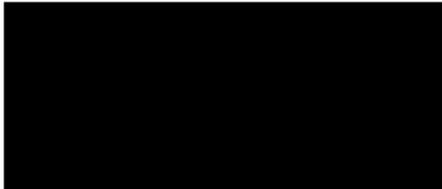


identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



B6

FILE: [Redacted]  
EAC 03 128 50272

Office: VERMONT SERVICE CENTER

Date: JUN 21 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Other Worker pursuant to § 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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a textile company. It seeks to employ the beneficiary permanently in the United States as a technical support specialist. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 14, 1998. The proffered wage as stated on the Form ETA 750 is \$1,080 per week, which equals \$56,160 per year.

On the petition, the petitioner stated that it was established on January 1, 1984 and that it employs two workers. The petition states that the petitioner's gross annual income is \$758,167 and that its net annual income is \$355,482.<sup>1</sup> On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as an assistant support specialist from May 1995 to June 1996 and as a technical support specialist from June 1996 and continuing until the beneficiary signed that form on January 12, 1998. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in New York, New York.

In support of the petition, counsel submitted the petitioner's compiled 1998 financial statements.

---

<sup>1</sup> Reference to the petitioner's 1998 tax return demonstrates that its total income, rather than its net income, was \$355,482.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on July 19, 2004, requested, *inter alia*, additional evidence pertinent to that ability.<sup>2</sup> The service center specifically requested the petitioner's 1998 tax return. The service center also specifically requested that, if it employed the beneficiary during 1998, it provide the 1998 Form W-2 Wage and Tax Statement showing the wages it paid to the beneficiary.

In response, counsel submitted the petitioner's 1998 Form 1120S, U.S. Income Tax Return for an S Corporation and a 1998 Form 1099 Miscellaneous Income statement showing payments the petitioner made to the beneficiary during that year.<sup>3</sup>

The tax return shows that the petitioner is a corporation, that it incorporated on June 5, 1996, and that it reports taxes pursuant to cash accounting and the calendar year. During 1998 the petitioner declared a loss of \$26,497 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The Form 1099 shows that during 1998 the petitioner paid the beneficiary \$15,600 in nonemployee compensation.

The acting director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage during 1998 and, on October 22, 2004, denied the petition.

On appeal, counsel submits (1) the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) a 2002 Form 1099 Miscellaneous Income statement showing that the petitioner paid the beneficiary \$45,000 during that year, (3) a letter dated November 3, 2004 from the petitioner's accountant, and (4) counsel's own letter dated November 9, 2004.

The 2002 tax return shows that during that year the petitioner declared ordinary income of \$60,040. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The accountant's letter states that the petitioner and its predecessor company<sup>4</sup> have never failed to meet their obligations. The accountant cites the petitioner's gross receipts and the increase in its gross receipts during

---

<sup>2</sup> The service center misstated the evidence that would satisfy the requirements of 8 C.F.R. § 204.5(g)(2). This office notes that the petitioner was obliged to provide copies of annual reports, federal tax returns, or audited financial statements demonstrating its continuing ability to pay the proffered wage beginning on the priority date. The service center implied that the petitioner need only demonstrate its ability to pay the proffered wage during 1998 and not during the ensuing years. Further, the service center indicated that the petitioner could demonstrate its ability to pay the proffered wage with reviewed financial statements.

<sup>3</sup> The Form 1099 shows that the petitioner paid the beneficiary as a contractor rather than an employee during 1998, and is an acceptable substitute for the requested W-2 form.

<sup>4</sup> Evidence in the record shows that the business was a partnership until a partner died during 1996. The remaining partner then reformed the petitioner as a sole owner subchapter S corporation. Because this change in style of ownership occurred before to the priority date no successorship issues are raised.

recent years as indices of its ability to pay the proffered wage. The accountant states that during 1998 the petitioner "changed its direction to better meet the demands of the marketplace and experienced a loss during this period of adjustment." Finally, the accountant stated that the petitioner has used accelerated depreciation on its machinery and equipment and that its market value exceeds its book value.

In his letter of November 9, 2004 counsel stated that the Department of Labor established the proffered wage in this case on July 3, 2002, and that the petitioner paid the beneficiary \$45,000 during that year. Although the proffered wage in this matter is \$56,160 the petitioner is not obliged to pay that amount to the beneficiary until the Form I-140 petition is approved. That the petitioner was not obliged to pay the beneficiary the proffered wage during any given year, however, does not demonstrate the petitioner's ability to pay it.

That the petitioner has always met its obligations is not dispositive of the issue of the petitioner's ability to pay additional wages. The petitioner is obliged to show not only that it has been able to meet its obligations but also that it is able to pay any additional amount that will be incurred by paying the beneficiary the full amount of the proffered wage. This ability must extend from the priority date to the time the beneficiary adjusts status.

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>5</sup> or otherwise increased its net income,<sup>6</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

The accountant also urges that the petitioner's annual increase in gross receipts since the priority date is an index of its ability to pay the proffered wage. Initially, this office notes that the only evidence submitted in support of the accountant's assertion that the petitioner has enjoyed an annual increase in gross receipts is the 2002 tax return. That single tax return is insufficient to demonstrate that the petitioner's have continually grown, rather than that the petitioner had a single year with higher gross receipts than it had during 1998. Further, an increase in gross receipts, like high gross receipts during an individual year, is insufficient to show an ability to pay additional wages during any years when the petitioner suffered a loss or low net income.

The accountant states that the petitioner's loss during 1998 was occasioned by a period of adjustment occasioned by a change in direction. Pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) a petitioner's losses or low profits during a given year can be overlooked in determining its ability to pay the proffered wage if they are shown to be uncharacteristic and unlikely to recur.

---

<sup>5</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>6</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

The accountant's description is too abstract, however, to demonstrate that the petitioner's loss during 1998 was the result of unusual circumstances and is unlikely to recur, or even that 1998 was an unusually unprofitable year for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel's reliance on the compiled financial statements submitted in this case is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed the beneficiary during 1998 and 2002 and paid him \$15,600 and \$45,000 during those years, respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2). Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage.<sup>7</sup> The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

---

<sup>7</sup> In his letter the accountant states that the book value of the petitioner's assets is less than their market value, implying that he believes that the petitioner's total assets are an index of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>8</sup> shown on lines 16(d) through 18(d). 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.

The service center was incorrect in implying that the beneficiary was not obliged to demonstrate its ability to pay the proffered wage during the years since 1998. The petitioner should have been required to provide evidence pertinent to each ensuing year for which evidence was available. Because the service center misstated the petitioner's obligation, however, this office will analyze only the two years for which evidence was submitted.

The proffered wage is \$56,160 per year. The priority date is January 14, 1998.

The petitioner established that it paid the beneficiary \$15,600 during 1998 and is obliged to demonstrate the ability to pay the remaining \$40,560 during that year. The petitioner declared a loss during 1998. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were available to it during 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

The petitioner demonstrated that it paid the beneficiary \$45,000 during 2002 and is obliged to demonstrate the ability to pay the remaining \$11,160 during that year. The petitioner declared ordinary income of \$60,040 during that year. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1998. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis.

The petitioner was also obliged to demonstrate its ability to pay the proffered wage during the other years since 1998. The service center, however, misstated that obligation, and the petitioner, as a result, provided evidence pertinent to only 1998 and 2002. Because the petitioner was misinformed about its obligation, and because the decision of denial did not rely upon the petitioner's failure to demonstrate its ability to pay the proffered wage during the remaining years, today's decision does not rely on that failure, even in part. In the event that the petitioner attempts to overcome today's decision on a motion, however, it should provide copies of annual reports, federal tax returns, or audited financial statements to show its ability to pay the proffered wage during each of the salient years.

---

<sup>8</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.



Page 7

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.