

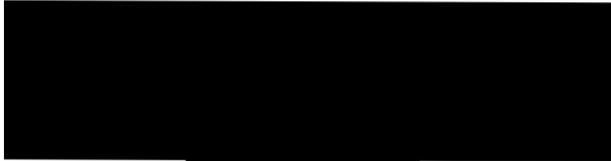
Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

B6

**PUBLIC COPY**



FILE:

EAC 04 086 53408

Office: VERMONT SERVICE CENTER

Date: APR 04 2006

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 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 commercial and home improvement company. It seeks to employ the beneficiary permanently in the United States as a floor layer. 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which amounts to \$20,800 annually.

With the petition, the petitioner's owner, submitted a letter dated January 13, 2004 that requested the substitution of the beneficiary for the original beneficiary identified in the ETA 750 as [REDACTED]. The petitioner stated that Mr. [REDACTED] no longer wished to be sponsored as a prospective employee, and the petitioner wished to withdraw Mr. [REDACTED] from the petition.

The petitioner also submitted IRS Form 1120, federal corporate income tax return, for the year 1998, as well as Form 1120A Short Form for tax year 2002. These documents indicated that the petitioner had taxable income before net operating loss deduction and special deductions of \$2,308 in 1998, and taxable income before net operating loss deduction and special deductions in 2002 of -\$22.

On September 8, 2004, the director denied the petition. The director examined the petitioner's taxable income for tax years 1998 and 2002, and determined that the petitioner's taxable income in both was not sufficient to pay the proffered wage of \$20,800. In addition the director examined the Schedules L in both tax return and determined that the petitioner had net current assets of \$3,037 in 1998 and net current assets of \$1,208 in 2002. The director then determined that the petitioner had not established that it had the ability to pay the proffered wage. The director further noted that the petitioner had provided no evidence that it employed the beneficiary as of the priority date and to the present.

On appeal, counsel asserts that the proffered position is not a new one, and that since the petitioner is substituting a new beneficiary in the petition, the wages paid, at the time of filing the petition, to floor layer employees should be considered in examining whether the petitioner has the ability to pay the proffered wage. Counsel states that in 1998, the petitioner paid \$20,000 in compensation to officers and \$18,854 in wages to individual employed as floor layers. Counsel states that the only individuals employed in 1998 were floor layers and that all administrative functions were performed by the petitioner's officer. Counsel then states that the combination of the petitioner's profits for the year which are more than two thousand dollars and the wages paid to floor layer employees in 1998 is in excess of \$20,000 which clearly demonstrated the petitioner's ability to pay the proffered wage in 1998. Counsel submits W-2 forms for 1998, 1999, 2000, 2001, 2002, and 2003 and states these documents are evidence of wages paid to floor layers full-time, part-time and short-term employees. Counsel also states that these documents show wages paid well in excess of the proffered wage being offered to the beneficiary. Counsel states that W-2 forms are missing for tax year 1998 which represent the \$18,854 paid in wages that year as documented by the petitioner's tax return. Counsel states that 1999 wages paid to floor layer employees were \$29,688; in 2000, wages paid to floor layer employees were \$28,388; and in 2001, wages paid to floor layer employees were \$23,675.

Counsel also submits the petitioner's Form 941, Federal Quarterly Tax Returns, for the years 1999 to 2003, and lists the total wages paid by the petitioner in these years, based on the Form 941 Forms. Counsel provides a breakout of wages paid by the petitioner for years 1999 to 2003, based on these documents. According to counsel, the petitioner paid \$74,258 in wages in 1999, \$65,338.15 in tax year 2000, \$44,675 in tax year 2001, \$47,810 in wages in tax year 2002, and \$35,966 in tax year 2003. Counsel states that these forms are further evidence of the petitioner's ability to pay the proffered wage.

Finally, counsel submits copies of the petitioner's bank statements from its two corporate bank accounts with [REDACTED] and [REDACTED] from January 1999 to December 2003.<sup>1</sup> Counsel presents a chart as Exhibit 3 that lists both accounts, with a combined ending balances totals and average monthly balances for the years 1999 to 2003. Counsel states that the average monthly balance for the combined banking accounts are as follows: \$10,485.74 in 1999, \$5,682 in 2000, \$5,188.81 in 2001, \$4,337.86 in 2002 and \$3,605.53 in 2003. Counsel divides the proffered wage of \$20,800 by twelve months to arrive at the figure of \$1,733.33. Counsel states that this figure is the amount that needs to be in the petitioner's monthly balances to establish the petitioner's ability to pay the proffered wage.

---

<sup>1</sup> [REDACTED] handled the petitioner's bank accounts until May 2000, after which [REDACTED] purchased [REDACTED] and then handled the petitioner's bank accounts.

Counsel in its response to the director's request for further evidence submitted the petitioner's bank statements for the years 1999 to 2003. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. 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. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, the petitioner did not submit federal tax returns for the years 1999, 2000, 2001 and 2003. The record does not reflect that the funds reported on the petitioner's bank statements for the corresponding years somehow reflect additional available funds that were not reflected on its tax returns, which as previously noted were not submitted by the petitioner to the record. Counsel did not provide the petitioner's 1999, 2000, 2001 or 2003 federal income tax returns, nor did she provide an explanation for why the petitioner's bank statements for these years should be given more probative weight than the petitioner's federal income tax returns for the respective years.

On appeal, counsel also posits that the petitioner only needs an ending monthly bank balance of \$1,733.33 to prove its ability to pay the proffered wage. The AAO does not agree with this statement. If anything, the balance in the petitioner's bank account at the end of a particular month would indicate some portion of the petitioner's annual net income up to that date. At the end of the year, the aggregate amount, if still in the form of cash, would appear on Schedule L of the petitioner's corporate tax return. Moreover, if each month's ending balance were truly that month's net income, then each new month's balance would have to begin at \$0. Since the beginning balance is the same amount as the previous month's ending balance, it is more likely that the difference between the starting and ending balance of any particular month would represent that month's net income (or loss).

Counsel also asserts that the fact that the petitioner paid wages to floor layer employees in 1998 in the amount of \$20,000 is evidence that the petitioner has the ability to pay the beneficiary's proffered wage. Counsel's statement is not persuasive. In general wages already paid to other employees are funds no longer available to pay the proffered wage. It is further noted that the petitioner stated in the initial petition that it wished to withdraw [REDACTED] from the petition. If Mr. [REDACTED] is the floor layer that the beneficiary would be replacing, the petitioner's employment record reflect that a Mr. [REDACTED] only earned \$5,508 in 1998. Even if the former beneficiary's wages in 1998 could be utilized to establish the petitioner's ability to pay the proffered wage in 1998, these wages are not sufficient to pay the proffered wage of \$20,800. It is also noted that the fact that the Forms 941 document wages paid by the petitioner does not establish that these wages were paid to persons doing work similar to the duties of the proffered position, as counsel appears to claim.

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. Although the beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner from April 1997 to the present, the petitioner's employment records do not reflect his employment. The petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998 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 is structured as a corporation. On the petitioner's tax return for 1998, Form 1120, CIS considers the petitioner's net income to be the sum shown on line 28, taxable income before NOL deduction and special deductions, namely, \$2,308. On the petitioner's tax return for 2002, Form 1120A, the petitioner's taxable income before net operating loss deduction and special deductions is -\$22. Neither figure is sufficient to pay the entire proffered wage of \$20,800 based on the petitioner's net income.

Nevertheless, counsel is correct that 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.<sup>2</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 tax returns reflect the following information for the following years:

	1998	2002
Taxable income <sup>3</sup>	\$ 2,308	\$ -22
Current Assets	\$ 3,227	\$ 3,737

<sup>2</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.

<sup>3</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.

Current Liabilities	\$ 190	\$ 2,529
Net current assets	\$ 3,037	\$ 1,208

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998. In 1998, as previously illustrated, the petitioner shows a taxable income of \$2,308, and net current assets of \$3,037, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of -\$22 and net current assets of \$1,208, and has not demonstrated that it has the ability to pay the proffered wage in 2002. As previously stated, the petitioner did not provide its federal income tax returns for the years 1999, 2000, 2001 and 2003, thus, whether the petitioner has the ability to pay the proffered wage in these years cannot be determined.<sup>4</sup>

As stated previously, the petitioner's monthly bank balances are not viewed as additional funding available to pay the proffered wage. Therefore the petitioner has not established that it has the ability to pay the proffered wage as of the 1998 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.

---

<sup>4</sup> It is noted that any future proceedings should include complete tax returns for each pertinent year and any assertion that the beneficiary would replace other workers should be documented by competent objective evidence.