

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

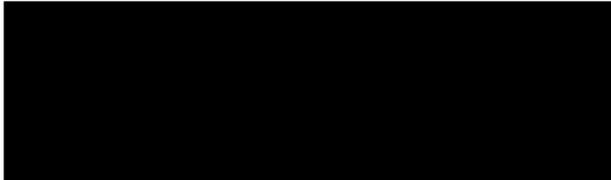
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:

EAC 06 046 50302

Office: VERMONT SERVICE CENTER

Date: OCT 01 2007

IN RE:

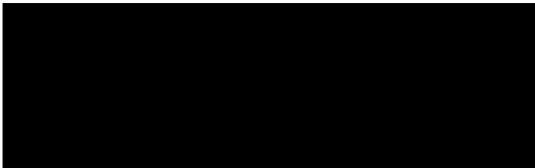
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an upholstery firm. It seeks to employ the beneficiary permanently in the United States as an upholsterer (inside). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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 the granting of preference classification to other 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 not available in the United States.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

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. 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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.65 per hour, which amounts to \$36,712 per annum. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on November 30, 2005, the petitioner claims to have been established on May 16, 1997, to currently employ 32 workers, to have a gross annual income of \$2,079,000 and to have a net annual income of \$65,000. The record contains copies of the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. They reflect that the petitioner files its federal tax returns using a standard calendar year. The returns contain the following information pertinent to the petitioner's ordinary income, current assets and liabilities, and net current assets:

	2001	2002
Ordinary Income ¹	\$ 20,378	-\$ 65,200
Current Assets (Sched. L)	\$850,568	\$ 289,038
Current Liabilities (Sched. L)	\$894,381	\$ 394,029
Net current assets	- \$ 43,813	-\$ 104,991

As set forth in the table above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

It is herein noted that the corporate petitioner identified on both the approved alien labor certification and on the Immigrant Petition for Alien Worker (I-140) is "[REDACTED]". The address shown on the labor certification, I-140 and on the tax returns is the same. The federal tax employer tax identification number is 23-2902173. The 2001 tax return is incomplete and does not contain any of the referenced statements or shareholder schedules. The 2002 tax return indicates that "[REDACTED]" each hold 50% of the petitioner's stock.

In addition to the tax returns for the petitioner, "[REDACTED]", the petitioner also provided the 2001 individual tax return of Mr. and Mrs. "[REDACTED]" as well as the corporate tax returns of "[REDACTED]" for 2001, 2002, 2003, and 2004. The tax returns all list the same address but a different location as that given for the corporate petitioner. The federal tax employer identification number is different than that of the corporate petitioner. The 2001 tax return indicates that "[REDACTED]" owned 100% of the stock of "[REDACTED]". The 2002, 2003, and 2004 tax returns show that "[REDACTED]" each hold 50% of the

¹ For the purpose of this review, ordinary income will be treated as net income.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

stock. An unsigned letter, dated November 17, 2005, with [REDACTED]'s name at the bottom is contained in the record. The letter states that the purpose is to advise CIS about the corporate structure in order to prove the ability to pay the proffered wage to the beneficiary, [REDACTED]. It is stated that both Pomona and [REDACTED] are one and the same company and that [REDACTED] owns both.

The director denied the petition on July 13, 2006. Noting that both the petitioner and Pomona Textile, Inc. are separate and distinct corporate entities, the director found that the petitioner's ordinary income or net current assets in 2001 and 2002 were insufficient to establish the petitioner's financial ability to pay the offered wage of \$36,712.

On appeal, counsel asserts that the payments to officers and directors could have been altered in the event of a new hire. Additionally, counsel maintains that the beneficiary is replacing a former employee, [REDACTED] who worked as an upholsterer at the proffered wage from 2002 to 2005. In support of these assertions, counsel provides copies of three letters. The letterheads indicate [REDACTED] Textiles." The first letter is dated November 14, 2002. It is signed by [REDACTED] and addressed to [CIS] and refers to the availability of a job for [REDACTED]. The second letter, dated May 12, 2003, is also signed by [REDACTED]. Similar to the unsigned November 17, 2005 letter submitted to the underlying record, it states that its purpose is to advise CIS about the petitioner's corporate structure in order to prove its ability to pay the proffered wage to, in this case, [REDACTED].

The third letter, dated August 9, 2006, is signed by [REDACTED] as president of [REDACTED], in which he states that [REDACTED] issued a Form 1099 to [REDACTED] for \$7,000 as a contractor in 2003 and that he became a direct employee of [REDACTED] on January 17, 2004, at the hourly rate of \$17.65. He worked as an upholsterer until July 29, 2005. [REDACTED] states that his position is available for the current beneficiary.

Counsel further provides a copy of "Minutes of Meeting of Board of Directors of [REDACTED]," dated February 2, 2001. They indicate that the salaries for officers and employees of the corporation be paid. The minutes also state that the salaries of [REDACTED] are reduced by \$15,000 and that the designated officers are [REDACTED] as Vice President, and [REDACTED] as Secretary.

The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The AAO does not find counsel's assertions persuasive. At the outset, the AAO notes that the record indicates that [REDACTED] and the corporate petitioner, Summerdale Mills Textile, Inc. are two different corporate

entities with separate corporate tax returns, different employer identification numbers, and at least in 2001, different shareholders and separate corporate minutes. It is also noted that as of the date of this decision, the state corporation records indicate that each are recognized by the Pennsylvania corporate records as active corporations. See <http://www.dos.state.pa.us/corps>. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." In this case, the record indicates that both corporate entities have maintained separate financial profiles and are distinct corporate entities.

Similarly, the record does not support adding officer compensation back to net income in this case. Such compensation is paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. Although the [REDACTED] submitted a copy of their 2001 individual tax return, that return, standing alone does not establish that officer compensation could have been foregone during either the 2001 or 2002. The corporate minutes submitted on appeal only state that their officer compensation from [REDACTED] was reduced by \$15,000. In 2002, no officer compensation was reported on the petitioner, [REDACTED]'s tax return.³

As noted above, [REDACTED] has advised that the beneficiary will replace a worker named [REDACTED] who was an upholsterer and who was issued a Form 1099 showing compensation paid to him as a contractor in 2003 for \$7,000. [REDACTED] states that [REDACTED] issued the 2003 Form 1099 and that [REDACTED] became [REDACTED] employee on January 17, 2004 at \$17.65 per hour. He held the position until July 29, 2005. The petitioner, however, has provided no copies of this 1099 or of any documentation showing wages paid to Mr. [REDACTED] to verify his full-time employment at the certified wage and subsequent termination. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Unless specifically documented by name, duties performed, wages paid amounting to full-time employment, and subsequent termination the assertion that the beneficiary is an intended replacement for another worker is not persuasive. Generally, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, in this case, the evidence indicates that [REDACTED], rather than the petitioner, [REDACTED] employed [REDACTED] ki. As [REDACTED] is the prospective corporate U.S. employer identified on the I-140, the beneficiary may not be considered as a replacement for a worker of another corporation.

³ Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that any part of officer compensation could have been forgone or that the beneficiary would assume any officer's duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In determining the petitioner's continuing ability to pay the proffered wage, CIS will initially review whether the petitioner may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record contains no evidence that the petitioner has employed the alien.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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.

In this case, the petitioner's 2001 federal tax return shows that neither its \$20,378 in net income, nor its net current assets of-\$43,813, was sufficient to cover the certified wage of \$36,712 during that year. Similarly, in 2002, neither its -\$65,200 in net income nor its -\$104,991 in net current assets was sufficient to pay the proffered wage. The petitioner did not provide its own tax returns, audited financial statements or annual reports for 2003 or 2004. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning at the priority date. Based on the evidence contained in the underlying record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

Beyond the decision of the director, it is noted that the petition designates part (g) "any other worker (requiring less than two years of training or experience)." In this matter, it is noted that this petition must also be denied because the visa classification sought is not consistent with the certified position's requirements set forth on the labor certification. The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

The labor certification's minimum training and experience requirements do not describe a position that would require less than two years training or experience.⁴ The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁴ Item 14 requires that the alien have two years of experience in the certified job.