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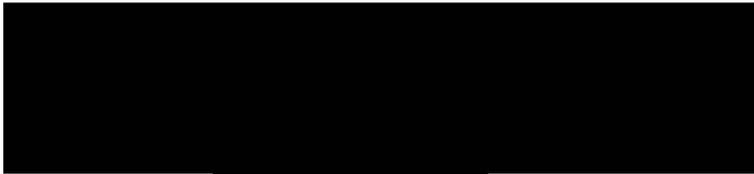
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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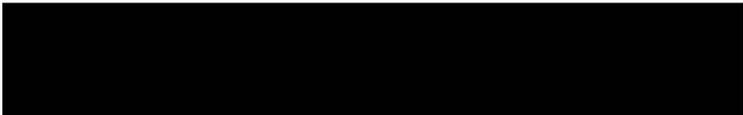
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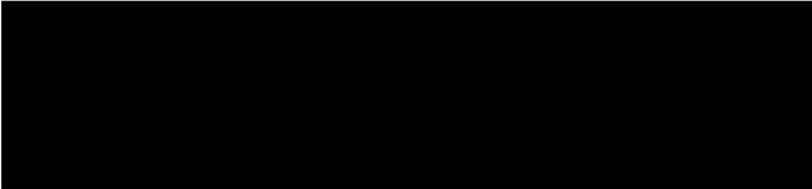
Petitioner:



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 for
Robert P. Wiemann, Chief
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 development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer.¹ 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 during tax years 2001 and 2002 while operating the business at negative net income and negative net current assets. The director also noted a discrepancy between the Employer Identification Number (EIN) listed on the I-140 petition and the EIN listed on the submitted tax forms. Finally the director stated that the documentation submitted to the record did not demonstrate the business relationship between the petitioner and two companies identified as SoftPlus, Inc., or First Acquisition Company, and thus this documentation was insufficient as evidence of the petitioner's ability to pay the proffered wage.

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 November 30, 2005 denial, the issues in this case involve the petitioner's identity and also whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. With regard to the petitioner's identity, the director stated that the EIN number listed on the I-140 petition differed from the EIN number listed on the Form ETA 750; although the director did not address this issue further. The AAO will briefly review the documentation submitted in the context of the petitioner's identity.

The I-140 petitioner, identified as US Interactive, listed its EIN on the I-140 petition as [REDACTED]. The I-140 petitioner then submitted its tax returns to the record with EIN [REDACTED] and an incorporation date of August 1, 1991.² Counsel also submitted copies of state of California documents as to the incorporation of SoftPlus, Inc. in California in 1994, and the subsequent merger of Softplus, Inc. and First Acquisition in Delaware in which the resulting business name was US Interactive, Corp. (Delaware). Counsel also submitted a copy of an IRS document dated January 12, 2000 that stated IRS had assigned an EIN number of [REDACTED] to First Acquisition Company. A second IRS letter dated April 28, 2000 addressed to US Interactive Corp. Delaware at the same address as First Acquisition in King of Prussia, Pennsylvania, acknowledged that

¹ The record indicates the beneficiary was approved for H-1B status with the petitioner and that the petitioner, filing as U.S. Interactive, Inc. (Formerly Softplus, Inc.) filed a previous I-140 petition (WAC 03 130 52940) on March 18, 2003, substituting the beneficiary for [REDACTED] on the ETA 750. This previous petition was denied on October 10, 2003 and a previous appeal was dismissed by the AAO on February 10, 2005. In the current petition, filed April 6, 2005, the petitioner is substituting the beneficiary for [REDACTED]. The petitioner submitted the instant I-140 petition and original Form ETA 750 after withdrawing the approved petition for [REDACTED].

² The AAO notes that on the petitioner's Form 7004, Application for Automatic Extension of Time to File Corporation Federal Income Tax Return for tax year 2001, previously submitted to the record, and on the petitioner's Form 1120 for tax year 2001, WebAccess, EIN [REDACTED] and US Interactive Corporation (FKA Softplus, Inc.), EIN of [REDACTED] are listed as subsidiaries.

the business' EIN was _____ and that the business had asked that its name be changed to US Interactive Corp. Delaware.

With the initial petition, the petitioner submitted a copy of a document "Report of Independent Certified Public Accountants," written by Pohl, McNabola, Berg and Company, (PMB) L.L.P., San Francisco, California. In its report, PMB stated it conducted a review of US Interactive Corporation's interim financial information and the review is substantially less in scope than an audit, and that the PMB did not express an opinion with regard to the financial statements. The PMB report also stated that the CPA firm reviewed the consolidated balance sheet of US Interactive Corporation, and subsidiaries as of December 31, 2003, and the related consolidated statement of stockholders' equity as of December 31, 2003.

In the history section of the report, PMB states the following, in pertinent part:

US Interactive Corporation ("the Company" or "USIC") is a professional services firm that is primarily focused on providing customer management solutions for companies in the communications industry. Effective July 25, 2003, US Interactive, Inc. sold USIC to Mr. Sunil Mathur, the interim CEO and a member of the Board of Directors of US Interactive Inc. USIC was a wholly owned subsidiary of US Interactive, Inc. I[t]s holding company, prior to its sale to Mr. Mathur.

The PMB report continues, in pertinent part:

On March 8, 2000, U.S. Interactive, Inc., the former parent of USIC, acquired SoftPlus, Inc, a privately held e-solutions firm, in a forward triangular merger by and among USIC, U.S. Interactive, Inc. and SoftPlus, in which SoftPlus became a wholly owned subsidiary of U.S. Interactive, Inc. under the name, US Interactive Corp. (Delaware)". . . USIC in conjunction with its former parent, US Interactive Inc. filed a joint plan of reorganization under Chapter 11 on January 22, 2001. . . . On September 22, 2001, reorganization was confirmed, all claims against the debtor that arose before the Chapter 11 proceedings was initiated were extinguished, unless specifically preserved in the plan of reorganization . . . The financial statements for the years ended December 31, 2003 show the European subsidiaries, US Interactive Europe, Ltd., and Soft Plus GmbH, as discontinued operations. The European Operations are dormant operations due to lack of sufficient business in the European sector since 2002.

Finally the report states that _____ CEO and President, purchased all of the outstanding shares of USIC from US Interactive, Inc. on July 25, 2003.

The AAO notes that although the tax returns indicate that US Interactive, Inc. is a holding company, there is no further evidentiary documentation of this fact in the record. The tax returns in the record for 2000, 2001, and 2003 also indicate that US Interactive Corp. is a subsidiary of US Interactive Inc., although the record is not clear as to when US Interactive, Inc. purchased, took over, or merged with US Interactive Corp. The record only indicates that First Acquisition, a company located in King of Prussia, merged with First Acquisition, and that the subsequent name for this corporate merger was US Interactive Corp. (Delaware). Although the record is clear as to when SoftPlus, Inc. was incorporated in the state of California, the record is less clear as to when US Interactive Inc. was incorporated and what the relationship is or was between SoftPlus, Inc. and US Interactive, Inc.

The record also contains a document entitled "Certificate of Merger of SoftPlus, Inc. With and Into First Acquisition Co." filed on March 10, 2000 with the state of California on that date. The document indicates that Soft Plus, Inc. is incorporated in the state of California and First Acquisition Co. is incorporated in the state of Delaware. This document indicates that the surviving corporation of this merger is amended to indicate that US Interactive Corp. (Delaware), located in King of Prussia, is the surviving corporation. A similar certificate is found in the record that documents the merger and the changed name in the state of Delaware. A final document submitted with the initial petition is entitled "Final Decree Closing Chapter 11 Case." This document is dated February 2, 2004 and described US Interactive Corp. (Delaware) as a reorganized debtor in the Chapter 11 case and also declared that the Chapter 11 case of US Interactive Corp. (Delaware) was closed, while the court still retained jurisdiction of a pending adversary proceeding titled U.S. Interactive, Inc. v. American Communications Network, Inc. SoftPlus, Inc as of January 2000.

On appeal, counsel asserts that director's reference to inconsistent EINs for tax years 2000 to 2003 is not correct. Counsel states the EIN on the I-140 petition is the correct EIN for U.S. Interactive Corp. (USIC), while the tax returns submitted to the record were for U.S. Interactive, Inc. (USIT). Counsel states that the tax returns contain the necessary financial data for USIC in attachments because USIC was a wholly owned subsidiary of USIT until July 2003. Counsel states that USIC's EIN was and is [REDACTED], and USIT's EIN was and is [REDACTED], and that CIS used the USIT financial figures rather than the USIC figures in its denial. Counsel also notes that in the years 2000-2003 there were multiple tax filings due to mergers and acquisition activity.

Counsel also asserts that the director's statement that the evidence does not clearly demonstrate the business relationship between the petitioner and one of the entities mentioned by the director (First Acquisitions and SoftPlus, Inc) is incorrect. Counsel states the Certificates of Merger from both Delaware and California clearly state that SoftPlus, Inc. was merged with and into First Acquisition Company and the surviving entity was renamed U.S. Interactive Corp. (Delaware) or USIC. Counsel states he is submitting additional documentation to establish that the EIN for First Acquisition Company was assigned to U.S. Interactive Corp. (Delaware) or USIC upon completion of the merger and the corporate renaming.³

Thus, the record indicates that on March 2000, a merger of SoftPlus, Inc. with First Acquisition took place with a subsequent name change to US Interactive Corp. (Delaware). The record also indicates that in tax year 2001, US Interactive Corp.(Delaware) was a subsidiary of US Interactive Inc. and its assets were recorded in US Interactive Inc.'s consolidated tax return. US Interactive Inc. also filed a consolidated tax return in tax years 2002 and 2003 that contained the financial information for US Interactive Corp. (Delaware). The record finally indicates that in July 2003, US Interactive Corp. (Delaware) was bought by [REDACTED], and is no longer a subsidiary of US Interactive, Inc.

With regard to the petitioner's 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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of 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:

³ These documents are listed below in the evidence submitted on appeal.

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 August 14, 2000. The proffered wage as stated on the Form ETA 750 is \$75,000 per year. Section 14 of the form indicates that the petitioner required three years of work experience in the proffered position or three years in the related occupation of engineer. The Form ETA 750 states that the position requires five to six years of college with a "MS in C.S. or Engineering." Section 15 of the ETA 750, Part A states: "Will accept a B.S. in C.S. or Engineering plus 5 years progressive experience in lieu of an M.S. in C.S. or Engineering plus 3 years experience."

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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal⁴. On appeal, counsel submits a brief with accompanying documentation. The relevant documentation includes:

A copy of the regulation at 8 C.F.R. § 204.5(g)(2) with regard to establishing the petitioner's ability to pay the proffered wage;

A copy of an interoffice memorandum written by William R. Yates, former Citizenship and Immigration Services (CIS) Associate Director for Operations, with regard to determining the

⁴ 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).

petitioner's ability to pay a proffered wage and guidance to adjudicators on when to issue a request for further evidence.⁵

A copy of court decisions including *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989); *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988); *Ohsawa America*, 1988-INA-240 (BALCA⁶ 1988); *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); *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003); and *Matter of X*, an unpublished AAO decision, excerpted in *Bender's Immigration Bulletin*, September 15, 2003, page 1528;

A spreadsheet with a breakout of the petitioner's Form 1120 data, Schedules L, and various statements for the years 1999 to 2004;

A letter from the IRS dated January 12, 2000, to First Acquisition Company, 2012 Renaissance Boulevard, King of Prussia, Pennsylvania, that gave the business an EIN number 23-3024792. This document has a handwritten notation that states: "U.S. Interactive Corp. (Delaware)";

A letter from the IRS to U.S. Interactive Corp. Delaware, 2012 Renaissance Boulevard, King of Prussia, Pennsylvania, dated April 28, 2000 that states the EIN number is [REDACTED] and notes that, as requested, the name of the business has been changed to U.S. Interactive Corp. Delaware;

A IRS Form 1120 for partial tax year 2003, from July 26, 2003 to December 31, 2003, filed by US Interactive Corp, Cupertino, California, EIN [REDACTED]. This document notes that US Interactive Corp. was incorporated on October 29, 1999.

An IRS Form 1120 for tax year 2004 filed by US Interactive Corp. Cupertino, California with an EIN number of [REDACTED] and no subsidiary listed, although three foreign companies operating under the name of SoftPlus are identified in the return;⁷

A copy of a document described as a Subordination Agreement between US Interactive, Inc. as parent and U.S. Interactive Europe Limited as borrower; and a copy of a NatWest business account in London for Mr. [REDACTED] the petitioner's owner, for December 30, 2004 that indicates a balance of 166, . British pounds and a statement for December 30, 2005 that indicates a balance of 162,7886.83 British pounds.

Three other documents written in German appear to document an account with Dresdener Bank in Germany, that indicate ending balances for December 2003, October 2004, and October 2005.

⁵ 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).

⁶ Bureau of Alien Labor Certification Appeals.

⁷ This tax return is not filed as a consolidated tax return.

The record also contains Forms 1120 for tax years 2000, 2001, 2002, and 2003 that contain consolidated balance sheets for US Interactive, Inc. and US Interactive Corp. The 2000 tax return is filed by US Interactive and subsidiaries. The tax return indicates that the petitioner was incorporated in 1991, and that Web Access, EIN [REDACTED] was another subsidiary of the petitioner. In tax year 2001, the tax return was also filed by US Interactive and subsidiaries. In tax years 2002 and 2003, the tax return was filed by US Interactive and subsidiary. The Form 851, for tax year 2002, Affiliations Schedules, identifies U.S. Interactive, Inc., as a holding company.

The record also contains the beneficiary's W-2 Forms for tax years 2000, 2003, and 2004, and copies of the DE6 quarterly employment records from 2000 to 2003 with employers identified as SoftPlus, Inc, and US Interactive Corp. (Delaware) for the respective years.⁸

A supplemental statement entitled "M. Saravu I-140 Data" is found in the record that appears to be an attachment for the I-140 petition written on the petitioner's letterhead. In it, the petitioner examines its ability to pay the proffered wage from tax year 2000 to 2003. The petitioner noted that it submitted the beneficiary's W-2 forms for tax years 2000, 2003, and 2004, with a partial documentation of wages earned in 2004. The petitioner stated that in tax year 2000, the petitioner paid the beneficiary \$80,000 for the time he worked with the petitioner, and thus it had established that it paid a salary greater than the proffered wage of \$75,000 in the priority year.

With regard to tax years 2001 and 2002, the petitioner noted that the beneficiary did not work for the petitioner, and thus, the petitioner's ability to pay the proffered wage could be established by examining the consolidated beginning balance statements included in the petitioner's tax returns for tax years 2001 and 2002. With regard to tax year 2003, the petitioner stated that the petitioner's ability to pay the proffered wage could be established by examining the petitioner's consolidated statement of income and deductions for tax year 2003. The petitioner notes that this consolidated statement indicates the petitioner had \$54,361 in taxable income before NOL.

With regard to tax year 2004, the petitioner stated that the beneficiary has been a full-time employee of US Interactive Corp. from January 19, 2003 and that a total of \$70,000 with approximately \$8,800 per annum in medical insurance premiums has been paid from that date. The petitioner states that it only has to demonstrate its ability to pay the difference between the beneficiary's current wage of \$70,000 and the proffered wage of \$75,000, and that this can be done through its net income and/or assets during this time frame. The petitioner also noted that it has submitted a W-2 form that established the beneficiary was paid \$66,859.04 since the beneficiary recommenced his employment in January 2003, and thus the petitioner only had to establish its ability to pay the difference between the beneficiary's actual wages of \$66,859 and the proffered wage of \$75,000. The petitioner also submitted with the initial petition a document from the state of California secretary of state that stated SoftPlus, Inc. was incorporated on January 28, 1994. This document is dated January 12, 2000.

The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered 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 1996, to have a gross annual income of \$977,875 and a net annual income of \$54,361, and to currently employ 27 workers. On the Form ETA 750B, signed by

⁸ The DE6 forms were submitted with the previous I-140 petition.

the beneficiary on April 1, 2005, the beneficiary claimed to have worked for the petitioner from October 1999 to December 2000, and then from December 2002 to the date he signed the Form ETA750.

On appeal, counsel refers to the Yates memo, and states that while the memo provides useful guidelines to establish the petitioner's ability to pay the proffered wage in simple petitions, it is meant as guidance for CIS adjudicators and should not be relied upon to exclude petitioners who are able to prove an ability to pay with evidence not mentioned in the Yates memo. Counsel then cites to *Masonry Masters Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), for the proposition that the beneficiary's ability to generate income can be used to determine the ability to pay 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).

On appeal, counsel cites *Masonry Masters, Inc. v. Thornburgh*, in support of his assertion that other factors, including the beneficiary's ability to generate income, should be taken into account when evaluating the petitioner's ability to pay the proffered wage. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment would significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel also on appeal cites to several BALCA decisions; however, counsel does not provide legal authority for the applicability of BALCA's precedent decisions to these proceedings occurring under the Department of Homeland Security. Nor does counsel submit how CIS's regulatory authority to verify the petitioner's ability to pay the proffered wage is obviated by DOL. Counsel also cites to an unpublished AAO decision, *Matter of X*. 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, court decisions such as *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) do not appear to support the petitioner's claim, but rather affirm CIS analysis of a petitioner's ability to pay the proffered wage.

Counsel on appeal also submits bank accounts to establish the financial assets of the petitioner's 100 percent shareholder and states that the petitioner's majority shareholder's assets can be used to pay the proffered wage. However, contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. 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."

Counsel's reliance on the balances in the petitioner's bank account is also misplaced. First, as counsel correctly noted, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 identified as US Interactive Corp. (Delaware) submitted the beneficiary's W-2 form for tax year 2000 that established that it employed and paid the beneficiary \$80,611.87 during the 2000 priority date year, a salary greater than the proffered wage of \$75,000. Therefore the petitioner has established its ability to pay the proffered wage as of the priority date. However, the petitioner has to establish its ability to pay the proffered wage from the priority date and until the beneficiary receives lawful permanent residence. With regard to tax years 2001 to 2004, the petitioner stated that the beneficiary did not work for it in 2001 and 2002, and it also established that it paid the beneficiary wages of \$66,859.04 in 2003, and \$70,000 in 2004.⁹ Thus the petitioner has to establish its ability to pay the entire proffered wage in tax year 2001 and 2002, and the difference between the beneficiary's actual wages and the proffered wage in 2003, and 2004.

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

⁹ The record of proceeding closed as of October 20, 2005 when the director received the petitioner's response to the director's request for further evidence dated September 7, 2005. Although the petitioner's 2005 tax return should have been available as of this date, the petitioner did not submit it to the record. With regard to the evidence submitted to the record with regard to the beneficiary's 1999 wages, the priority date for the instant petition is August 14, 2000. Therefore the 1999 evidence of the beneficiary's wages are not dispositive in this proceedings.

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.

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 Chang* at 537.

As stated previously the petitioner established its ability to pay the proffered wage in tax year 2000 based on the wages it paid the beneficiary. With regard to the petitioner's ability to pay the proffered wage in tax years 2001 to 2002, the AAO will examine the petitioner's net income as reflected in the consolidated financial statements contained in the corporate tax returns for U.S. Interactive, Inc., the petitioner's former parent company. For tax year 2003, the AAO will consider the petitioner's net income as reflected on the parent company's 2003 consolidated balance statement in its federal tax return, as well as the petitioner's partial return Form 1120 to the period of July 26, 2003 to December 31, 2003. In tax year 2004, the AAO will consider the petitioner's net income identified on line 28 of the petitioner's Form 1120 federal income tax return. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$75,000 per year for tax years 2001 to 2004:

- In 2001, the consolidated balance sheets submitted with the Form 1120 stated a net income¹⁰ for the petitioner of -\$4,052,967.
- In 2002, the consolidated balance sheets submitted with the Form 1120 stated a net income for the petitioner of -\$863,665.
- In 2003, the consolidated balance sheets submitted with the Form 1120 and the petitioner's partial tax return stated a net income of \$16,171.
- In 2004, the Form 1120 stated a net income of -\$295,534.

Therefore, for the years 2001, 2002, and 2004, the petitioner did not have sufficient net income to pay the proffered wage. In tax year 2003, the petitioner had sufficient net income to pay the difference of \$8,140.96 between the beneficiary's actual wages of \$66,859.04, and the proffered wage of \$75,000.

¹⁰The petitioner's net income is its taxable income before NOL deduction and special deductions, as indicated on the consolidated balance sheets submitted with the parent company's federal income tax returns or as reported on Line 28 of the petitioner's 2004 Form 1120.

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. 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.¹¹ 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. The AAO will again examine the parent company's consolidated balance sheets submitted with its federal tax returns in 2001 and 2002 to calculate the petitioner's net current assets during tax years 2001 and 2002.

- The petitioner's net current assets during 2001 were \$6,513,615.
 - The petitioner's net current assets during 2002 were \$591,659.¹²
- The petitioner's net current assets during 2004 were -\$1,063,507

Therefore, for the years 2001 and 2002, the petitioner did have sufficient net current assets to pay the entire proffered wage of \$75,000. However, the petitioner did not establish that it had sufficient net current assets to pay the difference of \$5,000 between the beneficiary's actual wages in 2004, namely, \$70,000, and the proffered wage of \$75,000.

The AAO notes that the Form ETA 750 for the instant petition has a priority date of August 14, 2000. The AAO also notes that the petitioner, as U.S. Interactive, with EIN [REDACTED] has filed multiple I-140 immigrant petitions and I-129 nonimmigrant petitions with CIS. Further, CIS records indicate that the petitioner, formerly known as Softplus, Inc., EIN [REDACTED], filed 337 petitions in the 1990s onward.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful

¹¹According 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.

¹² The AAO notes that counsel's spreadsheet submitted to the record provides different figures for the petitioner's net current assets in tax years 2001 and 2002, even though counsel examined the petitioner's assets on the consolidated balance sheets attached to the federal tax returns for these years. Counsel appears to have transposed the petitioner's net current assets figures from tax year 2002 to tax year 2001. The record is not clear how counsel calculated the petitioner's net current assets in tax year 2002 as -\$19,902.

permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977)(petitioner must establish ability to pay as of the date of the Form MA7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). See also 8 C.F.R. § 204.5(g)(2). In the instant petition, the petitioner has provided no further information with regard to any other beneficiaries and its ability to pay the wages for all beneficiaries of pending petitions as of the 2000 priority and onward. Therefore the record does not establish that the petitioner during tax years 2002, 2003 and 2004 had sufficient net income or net current assets to pay all beneficiaries of its pending petitions.

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 except for tax years 2000 and 2001.

On appeal, counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and asserts that the totality of the petitioner's circumstances should be considered when examining the petitioner's ability to pay the proffered wage.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the year 2004 was an uncharacteristically unprofitable year for the petitioner. Based on the record, the petitioner, as a subsidiary of US Interactive Inc., experienced a downward economic turn in terms of net income that lasted from 2000 to 2004, rather than one unprofitable year among years of profitability. The record establishes that the petitioner, as a subsidiary of US Interactive Inc., was partner to Chapter 11 bankruptcy proceedings during the years 2000 to 2003. Based on the Forms DE6 submitted to the record with the previous petition filed by the petitioner for the beneficiary, the petitioner also experienced a significant decrease in the size of its workforce during the priority year and up to September 2003. The petitioner's DE6 report indicates that in January 2000, the petitioner had 155 employees, whereas in September 2003, the petitioner had eight employees. When the beneficiary rejoined the petitioner in the first quarter of 2003, the petitioner had lost more than 94 percent of the employees that it had in December 2000.

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 AAO also notes that the director's comments with regard to the different EIN numbers supported by the record are not adequately addressed by counsel. The record does not sufficiently establish that the original petitioner identified on the Form ETA 750 as U.S. Interactive, Inc. (formerly Softplus, Inc.) located in Cupertino, California, has remained the petitioner of the instant petition. Nor has counsel or the petitioner addressed whether the petitioner, U.S. Interactive (U.S. Interactive Corp. (Delaware)), is a successor-in-interest to the Form ETA 750 applicant, U.S. Interactive Inc. Without further clarification of this issue, the director's decision shall stand.

Furthermore, as stated previously, 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.