

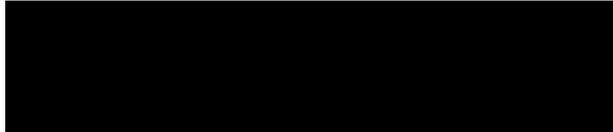
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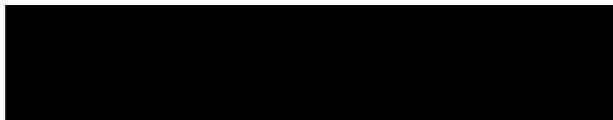
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LIN 03 117 52097

Office: NEBRASKA SERVICE CENTER

Date: AUG 24 2005

IN RE:

Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a printing company. It seeks to employ the beneficiary permanently in the United States as a graphic designer. 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. The director also determined that the petitioner had not demonstrated that the beneficiary has the experience necessary to qualify him for the proffered position. The director denied the petition on both grounds.

On appeal, the petitioner 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.

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.

8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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). 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 for processing on October 15, 2002. The proffered wage as stated on the Form ETA 750 is \$20.50 per hour, which equals \$42,640 per year. The Form ETA 750 also states that the proffered position requires three years experience in the job offered, graphic designer typesetter, or three years in the related occupation of computer graphic designer.

On the petition, the petitioner stated that it was established on May 17, 1989 and that it employs three workers. The petition states that the petitioner's gross annual income is \$573,837 and that its net annual income is a loss of \$43,631. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Chicago, Illinois.

On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed to have worked (1) part-time as a graphic designer/typesetter for Progress and Business Foundation in Krakow, Poland from March 1993 to June 1993, (2) as a full-time advertising specialist/graphic designer for Okocim Brewery in Okocim, Poland, from September 1993 to March 1994, (3) as a full-time division director for Kracow Stock and Brokerage Office in Tarnow, Poland, from April 1994 to July 1997, (4) full-time for IQNET Company as its owner, graphic web designer, typesetter, and translator from August 1996¹ to March 2001, and (5) as a self-employed full-time advertising specialist and graphic designer in Tarnow, Poland from March 2001 until at least October 8, 2002, the date of that form.

In support of the petition, the petitioner submitted portions of its 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports taxes based on the calendar year.

The 2000 return shows that during that year the petitioner declared taxable income before net operating loss deduction and special deductions of \$45,552. Because the corresponding Schedule L was not submitted, the petitioner's net current assets could not be calculated.

The 2001 return shows that during that year the petitioner declared a loss of \$43,561 as its taxable income before net operating loss deduction and special deductions. Because the corresponding Schedule L was not submitted, the petitioner's net current assets could not be calculated.

Because the priority date is October 15, 2002, however, evidence pertinent to the petitioner's fiscal performance during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

As to the beneficiary's experience, the petitioner submitted a Certificate of Employment in Polish and an English translation. The translation states that the beneficiary worked full-time at the Okocim Brewery in

¹ This office notes that the period during which the beneficiary claims to have worked full-time for Kracow Stock and Brokerage overlaps the period during which he claims to have worked full-time for his own company, IQNET. Because this apparent conflict was not addressed in the decision of denial, however, and the petitioner has been offered no opportunity to address it, today's decision will not be based, even in part, on that ground.

Brzesko, Poland², from September 6, 1993 to March 26, 1994 and that the last position he held with that employer was marketing information system coordinator. The petitioner also provided a letter of recommendation, dated March 26, 1994, from the Okocim Brewery pertinent to the beneficiary. That letter confirms that the beneficiary worked as a marketing information system coordinator, and lists no duties pertinent to graphic designer typesetter or computer graphic designer positions.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and insufficient to demonstrate that the beneficiary has the requisite three years of experience, the Nebraska Service Center, on August 28, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested a copy of the petitioner's 2002 tax return. Further, the Service Center requested that, if the petitioner employed the beneficiary during 2002, it provide a copy of the Form W-2 Wage and Tax Statement showing wages it paid to the beneficiary during that year. Finally, the Service Center requested that the petitioner provide evidence that the beneficiary has three years of qualifying experience.

In response, the petitioner submitted (1) two pages of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return, (2) the petitioner's financial statements for the fourth quarter of 2001, the fourth quarter of 2002, and the second quarter of 2003, (3) a Certificate, dated September 18, 2003, in Polish and an English translation, on the letterhead of Brook Crompton Electric Motor Factory in Tarnow, Poland, (4) a Certificate, dated September 16, 2003, in Polish and an English translation, on the letterhead of Marcosta Industrial Machine Maintenance and Trade Center in Tarnow, Poland, (5) a Recommendation, dated September 16, 2003, in Polish and an English translation, on the letterhead of the Ada Neon Advertising Agency in Tarnow, Poland, (6) a Certificate, dated September 16, 2003, from the Mlektar company of Tarnow, Poland, (7) a reference letter dated September 15, 2003, from the Stalbud company in Tarnow, Poland, (8) a request from a public library in Tarnow, Poland, dated July 7, 1998, that the beneficiary design an internet site for it, (9) twelve orders, dated from February 10, 1996 to September 1, 1997, (10) contracts in Polish with English translations, and (11) a Polish certificate of business registration and English translation.

The September 18, 2003 letter from Brook Crompton Electric Motor Factory states that the beneficiary owned a company named Qnet [sic], in Poland, and that in 1996 that company designed and installed an Internet site for Brook Crompton Electric Motor Factory.

The September 16, 2003 letter from Marcosta Industrial Machine Maintenance and Trade Center states that the beneficiary owned a company named [REDACTED] in Poland, and that in 1997 that company installed an internet site for Marcosta Industrial Machine Maintenance and Trade Center.

² The beneficiary claimed employment for the Okocim Brewery in Okocim. The employment verification submitted states that he worked for the Okocim Brewery in Brzesko. Because this apparent discrepancy was not cited in the decision of denial, and the petitioner has not been accorded an opportunity to address it, however, today's decision will not be based, even in part, on that ground.

The September 16, 2003 letter from [REDACTED] states that the beneficiary owned a company named [REDACTED] in Poland, and that in 1998 that company installed an internet site for Ada Neon that it maintained until the end of 2001.

The September 16, 2003 letter from [REDACTED] states that the beneficiary owned a company named [REDACTED] in Poland that developed an internet site for Mlektar beginning during 1997.

The September 15, 2003 letter from Stalbud states that the beneficiary owned a company named [REDACTED] in Poland that designed and installed an internet site for Stalbud during 1997 and maintained it until the end of 2001.

The contracts provided are between [REDACTED] and Opinion Consulting Bureau, [REDACTED] Advertising, PUGK company, and FSE Tamel, all of Tarnow, Poland, and were signed from February 10, 1996 through August 11, 1998.

The Polish certificate of business registration states that the beneficiary and others established [REDACTED] on September 11, 1996.

Each of the work orders provided contains the addresses of IQNET, the beneficiary's company, and another company.

The petitioner did not provide any W-2 forms, indicating that it did not employ the beneficiary during 2002.

The submitted portion of the 2002 return shows that during that year the petitioner declared a loss of \$109,402 as its taxable income before net operating loss deduction and special deductions. Because the corresponding Schedule L was not submitted, the petitioner's end-of-year net current assets could not be calculated.

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 January 14, 2004, denied the petition. In the decision, the director characterized the financial statements submitted as unaudited, and stated that they are, therefore, the representations of management.

On appeal, provides copies of monthly bank account statements and a letter, dated February 11, 2004, from its accountant. The accountant's letter states that he prepared the financial statements submitted and that they were "based on financial documentation such as bank statements, contracts, corporate books and records, etc., and represent the actual financial condition of [the petitioner]."

In a brief, the petitioner argues that the petitioner's assets, loans, and accounts receivable were not appropriately considered.

The petitioner states that it paid over \$100,000 for outside pre-press and graphic design jobs, and that employing the beneficiary would obviate most of that expense. The petitioner did not, however, demonstrate the amount it paid for contract graphic design work during any of the salient years or the number of hours of

contract labor that expense represents. In fact, on appeal, the petitioner admits, in a letter submitted on appeal, that no evidence in support of the assertion that hiring the beneficiary would save the petitioner money exists.³

Merely going on record without proof is insufficient to sustain the burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). This office is unable to compute, or even estimate, the amount of the alleged contractor expense that hiring the beneficiary would obviate. The statements of the petitioner that its contract graphic design expenses exceeded \$100,000, and that hiring the beneficiary would obviate more than half of that expense, are insufficient without objective supporting evidence such as invoices.

The petitioner emphasizes the amount in its bank account and the amount of its receivables and also argues that its assets are a fund available to pay additional wages. In addition, the petitioner states that the amount it claimed as depreciation for income tax purposes does not necessarily correspond to the amount by which an asset lost value.

As to the financial statements provided, the petitioner argues, based on the statement of its accountant in the letter of February 11, 2004, that those financial statements “are not our own representation of the company’s financial status, but show the actual financial condition calculated based upon concrete financial evidence.”

The scope of an accountant’s engagement in producing financial statements may be to audit, to review, or to compile those statements.

The AICPA definition of Compilation of a Financial Statement is “Presenting in the form of financial statements information that is the representation of management (owners) without undertaking to express any assurance on the statements.” Accounting and Review Services Standards (SSARS)\Codification AR § 100: Compilation and Review of Financial Statements at AR § 100.04.

The accountant’s report that must accompany any compiled financial statement is essentially a disclaimer of responsibility for the assertions contained therein. Pursuant to AR § 100.17 every such compilation report must contain the following paragraph:

A compilation is limited to presenting in the form of financial statements information that is the representation of [the management or owners of the company.] [I or We] have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.

A review must be accompanied by the following, somewhat less stringent, disclaimers, among others: (1) a statement that all information included in the financial statements is the representation of the management (owners) of the entity AR § 100.38(b), and (2) a statement that a review is substantially less in scope than an

³ A letter in the file, on the petitioner’s letterhead, dated February 11, 2004, states, “Additionally, no evidence to show that hiring an employee will save us money exists yet; such evidence can only be presented AFTER we hire an employee, when the payments for outside labor have already been reduced.”

audit, the objective of which is the expression of an opinion regarding the financial statements taken as a whole and, accordingly, no such opinion is expressed. AR § 100.38(d).

Neither a review nor a compilation is the equivalent of an audit. The figures in reviews and compilations are the representations of management. In neither does the accountant who prepared them express an opinion pertinent whether the figures in the statement accurately portray his client's financial position. Neither may be substituted for audited financial statements in the context of proving the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

The accountant states that the petitioner's financial statements are not the representations of management and "represent the actual financial condition" of the petitioner, but does not submit the accountant's audit report that should accompany an audited financial statement whenever it is provided for any purpose. In the absence of that audit report, despite the accountant's assurance, this office will not treat the financial statements as audited.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The petitioner neglected to submit the accountant's report that should have accompanied the financial statements. That report would have made clear whether the financial statements were prepared pursuant to a compilation, a review, or an audit. Without that report, however, the petitioner has submitted insufficient evidence to demonstrate that the financial statements were produced pursuant to an audit. Absent sufficient indication that the financial statements were audited, this office will not consider them to be reliable evidence of the petitioner's ability to pay additional wages.

The petitioner's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁴ 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 reported on its tax returns.

The petitioner's assertion that the amount of depreciation taken during a given year may not reflect the amount of deterioration of its depreciable assets during that year is correct. Clearly, a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value

⁴ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. Although the amount claimed as depreciation during a given year may not closely correspond to the actual value the petitioner's perishable long-term assets have lost, the petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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.

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 \$42,640 per year. The priority date is October 15, 2002.

During 2002 the petitioner declared a loss. The petitioner is therefore unable to demonstrate the ability to pay any portion of the proffered wage with its profits during that year. The petitioner did not submit a complete copy of its 2002 tax return. Among the portions omitted was the Schedule L, from which the petitioner's net current assets could have been calculated.

The petitioner argued that its assets should be considered in determining its ability to pay the proffered wage. As was noted above, however, the petitioner's total assets are not directly relevant to its ability to pay additional wages, because its total assets are not a fund available to pay wages. The petitioner submitted no reliable evidence from which its net current assets can be calculated. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage with its net current assets during 2002. Further, the petitioner 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, therefore, 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 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date, and the petition was correctly denied on that ground.

The remaining issue is the evidence of the beneficiary's employment history. The beneficiary has adequately documented his claim to have worked for the Okocim Brewery from September 6, 1993 to March 26, 1994 and demonstrated that at the end of that period he was a marketing information system coordinator. That position is not, however, equivalent to graphic designer typesetter or computer graphic designer. The evidence does not demonstrate what other positions, if any, the beneficiary held with Okocim Brewery or how long he held them. That employment does not fulfill any portion of the three years of experience stated on the Form ETA 750 as a prerequisite of the proffered position.

The only other employment pertinent to which the petitioner has submitted documentation is his claim to have worked full-time for IQNET, a company in which he was part owner, from August 1996 to March 2001. The petitioner has submitted voluminous documentation to demonstrate that the beneficiary worked for that company. The evidence is sufficient to demonstrate that the business was in operation during the approximate period claimed by the beneficiary.

The evidence submitted, however, is insufficient to demonstrate that the beneficiary's employment with IQNET was full-time or what percentage of his employment consisted of graphic designer typesetter or computer graphic designer duties, as opposed to managerial, financial, or other duties. The evidence submitted is insufficient to show that the beneficiary has three years of experience as a graphic designer typesetter or computer graphic designer, and insufficient, therefore, to show that the beneficiary is eligible for the proffered position. The petition was correctly denied on this additional ground.

An additional issue exists in this case that was not addressed in the decision of denial. On August 28, 2003 the Service Center requested a copy of the petitioner's tax return. In response, the petitioner submitted only

two pages of that return. The petitioner did not comply with the Service Center's request and did not give any reason for the failure to provide the entire return. The petition should have been denied on this additional ground. Because the decision of denial did not include that ground, however, today's decision does not rely, even in part, on that issue.

The petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and failed to demonstrate that the beneficiary is eligible for the proffered position. 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.