

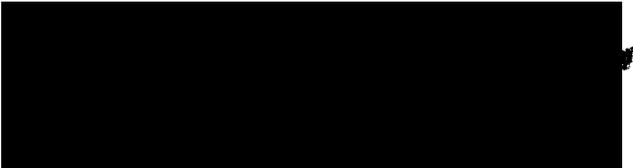
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U.S. Department of Homeland Security  
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U.S. Citizenship  
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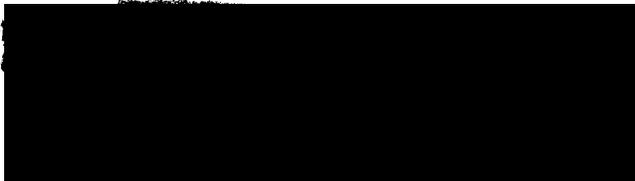
Office: VERMONT SERVICE CENTER

Date: AUG 16 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

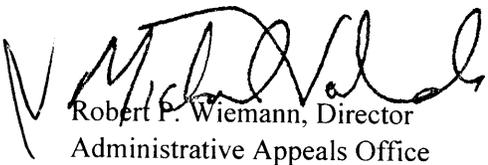
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

Successively filed Forms G-28 Notice of Entry of Appearance show that the petitioner has retained counsel to replace the counsel it previously retained in this matter. All representations will be considered, but the decision will be furnished only to the petitioner and to its current counsel of record.

The petitioner is a construction company specializing in the abatement and removal of lead, asbestos, and other hazardous materials. It seeks to employ the beneficiary permanently in the United States as an asbestos handler/supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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 granting 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.

8 C.F.R. § 204.5(g)(2) states:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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 \$43.07 per hour, which equals \$89,585.60 per year.

The petition was submitted on June 14, 2003. On the petition, the petitioner stated that it was established during 1999 and that it employs 160 workers. The petition states that the petitioner's gross annual income is

\$4,000,000,<sup>1</sup> but does not state its net annual income in the space provided. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in the New York City area.

In support of the petition, the petitioner's previous counsel submitted a letter, dated March 18, 2003, from the petitioner's president and owner stating that the petitioner employed over 160 workers during 2003 and earned revenue of \$4 million dollars.

On July 28, 2003, the Vermont Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center acknowledged the petitioner's March 18, 2003 letter, but noted that the petitioner has multiple petitions pending and stated that, in view of the number of petitions, it was exercising its option, pursuant to 8 C.F.R. § 204.5(g)(2), to require additional evidence.<sup>2</sup> Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner's previous counsel submitted (1) three letters from the petitioner's accountant, two undated, and one dated October 17, 2003, (2) the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return, (3) the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, and (4) printouts from a payroll processing company showing that the petitioner paid total wages of \$304,249.22 during 2001 and \$529,909.54 during 2002.

The October 17, 2003 letter from the petitioner's accountant states that the petitioner pays union dues, provides medical coverage to its employees, and is financially very strong and able to pay the proffered wage.

One of the undated letters states that the petitioner's 2001 payroll was \$304,249.22 and is divided on its Form 1120 U.S. Corporation Income Tax Return between Page 1, Line 12, Compensation of Officers and Page 2, Line 3 Cost of Labor.

The other undated letter from the accountant states that the company received payment of \$436,997.71 during January and February of 2003 for work performed during 2002. The accountant notes that if that amount is attributed to 2002 and added to that year's ordinary income, the sum is \$458,127.71. That letter further states that the petitioner's 2002 payroll was \$529,910 and is divided, on its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, between Page 1, Line 7 Compensation of Officers, Page 1, Line 8, Salaries and Wages, and Page 2, Line 3 Cost of Labor. The accountant also includes a calculation pertinent to the petitioner's total assets.

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<sup>1</sup> The evidence subsequently submitted did not support this statement.

<sup>2</sup> The regulation at 8 C.F.R. § 204.5(g)(2) states that "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." [Emphasis supplied.] In the instant case the Service Center enunciated a reason for declining to accept that statement as sufficient evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2001 return shows that during that year the petitioner was held as a subchapter C corporation and reported taxes based on the calendar year. During that year the petitioner had taxable income before net operating loss deduction and special deductions of \$6,327. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$32,027 and current liabilities of \$949, which yields net current assets of \$31,078.

The 2002 return shows that during that year the petitioner was held as a subchapter S corporation and reported taxes pursuant to the calendar year. During that year the petitioner had ordinary income of \$21,130. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$41,680 and no current liabilities, which yields net current assets of \$41,680.

A letter, dated October 21, 2003, from the petitioner's previous counsel accompanied those submissions. Counsel stated that the petitioner employs from 10 to over 100 employees at any given time, depending on the number of projects then in progress.

The Acting 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 11, 2004, denied the petition.

On appeal, the petitioner's newly retained counsel submits a letter, dated March 24, 2004, from the petitioner's president. In that letter the president states that the corporation employed 260 employees during 2000, 133 employees during 2001, and on the date of the letter employed 100 workers. The petitioner's president further states that, during 2001, the petitioner had gross income in excess of \$2 million. The petitioner's president finally states, "the beneficiaries of the six petitions pending before CIS are replacing and assuming the salary of the employees who had left the organization." [Emphasis in the original.] The president does not name the employees who are being replaced nor the salaries they were paid during their employment.

Counsel also provided the petitioner's Employer's Quarterly State Report of Wages Paid to Each Employee for the last quarter of 2000 and the last quarter of 2001. Those reports show the total number of workers to whom the petitioner paid wages at any time during those years and also show the number of employees to whom the petitioner paid wages during those quarters. Neither of those reports shows that the petitioner employed the beneficiary.

The report for the last quarter of 2000 shows that during that entire year the petitioner paid wages to 155 employees. The highest paid of the petitioner's employees during that year earned \$8,765.98. The report shows that, of those employees, the petitioner paid wages to 104 workers during the last quarter of 2000, but not that it employed them all at the same time. The highest paid employee during that quarter earned only \$4,980.05. In fact, the amounts paid to most of those workers are consistent with only a few days of work. Further, the total wages shown on that report for that year, \$142,230.44, is inconsistent with full-time employment of 100 workers for a year. That report does not demonstrate that the petitioner employed 100 workers at any time during 2000, and demonstrates that it did not employ 100 workers full-time for the entire year.

Similarly, the report for 2001 shows that during the entire year the petitioner paid wages to 133 workers. The highest paid employee earned \$22,211.94 during that entire year. During the last quarter of 2001, however, the petitioner paid wages to only 45 workers, and the amounts paid to most is consistent with only a few days of work. The highest paid worker during that quarter earned only \$7,465.88. The total wages shown on that report for that year, \$265,169.22, is inconsistent with full-time employment of 100 workers for a year, even at very moderate wages. That report does not demonstrate that the petitioner employed 100 workers at any time during 2001, and clearly demonstrates that it did not employ 100 workers full-time for the entire year.

Previously, the petitioner's accountant stated that all of the petitioner's Compensation of Officers, Salaries and Wages, and Labor Expense represent wage payments. Even if this assertion is taken as true, the total "wages" of \$304,249.22 paid during 2001 and \$529,909.54 paid during 2002 are inconsistent with full employment of 100 or more workers for a year.

Counsel argues that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Ordinarily, a petitioner must demonstrate, with copies of annual reports, federal tax returns, or audited financial statements, its continuing ability to pay the proffered wage beginning on the priority date. 8 C.F.R. § 204.5(g)(2). An exception exists for companies employing 100 or more workers. In such a case, the Service Center may, but it not obliged to, accept a statement from a financial officer of the company as evidence of its ability to pay the additional amount represented by the proffered wage.

In the instant case, the Service Center, because the petitioner had multiple petitions pending, opted not to accord the petitioner the benefit of that 100 employees exception. The petitioner may, conceivably, have employed 100 workers on March 24, 2004, as its president claimed. The evidence submitted, however, is insufficient to demonstrate that the petitioner has ever consistently employed 100 or more employees. Further, all of that evidence submitted pertains to 2000 and 2001, and is not, therefore, directly pertinent to the petitioner's claim of having employed 100 or more employees since the petition was submitted on June 14, 2003. The finding that the petitioner does not consistently employ 100 or more employees is consistent with the petitioner's previous counsel's assertion, in this letter of October 21, 2003, that the petitioner employs between 10 and 100 workers at any given time, depending on the number of projects then underway.

The petitioner will not be accorded the benefit of the 100 employees exception. In order to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, the petitioner must either show that it has paid those wages to the beneficiary since the priority date or demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's president stated that the beneficiaries of the pending petitions would replace previous employees who have left the petitioner's employ. The petitioner did not, however, name even one of those previous employees. The record contains no evidence, other than the petitioner's president's statement, that the beneficiary would replace a worker who worked in the same capacity in which the petitioner would be employed, and whose wages are sufficient to pay the proffered wage in this case. In fact, the evidence submitted does not demonstrate that the petitioner has ever paid any employee an amount even approaching the proffered wage of \$89,585.60 during a single year.

If determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 total 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$89,585.60 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$6,327. That amount is insufficient to pay the proffered wage. At the end of the year the petitioner had net current assets of \$31,078. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner had ordinary income of \$21,130. That amount is insufficient to pay the proffered wage. A letter from the petitioner's accountant states that during 2003 the petitioner received an additional \$436,997.71 for work performed during 2002, and that this amount should also be counted in the determination of the petitioner's ability to pay wages during 2002.

The petitioner's choice of tax accounting methods accords income either to the year during which it was earned or the year during which it was received. The accountant implies that the petitioner reports income when it is received, consistent with cash convention, but urges that the amount on the tax return be amended to include income earned during 2002 but not received during that year, which would be consistent with accrual. The petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purpose. The amount received during 2003 will not be counted as having been available to pay wages during 2002.

At the end of 2002 the petitioner had net current assets of \$41,680. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during either of the salient years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.