will be available to pay the beneficiary's salary. The accountant states that the president's salary was \$57,800.00 in fiscal year 2000 and \$114,495.00 in fiscal year 2001. The accountant does not discuss the specific duties of the petitioner's president or the amount of time spent by the president on each of his duties. Therefore the record lacks a basis for any finding that one third of the president's salary has been for duties which the petitioner intends to be performed by the beneficiary.

The accountant also states that the petitioner has been hiring bricklaying subcontractors to perform work which the beneficiary will be able to perform after being hired by the petitioner. The accountant states that in fiscal year 2000 the cost of outside labor exceeded \$41,000.00 and that in fiscal year 2001 the cost of outside labor exceeded \$49,000.00.

The accountant's statements fail to address the fact that the beneficiary was already on the petitioner's payroll as of the priority date. The record does not indicate whether the beneficiary was employed on a full-time

basis or on a part-time basis. If the beneficiary was already employed full-time, he would not be available to take on additional duties previously performed by the petitioner's president or by outside contractors. If the beneficiary was employed on a part-time basis, he could presumably take on additional duties. But the record does not provide any information on the number of hours per week worked by the beneficiary. Nor does the record provide any specific information on reasons why the petitioner did not wish to assign the beneficiary to additional duties prior to the approval of an immigrant petition. The Form W-2's for the beneficiary show that he was being paid by the petitioner as an employee, not as an outside contractor. The record provides no explanation of any factors which prevented the petitioner from utilizing the beneficiary for the duties described in the accountant's letter while the beneficiary was still in nonimmigrant status.

In his March 30, 2004 letter, the accountant also states that copies of bank statements submitted show substantial balances on average of more than \$20,000.00 in 2001 and in 2002. The accountant also states that copies of contracts of the petitioner executed during late 2000 and early 2001 provide assurance that the petitioner will have sufficient monies to pay the proffered wage.

The record contains copies of the bank statements referenced in the accountant's letter. The statements cover the period from April 2001 through February 2004. Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. No evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

The petitioner's bank statements show the following ending balances.

2001	Ending balances	2002	Ending balances
January		January	\$13,798.15
February		February	\$4,991.98
March		March	\$20,209.86
April	\$6,263.76	April	\$12,113.25*
May	\$29,386.78	May	\$2,482.19
June	\$14,538.26	June	\$22,222.23
July	\$25,970.77	July	\$4,182.45
August	\$19,640.50	August	\$45,465.22
September	\$45,108.54	September	\$13,435.87
October	\$28,216.51	October	\$30,955.38
November	\$12,047.24	November	\$7,492.15
December	\$32,091.61	December	\$27,188.56

* No bank statement for April 2002 was submitted. The ending balance for that month is therefore taken from the beginning balance on the statement for May 2002.

(table continued on next page)

2003		2004	
January	\$39,936.25	January	\$80,741.39
February	\$2,987.62	February	\$38,863.94
March	\$271.37	March	
April	\$50,839.69	April	
May	\$43,408.20	May	
June	\$34,790.43		
July	\$17,285.49		
August	\$22,516.92		
September	\$80,922.98		
October	\$35,720.40		
November	\$38,964.28		
December	\$7,179.05		

The analysis above of the beneficiary's form W-2 Forms shows that the wage increase needed to pay the beneficiary the full proffered wage was \$52,120.40 in 2001. That rate would require an increase of more than \$4,300.00 per month. If that increase had been paid from funds in the petitioner's bank account, the account would have been exhausted by November 2001.

The record also contains copies of contracts of the petitioner for construction work. Those contracts provide additional corroboration that the petitioner is an ongoing business, but provide no significant additional information.

Counsel cites three U.S. district court cases in support of instant petition. None of the cases relied upon by counsel are binding precedents in the instant petition. Although the AAO may consider the reasoning of a district court 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).

One of the cases cited by counsel *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), which is cited for the proposition that CIS must consider sources of income pledged by the employer. 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 the beneficiary. In the instant petition, counsel is asserting that CIS should treat its work contracts as evidence of its ability to pay. However, no evidence has been submitted to indicate that the funds from those contracts are in addition to the income shown on the petitioner's tax returns, which are discussed above.

Counsel also cites *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989), without stating the relevance of that case to the instant petition. However, *Chi-Feng Chang v. Thornburgh* affirmed that insufficient net income as shown in a petitioner's tax returns was a proper basis for an adverse finding on the petitioner's ability to pay the proffered wage. Moreover, the district court in that case stated that depreciation deductions represented actual costs of running a business. *Id.* at 537.

Finally, counsel cites *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) for the proposition that CIS should consider the beneficiary's ability to generate income when determining the petitioner's ability to pay the proffered wage. However nothing in that decision refers to the beneficiary's ability to generate income for the petitioner. Rather, as noted above, the decision affirms that 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. *Id.*, at 1054, (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)).

Another federal district court did make reference to the beneficiary's ability to generate income, in the case *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989). Part of that decision mentions the ability of the beneficiary to generate income, but the holding in the case is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Furthermore, in the instant petition, insufficient evidence has been provided to explain how the beneficiary's employment as a bricklayer will significantly increase profits for the petitioner.

In his appeal statement, counsel notes that the accountant is a certified public accountant, and states that certified public accountants have the authority to independently review and audit financial statements. Counsel further states that if there is any uncertainty as to a company's financial viability, an opinion of a certified public accountant should be accepted as a conclusive finding on that issue. Counsel therefore asserts that the March 30, 2004 letter of the accountant submitted in the instant petition should be considered as sufficient evidence to establish the petitioner's ability to pay the proffered wage.

Notwithstanding counsel's assertions, opinion letters by certified public accountants are not among the forms of evidence described in the regulation at 8 C.F.R. § 204.5(g)(2). The regulation states that the three acceptable alternative forms of required evidence to establish a petitioner's ability to pay the proffered wage are federal tax returns, annual reports and audited financial statements. By requiring audited financial statements rather than unaudited financial statements, the regulation recognizes the significance of the work of independent accountants in assuring the reliability of financial statements submitted in evidence. In the instant petition, however, no audited financial statements have been submitted in evidence. The March 30, 2004 letter from the accountant does not state that the accountant's opinion is based on either an audit or on a professional review of the petitioner's finances. Rather the accountant provides information about the petitioner's business plans in hiring the beneficiary, and summarizes information from copies of bank statements which are also submitted in evidence. Nothing in the applicable regulations indicates that the accountant's opinion on the financial evidence in the record should be deemed to be a conclusive finding on the issue of the petitioner's ability to pay the proffered wage.

The matters raised in the accountant's letter have been discussed above. For the reasons already discussed, the evidence is found insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly noted that the petitioner's tax year begins on May 1 of each year. The director correctly stated the petitioner's net income in its 2000, 2001 and 2002 tax years, and correctly calculated the petitioner's year-end net current assets for each of those tax years. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The director also correctly found that the petitioner's bank statements and work contracts had not been shown to represent additional funds beyond those shown on the petitioner's tax returns.

The decision of the director to deny the petition was correct. For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.