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U.S. Citizenship
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Services

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FILE: [Redacted]
SRC 03 169 50766

Office: TEXAS SERVICE CENTER Date: NOV 19 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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a foundation repair company. It seeks to employ the beneficiary permanently in the United States as a foundation repairer. 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.

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.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$8.91 per hour, which amounts to \$18,532.80 annually. On the Form ETA 750, the beneficiary indicated that the petitioner had employed him from August 1996 to October 1998 as an apprentice house foundation repairer, and then as a house foundation repairer from 1998 to the present.

On the petition, the petitioner claimed to have been established in 1989, and to have 22 employees. With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 2001, as well as a letter of work verification from the petitioner that stated the beneficiary was employed by the petitioner as an apprentice house foundation repairer from August 1996 to October 1998. The petitioner's federal income tax return indicated gross receipts of \$995,091, taxable income before net operating loss deductions of \$2,186, \$29,321 in salaries and wages, \$63,693 in compensation of officers, and other costs, as outlined on Schedule A, of \$1,280 for subcontract labor, \$104,901 in commissions and \$150,735 in outside contract services.

On November 19, 2003, the director requested additional evidence pertinent to the beneficiary's qualifications to perform the proffered position. The director stated that although the petitioner had stated in its cover letter that the beneficiary had worked for a previous employer as an apprentice house foundation repairer, the previous

employer had been the petitioner. The director requested that the petitioner explain why it did not provide an experience letter for the actual job the beneficiary performs for the petitioner. The director also noted that the beneficiary entered the United States on July 2, 1996 without inspection and that the petitioner's petition with a priority date before April 30, 2001 allowed the beneficiary to file under Section 245(i) for adjustment of status. The director then stated that since the beneficiary did not have authority to work for the petitioner, the beneficiary may have given the petitioner false documentation which precluded an approval. The director then requested that the petitioner submit the documentation provided by the beneficiary when he was hired to fulfill the employment requirements of Form I-9, Employment Eligibility Verification. The director also requested copies of W-2 Wage and Salaries statements for the petitioner's submitted 2001 and 2002 tax returns.¹ The director also asked the petitioner to explain in detail why the beneficiary did not earn the proffered wage, if this was the case. Finally the director requested the job titles of the petitioner's employees.

In response, counsel states that the Form ETA 750 does not require a letter of work verification for both the positions of apprentice house foundation repairer and house foundation repairer. Counsel states that the Form ETA 750 only required a minimum of two years of experience in the position of apprentice house foundation repairer or house foundation repairer. Counsel then submitted a second letter from the petitioner that verified the beneficiary's work experience from 1998 to the present.

Counsel also stated that federal regulations require the petitioning employer to prove its financial ability to pay the proffered wage, and do not require that the beneficiary be employed by the petitioning employer when Form ETA 750 is submitted. Counsel also stated that regulations did not require that the proffered wage be paid to the beneficiary at the time the Form ETA 750 is filed. Counsel states that in asking for the beneficiary's Form I-9, Forms W-2 or Forms 1099, Citizenship and Immigration Services (CIS) stepped beyond its regulatory, statutory, and legal precedent mandates. Counsel stated that whether the beneficiary had been working for the employer and how the beneficiary was paid by the petitioner previously and/or currently is irrelevant to the issue of whether the employer has the financial ability to pay the proffered wage. Counsel further states that the federal statutes and regulations governing the process of the submission and adjudication of an I-140 visa petition do not require the submission of a Form I-9 during the visa petition process. Counsel stated that the procedures for inspection of the Form I-9 by CIS are controlled by 8 C.F.R. § 274a.2(b)(2)(ii). Counsel then stated that if the Texas Service Center was initiating an investigation and was requesting inspection of the Form I-9, the federal regulations mandate an issuance of a three-day notice prior to inspection. Counsel also submitted a two-page document that outlined procedures for Section 204.5 petitions for employment-based immigrants.

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 June 4, 2004, denied the petition. The director stated that the petitioner's federal income tax return on line 30 indicated a taxable income of zero.² The director also stated that the tax return indicated compensation of officers as well as a substantial amount shown in the cost of labor. The director then stated that the wages reported on line 13, namely \$29,321, were not found sufficient to pay the 22 employees listed in Part 5 of the I-140 petition. The director stated that it was unclear if the 22

¹ Although the director referred to the petitioner's 2002 federal income tax return, this document is not found in the record.

² The director listed the taxable income on line 30 as the petitioner's taxable income.

employees might in fact be a mixture of employees and contract laborers. The director stated that the petitioner's W-2 Forms and/or Form 1099-MISC were requested to verify the petitioner's continued ability to pay the proffered wage. The director stated that the petitioner failed to submit these documents, and as a result, failed to meet the requirements of 8.C.F.R. 204.5 (g)(2)(ii), with regard to the petitioner's ability to pay the proffered wage. As a result, the director stated the petition was denied. With regard to counsel's assertion that CIS had stepped beyond regulatory, statutory, and legal precedent mandates by requesting the beneficiary's Form I-9, Form W-2 and Form 1099, the director noted that 8 C.F.R. § 204.5(g)(2)(ii) does allow CIS to request personnel records.

On appeal, counsel asserts that CIS made assumptions and derogatory comments about the petitioner and the beneficiary with regard to the I-9 Form and that this issue should not in any way be addressed in the I-140 petition process. Counsel further states that the denial of the petitioner's I-140 petition has violated the petitioner's right to due process of law. Counsel also states that CIS stepped beyond the regulatory mandates by requesting documents that are not required under the federal regulations for an I-140 petition. Counsel reiterates assertions made in the petitioner's response to the director's request for further evidence, with regard to federal regulations not requiring the submission of a Form I-9 with the I-140 petition. Counsel states that CIS failed to explain how the documentation to fulfill the I-9 work eligibility requirement pertains to the I-140 petition, and therefore this request is a transgression of the petitioner's right to due process of law. Counsel also reiterates that federal regulations do not require that the beneficiary be employed by the petitioner when the I-140 petition or Form ETA 750 is filed, nor do they require the petitioner to pay the prevailing wage at the time of filing the I-140 petition. Finally counsel states that the petitioner's tax return for 2001 indicated that at least \$104,901 for commissions and \$150,735 for outside contract services were paid, among others, to maintain a normal business operation. Counsel states that the petitioner also has sufficient cash to pay the difference between the beneficiary's actual wages and the prevailing wage.

Upon review of the record, as previously stated, the petitioner's Form 1120 for 2002 is not found in the record. As a consequence, the AAO will examine the petitioner's ability to pay the proffered wage based on the petitioner's 2001 federal income tax return. It is also noted that counsel's statement with regard to the submission of Form I-9 not being a part of filing an I-140 petition is correct. Petitioners are not required to file this documentation as a part of the submission of the initial I-140 petition or Form ETA 750. As stated further in these deliberations, documentation such as W-2 forms or Forms 1099-MISC are routinely requested of petitioners in exploring whether the petitioner has the ability to pay the proffered wage. Within the context of reviewing an employment-based immigrant visa petition, the director's request for a Form I-9 and his statements with regard to false I-9 documentation also are immaterial. In addition, counsel is also correct when stating that petitioners are not required to pay the proffered wage before the beneficiary adjusts status. Rather, they are required to show their ability to pay the proffered wage.

It is noted that the petitioner's failure to submit the I-9 and the beneficiary's W-2 Form and/or Form 1099-MISC is only one of the director's reasons for his denial of the instant petition. It is further noted that the director's request for the Form I-9 is not material to the present proceedings. In addition, if there is no W-2 Form or Form 1099-MISC because the beneficiary was employed without authorization,³ the director in his request for further evidence was

³ Such employment will trigger a bar to adjustment for the beneficiary, but since these proceedings are not the adjudication of the I-485, such a factor is not material. Similarly, knowingly employing persons without

asking for evidence that does not exist, and as such, the director's rationale can not be a sufficient reason to deny the petition.

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 August 1996 to the present, the petitioner submitted no employment records such as W-2 forms, Forms 1099-MISC, or paychecks to reflect this employment. Without more persuasive evidence, 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. The petitioner's 2001 federal income tax return on line 28 reflects taxable income of \$2,186.⁴ This sum is not sufficient to pay the proffered wage of \$18,532.80. Since the petitioner provided no documentation as to the actual wages paid to the beneficiary, it is not possible to gauge whether the petitioner's taxable income for 2001 was sufficient to pay the difference between the beneficiary's actual wages and the proffered wage.

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.

authorization could also subject an employer to certain sanctions, but these two factors are immaterial, except as a matter of credibility, to the instant case.

⁴ As previously stated, the director listed the taxable income on line 30 as the petitioner's taxable income.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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 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 2001:

	2001
Taxable income ⁶	\$ 2,186
Current Assets	\$ 41,852
Current Liabilities	\$ 90,667
Net current assets	\$ -48,815

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$2,165, and negative net current assets of \$48,815, and has not, therefore, demonstrated the ability to pay the proffered wage. Without more persuasive evidence, the petitioner has not established that it has the ability to pay the proffered wage as of the 2001 priority date and onward, based on its taxable income or net current assets.

On appeal, counsel asserts that the petitioner's 2001 tax return indicates the petitioner paid \$104,901 in commissions and \$150,735 for outside contract services. However, counsel makes no correlation between the commissions and outside contract service, the salary and wage figure of \$29,321 shown on line 13, and any wages or compensation paid to the beneficiary, or to the rest of the petitioner's claimed employees. Therefore, it is not possible to determine whether the commissions and outside contract services expenses included the beneficiary's wages. Furthermore, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988).

Counsel further asserts that the petitioner has sufficient cash deposits to pay the difference between the beneficiary's actual wages and the proffered wage. It is not clear whether counsel is referring to the petitioner's available cash, \$7,227, as identified in the petitioner's 2001 Schedule L, which are included in the examination of the petitioner's current assets, as described above or other available cash. Again, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Without more

⁵ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁶ 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.

persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the 2001 priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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

ORDER: The appeal is dismissed.