

Administrative Review  
Date: 10/11/11

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



U.S. Citizenship  
and Immigration  
Services



B6

FILE: LIN 03 172 51345 Office: NEBRASKA SERVICE CENTER Date: 10/11/11

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:  
[Redacted]

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 sustained. The petition will be approved.

The petitioner is a company that buys, sells, restore and cleans oriental rugs. It seeks to employ the beneficiary permanently in the United States as an oriental rug repairer. 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.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 8, 2002. The proffered wage as stated on the Form ETA 750 is \$9.57 per hour, which amounts to \$19,905.60 annually.

On the petition, the petitioner indicated it was established in 1987, had five employees, a gross annual income of approximately 1.3 million dollars, and a net annual income of approximately \$100,000.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 8, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its latest annual report, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage as of October 8, 2002. The director also requested evidence that the beneficiary obtained the required three years of work experience in the proffered job before October 8, 2002, the priority date.

In response, counsel submitted Form 1120 corporate tax returns for the petitioner for the year 2003, and a letter entitled "Explanation of Finances" from the petitioner's owner. The petitioner's corporate income tax return for

2003 indicated taxable income of -\$2,091. The petitioner's owner in his letter stated that the petitioner sells 19th century oriental rugs that have been professionally restored. The owner also stated that the company was very profitable between the years 1986 and 1999, but that in 1999, the petitioner lost two of its three key employees who repaired rugs. One of the workers left because he had asthma, which was aggravated by the dust of the rugs and the other employee moved out of state. The petitioner's owner stated that the remaining rug repairer did not have the expertise to adequately and efficiently repair rugs. As a result hundreds of rugs, valued at over \$300,000 remain unrestored, and therefore unsold. The petitioner stated that based on the beneficiary's experience and skill in repairing rugs, he could generate at least four times his proffered salary, and thus, the petitioner is certain to have the financial ability to pay the proffered wage of \$19,905.60.

Counsel also submitted an original letter with translation from [REDACTED] Tehran, Iran. The letter stated that the beneficiary worked at the company as a carpet mender and trainer from January 20, 1998 until June 6, 2001. The letter also stated that the company altered its business activity in June 2002, and that since then, the beneficiary mends carpets at home.

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 March 27, 2004, denied the petition. The director stated that while the petitioner's 2003 federal income tax return indicated gross receipts of \$159,204, total income of \$120,871, salaries of \$24,443, cash assets loss of \$3,954, and taxable income of -\$2,091. Based on the petitioner's tax return, the director determined that the petitioner had not established it had the ability to pay the proffered wage as of the priority date and continuing to the present.

On the form I290B, counsel states that evidence of the petitioner's ability to pay the proffered salary includes a substantial amount of assets owned by the petitioner including inventory and real property. Counsel also states that tax forms and financial statements have been requested from the petitioner's accountant and are in the process of being gathered and prepared for the appeal. Counsel then submits a brief dated July 27, 2004 and reiterates the petitioner's owner's comments in his earlier letter. Counsel states that an inventory of rugs valued at over \$300,000 remain unrestored and therefore unsellable. Counsel also states that although total assets exceed one million dollars, financial statements of the company do not show any assets on the surface due to liabilities. Counsel asserts that a large portion of the petitioner's liability, \$251,379, is owed to the petitioner's owner based on a loan the owner provided to the petitioner. Counsel states that the petitioner's owner is willing to use this amount as collateral to guarantee the beneficiary's wage. Counsel states that this collateral would exceed the proffered wage of \$19,905 by over 1,200 percent. It is noted that counsel refers to two attachments in his brief. The first is a letter from Mr. [REDACTED], identified as president, that is entitled "Explanation of Finances." This letter, which is presumed to be the same letter submitted in response to the director's request for further evidence, is not submitted with the brief. In addition, counsel refers to a balance statement attachment that is also not found in the brief. The AAO will examine the record as presently constituted in these proceedings.

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 2002 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). 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.

The petitioner has not submitted any information with regard to the petitioner's net income for the tax year 2002, which would include the priority date of October 8, 2002. It is noted, however, that the director, in his request for further evidence, while mentioning the priority date of October 2002, did request the petitioner's latest tax return, which the petitioner has interpreted as its 2003 tax return. For purposes of these proceedings, the AAO will examine the petitioner's 2003 corporate income tax return, which is the only relevant evidence in the record with regard to the petitioner's ability to pay the proffered wage. With regard to tax year 2003, the petitioner has negative net income of \$2,091. This sum is not sufficient to pay the proffered wage.

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. As correctly noted by counsel, these assets include the petitioner's inventory. 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.<sup>1</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. The petitioner's 2003 tax return reflects the following information:

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<sup>1</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

	2003
Taxable income <sup>2</sup>	\$ -2,091
Current Assets	\$ 1,177,875
Current Liabilities	\$ 361,099
Net current assets	\$ 816,776

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2003. In 2003, as previously illustrated, the petitioner shows a taxable income of -\$2,091, and net current assets of \$816,776. The petitioner, therefore, has demonstrated the ability to pay the proffered wage in 2003. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant petition, the petitioner has to establish that it has the ability to pay the proffered wage as of October 22, 2002. Although the petitioner did not submit its 2002 federal income tax return, column B of Schedule L of the petitioner's 2003 tax return indicates figures for the petitioner's assets and liabilities at the beginning of tax year 2003. These figures are generally acknowledged to reflect the petitioner's ending assets and liabilities for the previous year, which in the instant petition, is tax year 2002. According to Schedule L of the petitioner's 2003 tax return, the petitioner had current assets of \$1,185,973 at the end of 2002, with current liabilities of \$388,090. Thus, the petitioner, at the end of 2002, has net current assets of \$797,883. Therefore, the petitioner, based on the petitioner's 2003 Schedule L, has sufficient funds to pay the proffered wage of \$19,906.60 in 2002.

Counsel also urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. In the instant petition, counsel asserts that the petitioner reasonably expects that beneficiary's ability to increase the petitioner's business profits based on the beneficiary's expertise in repairing oriental rugs, and mentions the previous successful operation of the petitioner based on increased number of employees who restored the petitioner's oriental carpets. However, counsel provided no further evidence, such as earlier corporate income tax returns, to further substantiate this assertion. The assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel also states that the petitioner's owner has made a loan to the petitioner that would substantially exceed the beneficiary's proffered wage.<sup>3</sup> However, counsel also does not further substantiate the exact nature of the loan, or the petitioner's owner's willingness to provide the loan. *Matter of Soffici*. Furthermore, because a

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<sup>2</sup> 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.

<sup>3</sup> It is noted that even if the assets of a petitioner's sole officer or owner could be considered as a source of further financial resources, the petitioner's 2003 federal tax return does not identify the petitioner's owners, officers, or shareholders. In addition, counsel does not submit any further evidentiary documentation of any such loan.

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."

As stated previously, although the petitioner's 2002 corporate income tax return is not found in the record, the assets and liabilities as of the beginning of the year reflected in the petitioner's 2003 tax return indicate that the petitioner had sufficient net current assets to pay the proffered salary of \$19,905.60. In addition, *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioner in the instant petition stated that business was profitable in the 1990s until the two other rug repairers left his employ, which supports an overall view of a petitioner with both profitable and unprofitable years of business activities based on its employment practices. Within the context of the totality of circumstances, the petitioner has established that it has the ability to pay the proffered wage from the 2002 priority date and onward. Therefore, the director's decision shall be withdrawn, and the petition shall be approved.

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 met that burden.

**ORDER:** The appeal is sustained.