

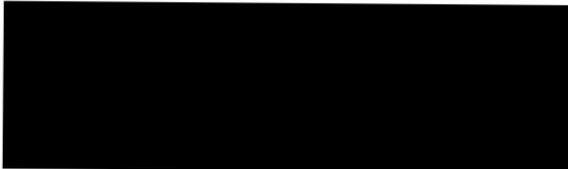
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**U.S. Citizenship  
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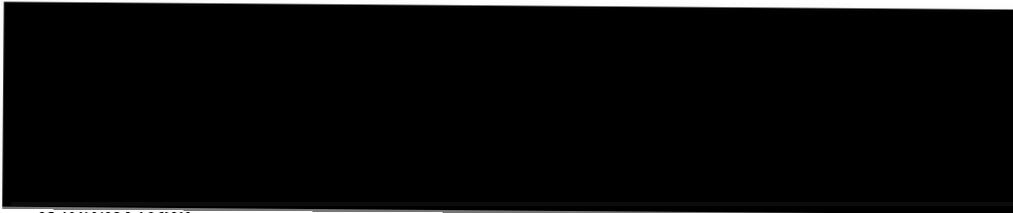
Date: APR 30 2007

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, Chief  
Administrative Appeals Office

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

The petitioner is a software development and consulting business. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 based on the beneficiary's wages, the petitioner's net income or the petitioner's net current assets for tax year 2003 and continuing until the beneficiary obtained legal residency. The director rejected the use of the petitioner's amended 2003 and 2004 tax returns as the new accounting system was not in effect at the time the petition was initially filed, and the record did not indicate that the IRS had accepted the new accounting methodology and amended returns. The director also noted that the petitioner had filed 13 I-140 petitions since January 1, 2003 and 39 I-129 petitions since January 1, 2003 that would also affect the petitioner's ability to pay the proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on October 13, 2003. The proffered wage as stated on the Form ETA 750 is \$62,000 per year. The Form ETA 750 states that the position requires four years of college with a

bachelor's degree or foreign academic equivalent in computer science or mechanical engineering or related fields. The ETA 750 specifies one year of work experience in the proffered position or one year of experience in a related occupation of programmer, programmer analyst, or related experience.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. On appeal, counsel submits a second letter from ██████████ Columbus, Ohio.<sup>2</sup> In his letter, ██████████ examines when permission is required from the IRS for changes in methods of accounting practices for tax returns, and other related issues. ██████████ further notes that the director's decision on the instant petition established that Citizenship and Immigration Services (CIS) accepts that only the prorated portion of the annual proffered wage need be demonstrated in the first year of the priority date. ██████████ also states that the difference in proffered wages and actual wages for tax years 2003, 2004 and the 2005 year to date are \$240,489, \$142,675, and \$20,070. ██████████ then notes that the petitioner's net income, as indicated by Schedule M-1 and the petitioner's net current assets documented on the petitioner's Schedules L, were \$123,774 and \$338,627 respectively in tax year 2003, and \$102,568 and \$247,864 respectively in 2004. ██████████ states that in tax years 2003 and 2004 the petitioner's net current assets were more than the cumulative difference for all the beneficiaries combined, and that the available cash on hand for tax year 2005 to date is greater than the cumulative difference.

Counsel submits a one page document entitled "ability to pay calculations" that examines the wages of seven individuals with regard to priority dates, proffered wages, prorated wages for priority years, wages paid in 2003 (based on prorated wages), wages paid in 2004 and wages as of 2005. Finally on appeal, counsel submits the beneficiary's wage slip for October 7, 2005 that indicates a biweekly wage of \$2,500, with year-to-date wages of \$38,921.75.

The record also contains the petitioner's Forms 1120 for tax years 2003 and 2004. An accompanying Form 1120X for both documents indicates that amended tax returns was filed with the IRS on June 29, 2005. In the Forms 1120X, it is indicated that changes were made to Schedules L, M-1 and M-2. The two amended tax returns indicate the petitioner had taxable income before net operating loss deduction and special deductions of \$8,117 in 2003 and of \$8,678 in tax year 2004.<sup>3</sup>

In an accompanying letter written by ██████████ that the petitioner submitted in response to the director's request for further evidence, ██████████ explained that the petitioner had changed its accounting basis and now includes the "hybrid" method of accounting, as illustrated by the amended 2003 and 2004 Forms 1120.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> The state of Ohio licensing center indicates that ██████████ CPA license expired on December 31, 2005. *See* <https://license.ohio.gov/lookup/default.asp>. (Available as of April 12, 2007).

<sup>3</sup> The original tax returns for tax years 2003 and 2004 to which ██████████ referred in the petitioner's response to the director's request for further evidence are not found in the record. The director, in his decision, also referred to both the original tax returns and the amended tax returns. The AAO has reviewed the petitioner's original tax return for tax year 2003 that was contained in another I-140 petition submitted by the petitioner, and will comment on these returns further in these proceedings.

██████████ then stated that in the first year in which the priority date is established, the petitioner only needs to demonstrate that it has the ability to pay the wages due to beneficiary from the priority date to the end of the fiscal year. ██████████ then analyzed what he described as published AAO decisions issued in 2004. ██████████ included Internet excerpts of the contents of the unidentified AAO decisions, and stated that the majority of them only required the petitioner to demonstrate ability to pay the beneficiary's wages as of the priority date to the end of the priority year, in the priority year.<sup>4</sup> ██████████ also apparently prepared a document entitled "Ability to Pay Calculations" that examines the priority dates; the proffered wages; the prorated proffered wages; the actual wages paid in 2003 and 2004, and, finally, the difference between the prorated salaries and the actual wages for 2003 and 2004 for six beneficiaries.<sup>5</sup> ██████████ refers to a CIS interoffice memo written by William Yates (the Yates memo) in support of his assertion that items such as net income and net current assets can be examined to determine the petitioner's ability to pay the proffered wage.<sup>6</sup> Finally ██████████ in reference to the amended tax returns submitted to the record states that the best measure of the petitioner's profitability is line 1, Schedule M-1, of the petitioner's tax return. For tax year 2003 and 2004, ██████████ described the petitioner's net income based on line 1, Schedule M, as \$123,774 and \$102,568. ██████████ also stated that based on the amended tax returns, the petitioner's net current assets for tax year 2003 were \$338,627 and for tax year 2004 were \$247,864.

The record also contains Form 941, Employer's Quarterly Federal Tax Return for the first quarter of 2005, along with W-2 Forms for the beneficiary and other employees for tax years 2003 and 2004. These documents indicate the petitioner paid the beneficiary \$15,600 in 2004. Counsel also submitted the petitioner's Form 941 for the first quarter of 2005, which indicated the petitioner had eleven employees, with combined wages, tips and other compensation of \$164,246.15. The record also contains a one-page breakout of employee information apparently generated by the petitioner for the first quarter of 2005 that lists thirteen employees and their quarterly salaries. The record also contains the beneficiary's individual income tax return, Form 1040, for tax year 2004 that indicated the beneficiary received wages or a salary of \$44,836 in tax year 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of approximately \$500,000, and to currently employ twelve workers. On the Form ETA 750B, signed by the beneficiary on October 9, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in stating that the amended tax returns were rejected as credible evidence. Counsel states that the second letter from ██████████ explains that according to tax law, the petitioner did not need permission to amend its tax returns for the purpose of calculating taxable income, and that CIS cannot question the amended returns for the petitioner as any amended tax return submitted to the IRS supersedes previous tax returns. Counsel states that the returns were amended to clarify the issue of the petitioner's ability to pay the proffered wages, not to confuse this issue. Counsel also notes that ██████████

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<sup>4</sup> In other words, ██████████ states that the petitioner may pro-rate the wages to be paid to the beneficiary during the priority date year to only include the wages as of the priority date and to the end of the year.

<sup>5</sup> The beneficiary is one of the six employees identified in this document.

<sup>6</sup> Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

provides a table to calculate the petitioner's ability to pay the petitioner's I-140 petitions that have been denied, up to tax year 2005.

Counsel also asserts that the director did not review any of the financial information provided in response to the director's request for further evidence. Counsel states that the petitioner submitted W-2 forms for all its employees which indicates the petitioner is a financially viable company with the ability to pay the proffered wage. Counsel states that the CIS did not mention these W-2 forms in its decision, nor did it address the fact that the petitioner had paid over \$591,000 in wages in tax year 2004.

Counsel also states that the petitioner's 13 I-140 petitions and 39 H-1Bs submitted to CIS in the last two years are hardly excessive. With regard to the H-1B petitions, counsel states that many of these petitions were for extensions for the same employees, and that the petitioner, like other companies in its competitive business, files more H-1B petitions than the number of individuals that actually join and stay at the company. Counsel notes that the petitioner provided the beneficiary's most recent pay voucher on appeal. Counsel states that the beneficiary presently earns an income at a rate equal to \$65,000 a year, which is more than the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

in his letters submitted to the record refers to the Yates memo which refers to the beneficiary's wages, and the petitioner's net income and net current assets as the three criteria by which CIS adjudicators can evaluate the petitioner's ability to pay the proffered wage. The AAO consistently adjudicates appeals in accordance with the Yates memorandum, and will do so in these proceedings in its examination of the petitioner's ability to pay the proffered wage.

also referred to the use of prorated wages when calculating the petitioner's ability to pay the proffered wage. In his letter submitted in response of the director's request for further evidence, refers to excerpts taken from the Internet of several AAO decisions that analyzed whether a petitioner could pay the proffered wage if prorated wages during the priority date year were considered. assertions are not persuasive. First, although does describe the decisions to which he refers as "published," he does not provide any published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore the excerpts to which refers do not appear to use the concept of prorated wages in their denial of the referenced petitions, but rather mentioned the issue as a hypothetical issue. Third, with regard to the issue of prorated wages, we will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay

stubs, the petitioner has not submitted such evidence for the beneficiary. [REDACTED] calculations contained in the initial document "Ability to Pay Calculations" submitted to the record in response to the director's request for further evidence identify four claimed beneficiaries who did not work in tax year 2003, and does not document any specific periods of employment worked by the remaining two beneficiaries. The assertions of counsel and of [REDACTED] with regard to the claimed proffered wages and prorated wages earned by other beneficiaries do not constitute evidence. 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). Finally the beneficiary stated in the Form ETA 750 that he had not worked for the petitioner as of the date he signed the form in October 2003, and the record contains no evidence that the beneficiary actually work for the petitioner during the 2003 priority year. Thus, the question of examining the prorated wages paid to the beneficiary in tax year 2003 is moot.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary wages in 2003, the priority year. It has established that it employed and paid the beneficiary \$15,600 in tax year 2004. The petitioner also submitted a pay slip for the beneficiary for pay period May 23, 2005 to June 5, 2005 with a biweekly wage of \$2,500 noted on the document. This pay rate is slightly higher than the proffered wage,<sup>7</sup> and along with the beneficiary's later pay stub submitted on appeal, appears to establish that during tax year 2005, the petitioner paid the beneficiary a wage equal to or greater than the proffered wage.<sup>8</sup> Nevertheless, 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). The petitioner did not establish that it paid the beneficiary the proffered wage as of the 2003 priority date and to the present time. Thus the petitioner cannot establish its ability to pay the proffered wage based on wages paid to the beneficiary as of the priority date and continuing. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax year 2003 and the difference between the beneficiary's actual wages and the proffered wage in 2004, namely, \$47,400.

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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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<sup>7</sup> The biweekly wages of \$2,500 multiplied by 26 weeks equals \$65,000. The proffered wage is \$63,000.

<sup>8</sup> It is noted that the record was closed as of the petitioner's response to the director's request for further evidence on July 13, 2005, and the petitioner could not have submitted its tax return for tax year 2005. The AAO will not examine further the petitioner's ability to pay the proffered wage in 2005.

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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

Although counsel, the director, and Mr. Yousaf refer to the petitioner's amended tax returns, and indicate that previous tax returns exist, the record in the instant petition only contains the petitioner's amended returns for 2003 and 2004. The AAO, however, has examined the petitioner's original tax return for tax year 2003 in another I-140 petition filed by the petitioner, and will comment on the changes in these amended tax returns, as appropriate. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." The AAO views the petitioner's change of accounting practices and the subsequent amended tax returns as questionable, specifically with regard to the significant increases in the petitioner's net current assets based on the changed accounting procedures and reallocation of assets. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). It is also noted that the IRS requires Form 3115 to be filed when switching accounting methods. The record does not reflect that the petitioner filed any such document. These factors raise questions as to the veracity of the petitioner's amended tax returns. Thus, the AAO gives no weight to the amended tax returns. Thus, the petitioner has not submitted sufficient documentation to establish that it has sufficient net income or net current assets to pay the proffered wage.

For illustrative purposes only, the AAO will examine the amended tax returns submitted to the record. First, it is noted that the AAO does not consider line 1, Schedule M in its deliberations with regard to petitioners' net income, as suggested by [REDACTED]. The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$63,000 per year from the priority date:

In 2003, the Form 1120 stated a net income<sup>9</sup> of \$8,117.

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<sup>9</sup>The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported

In 2004, the Form 1120 stated a net income of \$8,678.

Therefore, for the years 2003 and 2004, the petitioner did not have sufficient net income to pay the 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 stated previously, the AAO does not view the petitioner's amended tax returns as sufficient evidence as to the petitioner's net income or net current assets. The AAO will only examine the petitioner's net current assets in its amended returns for illustrative purposes.

The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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>10</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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. With regard to the petitioner's original tax return for tax year 2003, the petitioner did not list any assets on Line 2, item a or b, on Schedule L, trade notes and accounts receivable, and less allowance for bad debts; however in its amended tax return for 2003, the petitioner listed \$218,500 as trade notes and accounts receivables, and \$218,500 as less allowance for bad debts, and in its amended 2004 tax returns, listed \$209,890 on its Schedule L, line 2a, as trade notes and accounts receivables, and the same amount on line 2b, allowance for bad debts. Both of these figures significantly changed the petitioner's current assets for both years. For example, prior to the amendment of the petitioner's 2003 tax return, the petitioner's net current assets for tax year 2003 were \$13,127. As stated previously such significant increases in the petitioner's net current assets do raise questions as to the veracity of the amended tax return. The tax information contained on the two amended tax returns with regard to the petitioner's net current assets is as follows:

- The petitioner's net current assets during 2003 were \$338,627.
- The petitioner's net current assets during 2004 were \$227,931.

Therefore, for the year 2003, the petitioner had sufficient net current assets to pay the beneficiary's entire proffered wage, while in tax year 2004, the petitioner had sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage, namely \$47,400. However, as the director correctly pointed out in his decision, the petitioner has filed other Immigrant Petitions for Alien Worker (Form

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on Line 28 of the Form 1120.

<sup>10</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.

I-140) for an undetermined number of beneficiaries.<sup>11</sup> Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date. The petitioner, with statements uncorroborated by evidentiary documentation, has not established that it had the ability to pay the entire proffered wage for all beneficiaries whose priority date was during tax year 2003. While the petitioner submitted W-2 forms for two employees for tax year 2003 listed on [REDACTED] unsubstantiated list of beneficiaries and wages, these wages for 2003 totaled \$76,021, with an additional \$305,979 needed to pay the proffered wages of other beneficiaries listed who did not work for the petitioner in tax year 2003. Without more clarification as to any other beneficiaries and proffered wages, this sum does not appear sufficient to pay the proffered wages of the beneficiary and all other beneficiaries for whom the petitioner submitted petitions.<sup>12</sup> On appeal, counsel states that the numerous petitions submitted to CIS for I-140 and I-129 beneficiaries are hardly excessive and that many of the I-129 petitions are for H-1B extension petitions. Nevertheless, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As stated previously the petitioner has not satisfactorily answered the questions raised with regard to the two sets of tax returns submitted to the record. *See Ho*. Furthermore the petitioner has not satisfactorily identify the actual number of beneficiaries for whom petitions have been filed, and for which the petitioner would have to pay the proffered wage during the 2003 priority year and onward.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. 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.

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<sup>11</sup> It is noted that the director in his decision stated that the petitioner had filed 13 I-140 petitions and 39 I-129 petitions, while at the most the petitioner has provided documentation on wages paid to 15 employees in tax year 2003 and 2004. Thus far, the petitioner has provided tax documentation on 11 employees in the first quarter of 2005.

<sup>12</sup> It is noted that the list of seven beneficiaries presented by counsel and the petitioner in its response to the director's request for further evidence as pending applications with priority year designation of 2003 is significantly smaller than the 13 I-140 petitions and 39 I-129 petitions noted by the director in his decision.