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U.S. Citizenship
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Services

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MAR 10 2005

[Redacted]

FILE:

WAC-03-130-52940

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:

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:

[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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting and product development company. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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 states that the regulation pertaining to the petitioner's ability to pay the proffered wage does not require the employer to demonstrate net profit in order to show its ability to pay the proffered wage.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 January 12, 2000. The proffered wage as stated on the Form ETA 750 is \$70,000.00 annually. On the Form ETA 750B, signed by the beneficiary on December 2, 1999, the beneficiary claimed to have worked for the petitioner beginning in July 1999 through the date of the ETA 750B.

On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$2.1 million, and to currently have 27 employees, worldwide. The item for the petitioner's net annual income was left blank on the petition.

In support of the petition, the petitioner submitted the following: a letter dated January 28, 2003 from its executive vice president and chief financial officer confirming a job offer to the beneficiary; copies of letters from three former employers of the beneficiary confirming the beneficiary's employment as follows:

██████████ Company Ltd, Bangalore, India, from November 18, 1991 to April 7, 1998, ██████████ Corporation, Santa Clara, CA, from July 13, 1998 through September 24, 1998, and ██████████ San Jose, CA, from February 25, 2000 to December 31, 2002; a copy of a letter dated December 18, 2000 from the petitioner's human resources coordinator stating the beneficiary's employment from October 11, 1999 to December 8, 2000; a copy of an Evaluation Report on the beneficiary's education by the Foundation for ██████████ Inc., dated December 1, 1999; a copy of a Bachelor of Engineering degree awarded to the beneficiary in August 1990 by the University of Mysore, India; a copy of the beneficiary's professional resume; a copy of the Form 1120 U.S. Corporation Income Tax Return of U.S. Interactive and Subsidiaries for 2000; a copy of an I-129 approval notice dated December 31, 2002 issued to the petitioner for the beneficiary; a copy of an I-94 card of the beneficiary showing an admission to the United States at Miami on March 14, 2003; a copy of an I-94 card of the beneficiary showing an admission to the United States at Miami on February 14, 2003; copies of several pages of the beneficiary's Indian passport; and a copy of an Agreement and Plan of Merger dated February 1, 2001 among the petitioning corporation, the petitioner's corporate parent, and ██████████, Inc., and with several shareholders of ██████████ Inc., also as parties to the merger agreement.

The director issued a request for evidence (RFE) dated May 15, 2003 requesting additional evidence pertaining to the petitioner's ability to pay the proffered wage and pertaining to the beneficiary's education and training.

In response to the RFE, the petitioner submitted a letter dated June 9, 2003 from the petitioner's executive vice president and chief financial officer and the following documents: a copy of a "Pro Forma Return," Form 1120 U.S. Corporation Income Tax Return of U.S. ██████████ Corp. (the petitioner) for 2001; copies of two Form 7004 Applications for Extension of Time to File Corporation Income Tax Return of U.S. Interactive, Inc. & Subsidiaries for 2001 and 2002; a copy of an International Service Purchase Order to the petitioner dated January 22, 2003 from ██████████ Limited; a copy of page one of a statement dated May 30, 2003 by the Bank of America, San Francisco, CA for accounts of the petitioner with that bank; and an additional copy of a Bachelor of Engineering degree awarded to the beneficiary in August 1990 by the University of Mysore, India, with accompanying copies of course transcripts.

The director issued a second RFE dated July 2, 2003 requesting further evidence pertaining to the petitioner's ability to pay the proffered wage.

In response to the second RFE, the petitioner submitted a letter dated September 15, 2003 from the petitioner's executive vice president and chief financial officer and a copy of the Form 1120 U.S. Corporation Income Tax Return of U.S. ██████████ and Subsidiary for 2002.

In a decision dated October 29, 2003, 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 accordingly denied the petition.

On appeal, counsel submits a brief in the form of a letter dated December 23, 2003 and the following evidence: a copy of a letter dated December 16, 2003 from bankruptcy counsel for U.S. ██████████ Inc., and U.S. ██████████ Corp.; copies of selected provisions of Title 11, Bankruptcy, of the United States Code; a copy of an Order Conforming Debtors' Second Amended Consolidated Plan of Reorganization issued on September 11, 2001 by the United States Bankruptcy Court for the District of Delaware in the case captioned U.S. ██████████ Corp. (Delaware), *et al.*, Case No. 01 0224 (MFW); an Order issued on January 22, 2003 by the Bankruptcy Court in the same case number, but captioned U.S. ██████████, Inc., *et al.*; copies of the petitioner's Form DE 6 Quarterly

Wage and Withholding Reports from the first quarter of 2000 through the third quarter of 2003; a copy of the petitioner's Form DE 678X Tax and Wage Adjustment Form for the year 2000, dated July 13, 2001; copies of Form W2 Wage and Tax Statements for the beneficiary for 1999 and 2000; copies of three U.S. [REDACTED] Corp. 401(k) Plans for the years 1999-2000, 2000-2001, and 2001-2002, including auditors' reports for 2000, 2001 and 2002; a copy a statement dated November 28, 2003 by the Bank of America, San Francisco, CA for accounts of the petitioner with that bank; and a copy of the Form 1120 U.S. Corporation Income Tax Return of U.S. [REDACTED] Corp. (the petitioner) for 2000, covering the period from January 1, 2000 to March 3, 2000.

Counsel states on appeal the petitioner is not required to demonstrate net profit in order to show its ability to pay the proffered wage. Counsel states that the petitioner and its corporate parent filed voluntary petitions for Chapter 11 bankruptcy reorganization in the U.S. Bankruptcy Court for the District of Delaware in January 2001, and that the petitioner and its corporate parent successfully completed a reorganization and were awaiting the bankruptcy court's final decree as of the December 23, 2003 date of counsel's submissions to the AAO. Counsel states that throughout the bankruptcy proceedings the petitioner has paid all employees their full salaries and benefits, including paying the beneficiary at a rate higher than the proffered wage during periods when the beneficiary was employed by the petitioner.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

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, the beneficiary stated on the Form ETA 750, signed on December 2, 1999, that he was employed by the petitioner beginning in July 1999. The letter in the record dated December 18, 2000 from the petitioner's human resources coordinator states the beneficiary's employment to have been from October 11, 1999 to December 8, 2000. In that letter, the human resources coordinator states that the beneficiary was earning \$77,000.00 per year. That amount is higher than the proffered wage of \$70,000.00. However, the record before the director contained no evidence to corroborate the amount of wages paid to the beneficiary as claimed in the December 18, 2000 letter. Lacking such documentation, the evidence before the director was insufficient to establish the amount of wages paid the beneficiary in 2000. 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).

Counsel asserts in his December 23, 2003 letter that the beneficiary began a second period of employment with the petitioner in January 2003. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record before the director contained no evidence to support counsel's assertions on that point.

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. 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 record before the director contained copies of the following tax returns: a copy of the Form 1120 U.S. Corporation Income Tax Return of U.S. Interactive and Subsidiaries for 2000, with employer identification number [REDACTED] a copy of a "Pro Forma Return," Form 1120 U.S. Corporation Income Tax Return of U.S. [REDACTED] Corp. for 2001, with employer identification number [REDACTED] and a copy of the Form 1120 U.S. Corporation Income Tax Return of U.S. Interactive and Subsidiary for 2002, with employer identification number [REDACTED]

In his brief, counsel states that the company which filed the ETA 750 labor certification application, [REDACTED] Inc., became a subsidiary of the petitioner U.S. [REDACTED] Corp. through a merger agreement dated February 1, 2000. A copy of that agreement is in the record. Counsel states that U.S. [REDACTED] Corp. itself became a subsidiary of U.S. [REDACTED] Inc., through that same merger agreement. Counsel's summary of the merger process is somewhat supported by the merger agreement in the record, but in some respects the language of the merger agreement differs with counsel's summary, notably with regard to the names of the corporations involved in the merger.

According to the merger agreement, the corporations involved in the merger were "U.S. [REDACTED] Inc., a Delaware corporation, [REDACTED] Co., a Delaware corporation and a wholly owned subsidiary of USI, and [REDACTED], Inc., a California corporation. Also identified as parties to the merger agreement were four individual shareholders of [REDACTED] Inc. (*See Agreement and Plan of Merger*, page 1).

Although the date of the merger agreement is February 1, 2000, the agreement does not specify the actual closing date of the merger, which was to be set by the parties after the satisfaction of some conditions or in the alternative was to be set by another agreement among the parties. The record before the director contained no evidence on when the merger actually occurred, or even on whether the merger did occur at all.

Under the merger agreement, [REDACTED] Inc. was to be merged into [REDACTED] Co. After that action, [REDACTED] Inc. (a California corporation) would then be dissolved as a corporate entity. Following the merger, [REDACTED] Co. was to change its name to [REDACTED], Inc. The result would be two remaining corporations, U.S. [REDACTED], Inc. and its subsidiary, [REDACTED], Inc., both Delaware corporations. (*See Agreement and Plan of Merger*, page 5, Article II, section 2.1).

In counsel's brief, counsel states the name of the parent corporation is U.S. Interactive, Inc. and that the name of the subsidiary is U.S. [REDACTED] Corp. Counsel's statement on this point suggests that the name change of [REDACTED] Co. after the merger differed from that stated in the merger agreement. However, the record before the director contained no documentation of the name change of [REDACTED] Co.

Counsel's brief states that U.S. [REDACTED] Inc. and its subsidiary U.S. [REDACTED] Corp. sought to reorganize under Chapter 11 of the bankruptcy code by voluntary filings on January 22, 2001 in the U.S. Bankruptcy Court for the District of Delaware. The record before the director, however, contained no documentation of any bankruptcy filing.

Assuming that the merger was actually completed, the merger agreement in the record would be sufficient to establish that [REDACTED], Inc., a California corporation which filed the ETA 750 application, was merged into a subsidiary of U.S. [REDACTED] Inc. and that therefore the subsidiary became a successor in interest to [REDACTED] Inc., under the criteria set forth in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). However, the record before the director contained no evidence to definitively establish that the name of the successor in interest was U.S. Interactive Corp.

As noted above, the record before the director contained tax returns of the parent corporation, U.S. [REDACTED], Inc., for 2000 and 2002. The return for 2000 is identified as a consolidated return, but it is incomplete, lacking supporting statements referred to in the return and lacking any Form 851, Affiliations Schedule, which is required with each consolidated income tax return. The name on the return for 2000 is "U.S. [REDACTED]" indicating during 2000 the parent had more than one subsidiary. Because of the absence of a Form 851, the names of those subsidiaries are not identified in the 2000 return.

The only return for the year 2001 in the record before the director was a copy of a "Pro Forma Return," Form 1120 U.S. Corporation Income Tax Return of U.S. [REDACTED] Corp. for 2001, with employer identification number 23-3024792. That corporation is the subsidiary which counsel states is the successor corporation to [REDACTED] Inc. The designation of "Pro Forma Return" appears to indicate that this document is not an actual tax return which was filed with the Internal Revenue Service, but rather an accounting document intended to show the tax liability which the company would have incurred if it had filed its own return. On page one of the copy in the record, the only the top two-thirds of the page have been copied, down as far as line 30 showing taxable income. The portion of the page below line 30 has not been copied and the handwritten words "Pro Forma Return" appear in that blank portion of the page.

The consolidated returns in the record of the parent corporation for 2000 and 2002 suggest that for the year 2001 the parent also filed a consolidated return, but no copy of any such consolidated return for 2001 is in the record. Nor does the record contain any explanation for submitting a copy of the "Pro Form Return" of the subsidiary as evidence, rather than submitting a copy of the parent's actual consolidated tax return for 2001.

The tax return of the parent corporation for 2002 includes a Form 851, which states that during that year the parent corporation has only one subsidiary, U.S. [REDACTED] Corp. The name on the tax return for 2002 is "U.S. [REDACTED]."

In the instant petition, the petitioner is a subsidiary corporation, but the tax returns of the parent for 2000 and 2002 do not show separately the taxable income of any subsidiary. For the year 2001 the record contains the "Pro Forma Return" of the subsidiary, but no copy of an actual tax return, as required by the regulation at 8 C.F.R. § 204.5(g)(2). For the foregoing reasons, the tax returns in the record before the director would be insufficient to establish the petitioner's ability to pay the proffered wage during the relevant period, even if the figures on those returns indicated strong financial figures for the corporations named on those returns.

The regulation at 8 C.F.R. § 204.5(g)(2) allows annual reports or audited financial statements as alternative forms of acceptable evidence. Such evidence would have been appropriate if the petitioner filed no separate tax returns in its own name. Nonetheless, the petitioner submitted no copies of annual reports or audited financial statements for the record prior to the decision of the director.

Even if the tax returns in the record before the director were acceptable evidence, the information on those returns would be insufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

The Form 1120 tax return of U.S. [REDACTED] and Subsidiaries for 2000 shows taxable income before net operating loss deduction and special deductions on line 28 as -\$45,310,080.00. The Form 1120 "Pro Forma Return" of U.S. [REDACTED] Corp. for 2001 shows taxable income on line 28 as -\$4,052,967.00. The Form 1120 tax return of U.S. [REDACTED] for 2002 shows taxable income on line 28 as -\$860,527.00. Since each of those figures is negative, those figures fail to establish the petitioner's ability to pay the proffered wage during the relevant period.

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 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 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 tax returns in the record before the director yield the following amounts for net current assets: U.S. [REDACTED] -\$6,831,194.00 for the end of 2000, U.S. [REDACTED] Corp., \$591,659.00 for the end of 2001, U.S. [REDACTED], -\$1,123,454.00 for the end of 2002. The net current assets of U.S. [REDACTED] Corp. for the end of 2001, shown on its "Pro Forma Return," are positive and are higher than the proffered wage. However, the net current assets on the consolidated returns of the parent corporation for 2000 and 2002 are negative, and those figures therefore fail to establish the petitioner's ability to pay the proffered wage during those years.

The evidence before the director included a copy of page one of a statement dated May 30, 2003 by the Bank of America, San Francisco, CA for accounts of the petitioner with that bank. However, 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. 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. In the instant case, the bank statement shows total balances of \$1,105,425.95 in the petitioner's accounts as of May 30, 2003. That date was near the end of the period when the petitioner was operating under bankruptcy protection, according to counsel's brief. The fact that the petitioner had substantial bank balances on May 30, 2003 is not sufficient to establish that it had the ability to pay the proffered wage during the prior years.

In his decision, the director treated each of the tax returns in the record as if it was a tax return of the petitioner. The director erred in failing to note the different names and the two different employer identification numbers on those returns, and in failing to note that the return for 2001 was not an actual tax return but a "Pro Forma Return." The director therefore erred in considering those tax returns as acceptable evidence.

Concerning the director's analysis of the tax returns in the record, the director correctly found that the net income shown on each of those returns was negative, and that those figures therefore failed to establish the petitioner's ability to pay the proffered wage during those years. The director also correctly calculated the year-end net current assets shown on each return in the record, and correctly found that those figures also

failed to establish the petitioner's ability to pay the proffered wage during the relevant period. Although the director erred in viewing the tax returns in the record as acceptable evidence, the director's decision to deny the petition was correct, for the reasons discussed above.

On appeal, counsel submits additional evidence. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director. It may be noted that the record before the director closed on September 26, 2003, with the petitioner's submissions in response to the second RFE. Nearly all of the documents submitted on appeal are dated prior to that date, with the exception of a copy of the petitioner's DE 6 Quarterly Wage and Withholding Report for the third quarter of 2003 and a letter dated December 16, 2003 from the petitioner's counsel in bankruptcy describing the bankruptcy proceedings from January 22, 2001 through the date of the letter. Most of the information in the letter from bankruptcy counsel, however, was available to the petitioner before the record closed on September 26, 2003.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by two RFEs issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I&N Dec. 764.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director.

Documentation corroborating the amount of compensation paid to the beneficiary in 2000 and in 2003 was among the evidence submitted on appeal. Copies of the petitioner's Form DE 6 Quarterly Wage and Withholding Reports in the record for the four quarters of 2000 show compensation paid to the beneficiary in the amounts of \$16,041.67 for the first quarter, \$23,499.98 for the second quarter, \$22,999.98 for the third quarter, and \$18,070.24 for the fourth quarter, for total compensation of \$80,611.87 during 2000. That same amount of \$80,611.87 is also shown on the beneficiary's Form W2 Wage and Tax Statement for 2000 issued by the petitioner. That amount is higher than the proffered wage of \$70,000.00, and therefore the DE 6 reports for 2000 and the beneficiary's W2 statement for 2000 would be sufficient to establish the petitioner's ability to pay the proffered wage during 2000, which is the year of the priority date.

Counsel's assertions about the beneficiary's second period of employment with the petitioner beginning in January 2003 are supported in the evidence submitted on appeal by the petitioner's Form DE 6 Quarterly Wage and Withholding Reports for the first three quarters of 2003, which show compensation paid to the beneficiary in the amounts of \$11,442.32 for the first quarter, \$17,500.02 for the second quarter, and \$17,500.01 for the third

quarter, for total compensation of \$46,442.35 during 2003. The amounts paid to the beneficiary during the second and third quarters were at the annual rate of \$70,000.06, which is nearly equal to the proffered wage, the slight difference apparently due to arithmetic rounding during calculations.

Although the DE 6 reports and beneficiary's W2 statement for 2000 would be sufficient to establish the petitioner's ability to pay the proffered wage during the periods when the beneficiary was on the petitioner's payroll, the gap in the beneficiary's employment with the petitioner from December 2000 to January 2003 prevents any finding based only on the DE 6 reports and on the beneficiary's W2 statement for 2000 that the petitioner had the ability to pay the proffered wage during the entire period relevant to the instant petition.

The DE 6 reports also contain information on the number of the petitioner's employees each month. The reports in the record show that the number of the petitioner's employees dropped greatly after the middle of the year 2000. Each quarterly DE 6 report states the number of employees as of the 12th of the month for each of the three months covered by that report, except that the report for the second quarter of 2002 omits the monthly totals. The numbers of employees shown on those reports for each month are as follows:

2000:	Number of employees	2002	Number of employees
January	155	January	50
February	168	February	47
March	174	March	41
April	180	April	40 (total in 2 nd qrtr)
May	192	May	not stated
June	196	June	not stated
July	186	July	11
August	184	August	10
September	180	September	10
October	158	October	9
November	158	November	9
December	155	December	9
2001		2003	
January	139	January	8
February	118	February	9
March	112	March	9
April	81	April	8
May	75	May	8
June	74	June	9
July	63	July	8
August	62	August	7
September	63	September	8
October	63		
November	64		
December	62		

The DE 6 reports show that the beneficiary was employed by the petitioner during 2000, when the petitioner had at least 155 employees on the payroll each month, and that that the beneficiary then left employment with the petitioner, as did nearly all of the petitioner's other employees during the next three years. When the beneficiary rejoined the petitioner in the first quarter of 2003, the petitioner had lost more than 94% of the

employees whom it had in December 2000. These figures suggest that the petitioner did not have the ability to bring the beneficiary back onto the payroll and to pay him the proffered wage in 2001 and 2002.

The letter dated December 16, 2003 from bankruptcy counsel for the petitioner explains the bankruptcy proceedings of the petitioner and its parent corporation. The letter provides a clear and succinct summary of the Chapter 11 bankruptcy reorganization process and of the specific reasons why the petitioner and its parent corporation sought reorganization under bankruptcy protection. The letter states that the petitioner and its parent undertook to meet all salary and benefits obligations to the employees of each company, and the record contains no information which would cast doubt that the companies did in fact do so. However the letter does not address the reasons why the number of the petitioner's employees declined so significantly during the bankruptcy reorganization process. The most likely inference from that decline, of course, is that the petitioner was not generating sufficient income for the size of its payroll, and was forced to end the employment of most of its employees for financial reasons.

The letter from bankruptcy counsel describes an apparently successful reorganization of both companies, a description corroborated by copies of two court orders in the record from the bankruptcy court. Nonetheless, the DE 6 reports discussed above indicate that as the petitioner prepared to emerge from bankruptcy protection it was operating at a greatly reduced level of activity. Moreover, one of the orders from the bankruptcy court indicates that some of the previous creditors of the petitioner and its parent were to be paid only one cent per dollar on their claims against the petitioner and its parent. (See United States Bankruptcy Court for the District of Delaware, Case No. [REDACTED] (MFW), Order, January 22, 2003).

Although the evidence concerning the bankruptcy filings of the petitioner and its corporate parent is sufficient to establish that the petitioner was shielded from most of the liabilities it had incurred prior to the bankruptcy filing on January 22, 2001, that fact is insufficient to establish that the petitioner had the ability to pay the proffered wage during the period relevant to the instant petition.

The evidence submitted for the first time on appeal also includes a copy of the Form 1120 U.S. Corporation Income Tax Return of U.S. [REDACTED] Corp. (the petitioner) for 2000, covering the period from January 1, 2000 to March 3, 2000. In his brief, counsel states that this return pertains to the taxes of [REDACTED], Inc. for the portion of 2000 prior to its merger into U.S. [REDACTED] Corp.

The Form 1120 tax return of U.S. [REDACTED] Corp. for 2000 shows taxable income before net operating deduction and special deductions, on line 28, as \$20,196.00. A proportionate amount of the proffered wage for the period of about two months covered by that tax return would be approximately \$11,667.00. The petitioner's net income for the first two months of 2000 was therefore sufficient to pay the proportional amount of the proffered wage, even without crediting payments the beneficiary apparently received during the first two months of 2000, as indicated on the DE 6 report for the first quarter of 2000. Calculations based on the Schedule L attached to that return yields the figure of \$6,182,977.00 as the net current assets of the petitioner as of the March 3, 2000 ending date covered by that return. That figure also would be sufficient to establish the petitioner's ability to pay the proffered wage during the first two months of 2000. However, the petitioner's ability to pay the proffered wage during 2000 is more directly established by the DE 6 evidence discussed above, which shows that the beneficiary was on the petitioner's payroll for nearly all of 2000 and that he received compensation exceeding the proffered wage during that year.

The evidence newly submitted on appeal also includes copies of three U.S. [REDACTED] Corp. 401(k) Plans for the years 1999-2000, 2000-2001, and 2001-2002, including auditors' reports for 2000, 2001 and 2002. Audited financial statements are evidence specifically allowed by the regulation at 8 C.F.R. § 204.5(g)(2).

However, the audited financial statements submitted on appeal do not pertain to the petitioner's overall financial condition, but only to the 401(k) plan administered by the petitioner on behalf of its employees. Nothing in those reports indicates that funds in the plan were available to the petitioner for its operating expenses. Therefore the auditors' reports fail to provide evidentiary support to establish the petitioner's ability to pay the proffered wage.

The evidence submitted on appeal also includes a copy of a statement dated November 28, 2003 by the Bank of [REDACTED], San Francisco, CA for accounts of the petitioner with that bank. That statement shows total balances of \$833,890.65 in the petitioner's accounts as of November 28, 2003. The statement submitted on appeal has the same evidentiary limitations discussed above with regard to the May 30, 2003 statement submitted previously. The more recent statement tends to show that the petitioner remained a stable business six months after the earlier statement, since the petitioner still had substantial balances in its accounts. But even in conjunction with the earlier bank statement, the petitioner's bank statement dated November 28, 2003 is not sufficient to establish that the petitioner had the ability to pay the proffered wage during the prior years.

For the foregoing reasons, the evidence submitted on appeal would be 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, even if that evidence was properly before the AAO.

In summary, the evidence submitted for the record prior to the director's decision is 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. No tax returns in the name of the petitioner were submitted prior to the director's decision, nor were any annual reports or audited financial reports submitted, as required by 8 C.F.R. § 204.5(g)(2). Furthermore, the information in the evidence which was submitted to the director failed to show that the petitioner had the ability to pay the proffered wage during the relevant period.

The petitioner's evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I&N Dec. 764. But even if that evidence were properly before the AAO, that evidence would be insufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

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.