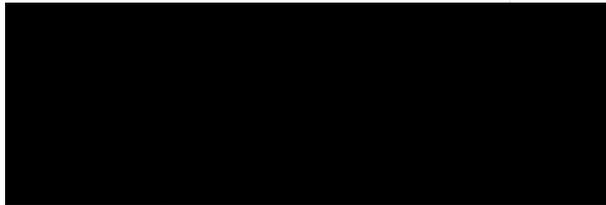




U.S. Citizenship
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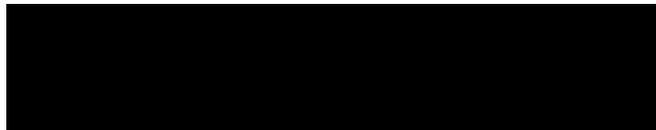
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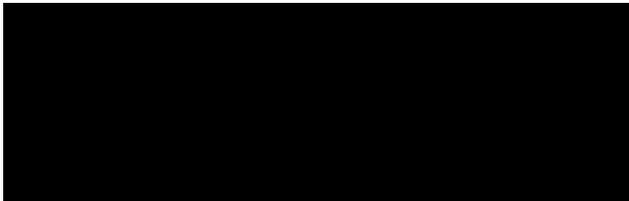
FILE: LIN 03 180 50477 Office: NEBRASKA SERVICE CENTER Date: NOV 10 2005

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:



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, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a stonemason. 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 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.

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 10, 2001. The proffered wage as stated on the Form ETA 750 is \$38,500 per year.

The petitioner was submitted on May 8, 2003. On the petition, the petitioner stated that it was established during 1985 and that it employs ten workers. 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 Chicago, Illinois.

In support of the petition, counsel submitted the petitioner's income statements and balance sheets for 2000, 2001, and the first six months of 2002. The accountant's reports that should accompany those financial statements whenever they are presented for any purpose did not accompany them. The 2000 and 2001 financial statements contain no indication of whether they were produced pursuant to a compilation, a review, or an audit. The 2002 financial statements bear the legend, "See Accountant's Compilation Report," indicating that they were produced pursuant to a compilation.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on September 10, 2003, requested, *inter alia*, additional evidence pertinent to that ability. 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 continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested (1) the petitioner's bank statements, (2) the petitioner's personnel records including IRS Form 1099 Miscellaneous Income statements and Form W-2 Wage and Tax Statements showing payments the petitioner made to the beneficiary since 2001, (3) Form 941 Employer's Quarterly Tax Return for the period since the priority date, and (4) the petitioner's state unemployment compensation forms covering the period since the priority date.

In response, counsel submitted (1) the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, and (2) printouts from the petitioner's payroll service showing Federal withholding data from all four quarters of 2001 and 2002.¹ Counsel submitted no W-2 forms or Forms 1099, apparently indicating that the petitioner did not employ the beneficiary since the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on June 29, 1990, and that it reports taxes pursuant to the calendar year.

The petitioner's 2001 tax return shows that the petitioner declared a loss of \$961,564 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 tax return shows that the petitioner declared a loss of \$40,137 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The withholding data printouts show that the petitioner employed between seven and 13 employees during each quarter of 2001 and 2002. Those printouts do not demonstrate that the petitioner employed the beneficiary during either of those years.

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 May 14, 2004, denied the petition.

On appeal, counsel submits (1) photocopies of articles from business journals with references to the petitioner and the petitioner's owner, (2) a letter, dated November 17, 2003, from the petitioner's bank, and (3) a letter, dated June 10, 2004, from the petitioner's owner.

The photocopies of articles indicate that the petitioner is a well-known and successful real estate development and construction company. The bank letter states that the petitioner's combined daily bank balances on that date were in excess of \$300,000.

¹ Although the submission of that printout is imperfectly responsive to the Service Center's request for the petitioner's Form 941 quarterly returns, this office is satisfied that they contain the same relevant evidence and are sufficiently reliable.

The petitioner's owner's letter states that, "loans which [sic] are given to shareholders **and are listed as current assets** on our company's income taxes are considered funds which [sic] are immediately available. When these loans are given out they are done so against collateral which [sic] can be immediately liquefied and converted into cash if necessary, so that the money can be paid back to the company within the year or earlier." [Emphasis supplied.] This office notes that the petitioner's owner's statement refers only to those loans to shareholders that are carried on its tax returns as current assets, not those shareholder loans listed elsewhere on its tax returns.

In a brief submitted with the appeal counsel argues (1) that the petitioner's renown, its real estate holdings, and its gross receipts are indices of its ability to pay the proffered wage, (2) that during 2001 the petitioner's Schedule L net current assets were greater than the amount of the proffered wage, and (3) that, in addition to those line items that ordinarily are included in the petitioner's current assets, shown at Schedule L, Line 1 through Line 6, the petitioner's Schedule L, Line 7 loans to shareholders should also be included in its net current assets.

Counsel's initial reliance on the financial statements submitted with the petition was misplaced. The 2000 and 2001 financial statements were submitted with no indication that they are audited. The 2002 financial statements indicate that they were produced pursuant to a compilation and are not, therefore, 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner's real estate holdings are not properly a part of the consideration of the petitioner's continuing ability to pay the proffered wage beginning on the priority date except to the extent that they contributed to the petitioner's net income, its net current assets, or to the extent that they are an indication that the overall magnitude of the petitioner's business indicates that it would have been able to pay the proffered wage. All three of those indices are considered below.

This office notes, further, that counsel submitted no evidence pertinent to the petitioner's real estate holdings. The only support for the existence and magnitude of those holdings is counsel's own statement. The assertions of counsel, however, are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

Reliance on a petitioner's gross receipts is generally unconvincing. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is generally insufficient. Generally, unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income,³ the petitioner is obliged to show the ability to pay the

² The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 gross receipts are a factor, of course, in the magnitude of the petitioner's operations, a consideration addressed further below.

In his argument pertinent to the petitioner's net current assets, counsel does point out that the Service Center used, incorrectly, the current asset figures from the beginning of 2001 in its calculations. This office, therefore, will address the use of current assets as an index of a petitioner's continuing ability to pay the proffered wage beginning on the priority date in detail, including an explanation of why use of end-of-year figures is appropriate, rather than those from the beginning of the year.

Net current assets are the difference between a corporation's current assets and current liabilities. End-of-year net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. This office emphasizes, however, that because of the nature of net current assets, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. A petitioner's net income may not correctly be added to its net current assets in determining the petitioner's ability to pay the proffered wage.

Because of the prospective nature in which net current assets are considered, however, consideration of the petitioner's net current assets at the beginning of a given year would be immaterial to the petitioner's ability to pay the proffered wage during that year. The petitioner's net current assets at the end of that year will be considered.

End-of-year net current assets are the taxpayer's end-of-year current assets less the taxpayer's end-of-year current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. On the 2001 and 2002 returns submitted, the petitioner's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

³ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

Counsel argues, however, that in the instant case the petitioner's loans to its shareholders, shown on Line 7 of its Schedules L, should also be included in the calculation of its net current assets. Counsel states that those loans are short-term loans that are collateralized and must be paid back. As evidence of those assertions counsel refers to the June 10, 2004 letter from the petitioner's president and stockholder.

The letter, however, does not support counsel's assertions. The June 10, 2004 letter indicates only that those loans to shareholders that the petitioner's tax returns show to be current assets are collateralized and quickly available to the petitioner. Counsel seeks, on the strength of that statement, to reclassify other loans to shareholders shown on the tax returns as current, although neither the tax return nor the petitioner's president's letter indicate that they are.

Typically even collateralized loans to shareholders may be secured only by the stock that was purchased with those loans, and may never be expected to be repaid at all. The placement of the loans upon which counsel seeks to rely at Line 7 of the Schedule L, below the area where current assets would be carried, is consistent with such an arrangement, and nothing in the June 10, 2004 letter states otherwise. Again, counsel's assertions are not evidence and are entitled to no evidentiary weight. *See INS v. Phinpathya, supra.*

Counsel further states, "Additionally, it is clear that as one of the largest builders in the city, the company also has an enormous credit line which [sic] they may use for any purpose at any time." The record, however, contains no indication of the existence of the credit line that counsel postulates.

Further, the existence of a line of credit, or any other indication of available credit, even if supported by the evidence, is not an indication of a petitioner's continuing ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Ordinarily, in 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 a given 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 computation of net current assets is addressed above.

The proffered wage is \$38,500 per year. The priority date is April 10, 2001.

During 2001 the petitioner declared a loss of \$961,564. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year.

During 2002 the petitioner declared a loss of \$40,137. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year.

Counsel asserts, however, that the magnitude of the petitioner's operations indicates, in itself, the petitioner's continuing ability to pay the proffered wage beginning on the priority date, notwithstanding that the petitioner's tax returns and the other evidence submitted do not demonstrate that ability arithmetically. In support of that proposition, counsel cites the November 17, 2003 letter from the petitioner's bank. Counsel represents that letter as stating that the petitioner "is one of the biggest clients of one of the largest banks in Chicago."

The petitioner's gross receipts were \$16,671,559 during 2001 and \$22,704,801 during 2002. The petitioner's gross profit was \$370,738 and \$1,558,961 during those years, respectively. The petitioner paid Officer Compensation of \$116,000 during both years and Salaries and wages of \$135,9623 and \$147,977 during those same years.

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). A review of the record confirms that the job offer is realistic and can be satisfied by the petitioner. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.