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U.S. Citizenship
and Immigration
Services



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FILE: [Redacted]
WAC 04 029 53201

Office: CALIFORNIA SERVICE CENTER

Date: AUG 08 2005

N RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the matter remanded to the director for further consideration.

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

On appeal, counsel submits a brief and additional evidence.

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 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 at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 29, 2000. The proffered wage as stated on the Form ETA 750 is \$37.50 per hour, which amounts to \$78,000 annually.

With the petition, the petitioner submitted unaudited consolidated financial statements for the years ending in December 31, 2002 and December 31, 2003 for the petitioner and its subsidiaries. It also submitted the petitioner's IRS Form 1120, federal corporate income tax return, for the year 2002.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 9, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports,

originals of signed federal tax returns, with all accompanying schedules, statements and attachments, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested documentation for the years 2000, 2001, and 2003. In addition, the director requested evidence to establish that the beneficiary possessed the education/training listed on Form ETA750. The director stated that such evidence should be submitted on the institution's official letterhead or stationery indicating the courses taken and the credits received, and any conferring of certificates or degrees. The director requested that if the ETA 750 required a baccalaureate degree, that the petitioner submit a copy of the official college or university transcript. The director also requested evidence to establish that the beneficiary possessed the experience listed on the Form ETA 750, and stated that such evidence should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying this information. The director added that such verification should state the beneficiary's title, duties, and dates of employment /experience, and the number of hours worked per week.

In response, counsel submitted a letter from [REDACTED] Office Manager, [REDACTED] (Canada) Inc., Delta, British Columbia. This letter stated that the beneficiary had worked for [REDACTED] Industrial from March 1, 1992 to October 1995, and that the beneficiary had been employed as a site supervisor/coordinator. Counsel submitted another letter from [REDACTED] Personnel & Office Services Manager, [REDACTED] Ltd, Vancouver, British Columbia, that stated the beneficiary worked as a construction manager from February 18, 1991 to January 6, 1992. Counsel also submitted the petitioner's IRS Form 1120 for 2000, and 2001. Counsel submitted no further documentation of the beneficiary's educational credentials.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 27, 2004, denied the petition. The director examined the petitioner's income tax returns for 2000 and 2001, and stated that in 2000, the petitioner had a taxable income of -\$899,790 with assets of -\$316,855. With regard to 2001, the director states that the petitioner's taxable income was \$550,536, with assets of \$64,720. For the year 2002, the director determined that the petitioner had taxable income of -\$975,937, with assets of -\$775,960. The director stated that Part 6 of the I-140 petition described the beneficiary's proffered wage as \$1,500 a week, and stated that the beneficiary's annual salary was \$72,000.¹ The director determined that since the petitioner had not shown a profit, it had not established its ability to pay the proffered wage of \$72,000.

On appeal, counsel refers to the director's comments as to the petitioner's negative dollar assets. Counsel states that while the petitioner's taxable income in 2002 was negative, this is not evidence of the company's ability to pay the proffered wage, and that a negative taxable income results from strategic account planning, and is standard accounting procedure for corporation. Counsel states that the petitioner's 2002 tax return shows assets of \$3,673,793 at the beginning of the year, and shows wages paid of \$3,854,016 for 2002. Counsel explains the various deductions and writeoffs taken in the petitioner's tax return for 2002.

¹ The proffered wage described in the director's decision is incorrect. The actual proffered wage is \$78,000. Multiplying 52 weeks by \$1,500, or multiplying \$37.50 an hour by 2080 annual work hours provides the same annual salary figure of \$78,000.

Counsel also states that CIS misread the financial position of the petitioner through its reliance on the petitioner's federal tax returns, and that CIS failed to follow established regulations that state in a case where the prospective United States business employs 100 or more workers, the director may accept a statement from a financial officer of the organization that establishes the prospective employer's ability to pay the proffered wage. Counsel states that the petitioner employs more than 200 workers. Counsel refers to a consolidated financial statement signed by [REDACTED] the company's authorized accountant, that confirms the petitioner's total assets of \$2,404,766 in 2002. Counsel resubmits this unaudited document to the record. Counsel also refers and submits to the record a letter from [REDACTED] the petitioner's president, that states the petitioner realized a profit in 2003. Counsel further states that by the end of 2003, there were twenty eight new employees, and the company had invested more than \$49,000 in equipment, and that for 2004, the petitioner has filled twenty five new jobs and invested in new computer and other equipment totaling \$47,830. Counsel submits no further documentation to further substantiate the number of the petitioner's previous or new employees. Counsel asserts that CIS had this information at the time of the filing the initial I-140.

Counsel also refers to *Matter of Sonogawa*, 12 I&N Dec. 612(BIA 1967), and states that since the petitioner is a long-established company, it continues to grow and to demonstrate reasonable expectation of increased profits, as well as continued growth. Counsel finally asserts that the beneficiary has worked for the petitioner since 1995, and submits the beneficiary's W-2 Wage and Tax Statement for 2003 that indicates he was paid \$80,693 in 2003. Counsel does not submit any previous W-2 statements to establish any previous wages paid to the beneficiary from 2000 to the present time.

In Mr. [REDACTED] letter, he states that in a negatively affected national economy, the petitioner has endured financially and currently has a positive cash flow and profits. The president further states that the company has a backlog of work and that it experienced an increase in workload beginning in the second quarter of 2003. The president also states that during the past three years, it has always been able to pay all employees their full payroll with no delays. To corroborate this statement, the president submits bank statements from National Bank of Arizona from November 2001 to December 2003. These bank statements indicate a withdrawal of funds for payroll purposes every two weeks during the time period covered by the statements. The president also states that by the end of 2003, the petitioner had hired 28 new employees, and as of April 15, 2004, it had hired 25 additional employees, as well as investing in computer and other equipment. The president finally states that the petitioner is on solid financial ground with no expected changes. The president's letter is accompanied by a document identified as Financial Statements of the petitioner and four apparent affiliates as of December 2003.

Counsel submits documentation taken from the Internet with regard to a Large Binocular Telescope project in Arizona in which the petitioner participated as part of a business consortium. Counsel also submits 2004 excerpts of the petitioner's website that describe the petitioner's work staff as diverse and number 200 members. The excerpts also describe the type of projects undertaken by the petitioner, a partial list of clients, and the awards that it has received for its work. Among the projects described are telescope projects on mountain tops or on the South Pole, trouble shooting for \$1 billion processing plants, expediting the replacement of failed structures, design of elephant enclosures, theme park caricatures, environmental remediation plants, power distribution in remote areas and state-of-the-art control systems.

On appeal, counsel refers to the ability to establish a petitioner's ability to pay the proffered wage, based on a statement from a corporate officer with regard to such ability for petitioners with more than 100 employees. In general, 8 C.F.R. 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provides further provides: "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 establish the prospective employer's ability to pay the proffered wage." (Emphasis added.) However, upon review of the record, there is no statement from a financial officer with regard to the number of employees paid by the petitioner as of the priority date and to the present time. While counsel as well as the petitioner's website assert that the petitioner now has 200 employees, and while the initial I-140 petition states that the petitioner has 150 employees, no actual statement to this effect by the petitioner's corporate officer or documentation, such as DE-6 quarterly employee documents, is found in the record.

Therefore, although counsel is correct in pointing out this method of establishing that the petitioner has the ability to pay the proffered wage, the record does not contain sufficient documentation to establish this fact.² While the petitioner's website does state that the petitioner has 200 employees, this documentation is not sufficient to establish the petitioner's ability to pay the proffered wage, as outlined in 8 C.F.R. 204.5(g)(2). While Mr. [REDACTED] in his letter comments on the increased number of employees in his company, nowhere in his letter does he establish that as of the priority date, the company had more than 100 employees. It is noted that the AAO does not find any derogatory information in the record to suggest that the petitioner did not have 100 employees at the time of the 2000 priority date; however, it also does not find sufficient documentation to sufficiently establish this fact. Therefore, the petitioner will be obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements.

On appeal, the petitioner submits its bank statements from late 2001 to late 2003. While these bank statements do support the petitioner's assertion that it paid its biweekly payroll over the time period covered by the bank statements, such documentation does not establish that the petitioner was paying more than 100 employees, nor does it establish that the petitioner has the ability to pay the proffered wage. First, 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.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. Although the beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner from October 1995 to the present, the petitioner only submitted the beneficiary's W-2 form for 2003 which establishes the petitioner paid the beneficiary \$80,693, which is more than the proffered wage. While the beneficiary's 2003 W-2 form establishes that the petitioner had the ability to pay the proffered

² The petitioner is encouraged to submit more sufficient documentation from its financial or corporate officer as to the number of employees and its ability to pay proffered wages in any future I-140 petitions.

wage in 2003, the record does not contain any other evidence of actual wages paid to the beneficiary as of the 2000 priority date through 2002. Without more persuasive evidence, the record does not reflect any wages paid in these years, and/or whether the petitioner also paid the beneficiary more than the proffered wage in these years. Without further documentation, it is not possible to ascertain whether the petitioner could have used any positive net income in 2000 to 2002, to pay the difference between any actual wages paid to the beneficiary and the proffered wage. Thus, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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). Showing that the petitioner's gross receipts 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 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, now CIS, should have considered income before expenses were paid rather than net income. As previously stated, the petitioner has established that it paid more than the proffered wage in 2003. Therefore the AAO will only examine the years 2000 to 2002 in determining whether the petitioner had sufficient net income to pay the proffered wage in the years 2000 to 2002. The petitioner's net income for 2000 to 2002 are as follows: -\$899,790 in 2000; \$550,536 in 2001; and -\$975,937 in 2002. Thus, while the petitioner had sufficient net income in 2001 to pay the proffered wage of \$78,000, it did not establish that it had sufficient net income to pay the proffered wage in 2000 or 2002.

Nevertheless, counsel is correct that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. In addition, 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.³ 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 a corporation's end-of-year net current assets are equal to or greater than the

³ 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.

proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The tax returns reflect the following information for the following years:

	2000	2002
Taxable income ⁴	\$ -899,790	\$ -975,937
Current Assets	\$ 3,687,980	\$ 1,915,826
Current Liabilities	\$ 1,773,317	\$ 1,282,911
Net current assets	\$ 1,914,663	\$ 632,915

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000; however, its net current assets of \$1,914,663 are more than sufficient to pay the proffered wage of \$78,000. In 2001, as previously illustrated, the petitioner had sufficient net income to pay the proffered wage. With regard to 2002, the petitioner has not demonstrated that it paid any wages to the beneficiary; however, its net current assets of \$632,915 are also sufficient to pay the proffered wage of \$78,000. Finally, the petitioner established that it paid the beneficiary more than the proffered wage in 2003. Therefore, the petitioner has demonstrated that it has the ability to pay the proffered wage as of the 2000 priority date and to the present time. The director's decision with regard to the petitioner's ability to pay the proffered wage will be withdrawn.

Beyond the decision of the director, it is noted that although the director in his request for further evidence requested documentation with regard to the beneficiary's education, the director did not address this issue in his decision. It is also noted that the petitioner did respond to the director's request for further evidence, but only with regard to the beneficiary's work experience. Furthermore, it is noted that the director's request for further evidence with regard to the actual necessary documentation to establish the beneficiary's educational credentials was incomplete.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

To be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above,

⁴ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. With regard to the instant petition, Form ETA 750, Part A, Section 14 requires a master's degree or the equivalent in construction management, and four years of experience in the job offered or four years of experience in a related occupation. The related occupation is described as "Industrial construction management or industrial engineering".⁵ The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended the University of Waterloo, Ontario, Canada, studied civil engineering from September 1971 to May 1974 and received a bachelor of science degree from this institution. The beneficiary also indicated that he attended Ryerson Polytechnical Institute, Toronto, Canada, in the field of structural technology from September 1966 to May 1969, and that he received a certificate of technology from this institution. The beneficiary on line 14 also stated that he had a diploma from the University of Phoenix and from [REDACTED] Inc., but the record contains no further information or documentation of any U.S. undergraduate or postgraduate studies.

In his request for further evidence, the director requested evidence that the beneficiary possessed the education/training listed on Form ETA 750 and specially requested that, if a baccalaureate degree is required for the position, that a copy of the university or college transcript be submitted. In response, the petitioner only submitted letters of work verification from the beneficiary's former employers in Canada. These letters documented less than one year of experience as a construction manager with [REDACTED], Ltd, in Canada and over four years of work experience as a site supervisor/coordinator with [REDACTED] Industrial (Canada) Inc. from March 1, 1992 to October 6, 1995. The petitioner submitted no documentation to establish that the beneficiary possesses a master's degree in construction management, or that he has four years of work experience as a construction manager. It is further noted that the director did not direct the petitioner to provide an educational evaluation document to determine whether the beneficiary's educational credentials both in Canada and in the United States were equivalent to a U.S. master's degree in construction management.

Furthermore, the record is not clear that the beneficiary's four years of work experience as a site coordinator in Canada is equivalent to the requisite four years of experience in industrial construction management or industrial engineering. It is noted that the actual job description on the Form ETA 750 includes such duties as budget management, safety, and quality control. These duties are not included in the duties identified as the beneficiary's responsibilities with Ferenco Industrial. Without more persuasive documentation, the petitioner has not established that the beneficiary has either the education or the work experience outlined on the ETA 750.

If supported by a proper credentials evaluation, a four-year baccalaureate degree in construction management or a related field from Canada could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree in construction management or a related field. However, in the instant petition, the educational requirement for the position is a master's degree or equivalent in construction management. The record reflects only incomplete documentation of the beneficiary's undergraduate university studies, and no documentation of any studies at a postgraduate level. It should be noted that unlike the temporary non-immigrant H-1B visa category for which

⁵ It is noted that the Department of Labor approved a correction on the ETA 750 on part 14 that inserted the word "and" in the box that identifies types of training. The record is not clear as to whether the petitioner was adding the field of industrial construction management and industrial engineering as a related academic field of study or as job experience in a related occupation.

promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions. Thus, the beneficiary has to possess a master's degree in construction management or the academic equivalent of such a degree. A combination of work experience in construction management and undergraduate studies in engineering or construction management would not be sufficient to establish that the beneficiary has a master's degree in construction management.

Although the petitioner has overcome the issue of whether it has the ability to pay the proffered wage, without more persuasive documentation and evidence, the petitioner has not established that the beneficiary possesses the requisite academic credentials or work experience, as outlined on Form ETA 750.

In view of the foregoing issues, the previous decision of the director will be withdrawn. The petition is remanded to the director for further consideration of the beneficiary's academic credentials and qualifications for the position. The director may request any additional evidence, such as educational equivalency reports, as are considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.