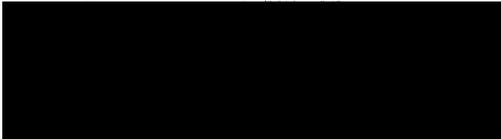




U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

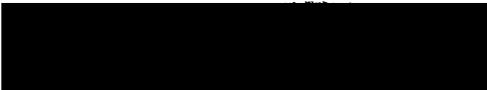
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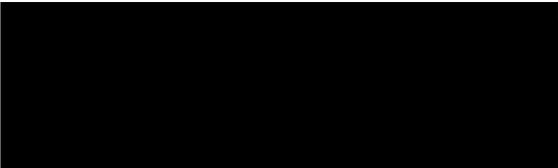
Petitioner:



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

The petitioner is a paving stone construction company. It seeks to employ the beneficiary permanently in the United States as a bricklayer supervisor. 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 July 3, 2002. The proffered wage as stated on the Form ETA 750 is \$24.76 per hour, which equals \$51,500.08 per year.

On the petition, the petitioner stated that it was established during 1990 and that it employs approximately 31 workers. The petition states that the petitioner's gross annual income is \$22,979,432 and that its net annual income is \$4,071,224.¹

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 Pompano Beach, Florida.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on September 27, 2004, the Director, Texas

¹ The evidence subsequently submitted does not support those estimates of the petitioner's gross and net incomes.

Service Center issued a Request for Evidence in this matter. That Request for Evidence asked that the petitioner provide evidence pertinent to its ability to pay the proffered wage. 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 petitioner was accorded 12 weeks to respond.

In response, counsel submitted a letter, dated December 20, 2004, in which he requested a 90-day extension of time during which to submit evidence in response to the Request for Evidence.

The regulation at 8 C.F.R. §102.3(b)(8) Request for Evidence, states, in pertinent part, that a “petitioner shall be given 12 weeks to respond to a request for evidence. **Additional time may not be granted.**” [Emphasis supplied.]

The director determined that the evidence of record did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 12, 2003, denied the petition.

On appeal, counsel submits (1) his own letter, dated December 16, 2004, (2) statements pertinent to the petitioner’s bank account, (3) a printout from web content of a copy of the income statements of Paving Stone Corporation for the first three quarters in 2002 and the first quarter of 2003, (4) printouts from web content of various press releases from Paving Stone Corporation, (5) a copy of the petitioner’s 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, and (6) the audited financial statements of Paving Stone Corporation for 2000, 2001 and 2002.

In his December 16, 2004 letter counsel notes that the petitioner is publicly traded, and that its financial information is therefore available on-line. Counsel cites the petitioner’s gross revenue and net income during 2000, 2001, and 2002 as evidence of its continuing ability to pay the proffered wage beginning on the priority date. Counsel states that, “On average for the years in question The Paving Stone Company has an average [sic] yearly net income of over six **million** dollars!”² [Emphasis in the original.] Counsel also states that the petitioner has filed 19 alien petitions.

The income statements taken from web content show that the petitioner suffered a loss during each of the quarters shown except the second quarter of 2002, when it reported a net income of \$20,000. Further, they contain no indication that they were produced pursuant to an audit. 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. If counsel intended that the income statements taken from web content should be considered as audited financial statements, they should have been accompanied by the accountant’s report stating that he had audited those reports.

² The evidence submitted does not support counsel’s estimate of the petitioner’s annual net income, as shall appear below.

The audited income statement of Paving Stone Corporation for 2000, 2001, and 2002 shows that the petitioner suffered an after-tax loss from operations of \$3,272,157 during 2002. The audited balance sheet shows that at the end of 2002 Paving Stone Corporation's current liabilities exceeded its current assets. Because the priority date is July 3, 2002, evidence pertinent to the petitioner's financial condition during 2001 or previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel'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.³ 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.

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 or audited financial statements, 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). As audited financial statements are listed in 8 C.F.R. § 204.5(g)(2) as preferred evidence of a petitioner's continuing ability to pay the proffered wage beginning on the priority date, it follows that CIS may consider them in a similar manner.

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.

³ 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.

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 \$51,500.08 per year. The priority date is July 3, 2002.

The audited income statement of Paving Stone Corporation shows that during 2002 it suffered a loss from operations of \$3,272,157 during 2002. Even if the income statements submitted are presumed to be those of the petitioner, the petitioner cannot demonstrate the ability to pay the proffered wage out of its profits during that year based on its audited income statement. According to that income statement, Paving Stone Corporation's 2002 end-of-year current liabilities exceeded its current assets. The petitioner cannot show its ability to pay the proffered wage during 2002 with the end-of-year net current assets shown on the audited balance sheet. Counsel submitted no other reliable evidence of the petitioner's finances during 2002. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

Counsel submitted no evidence pertinent to the petitioner's 2003 performance, notwithstanding that the Request for Evidence issued September 27, 2004, when the petitioner's 2003 tax returns should have been available, 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. Counsel provided no explanation of that omission. The petitioner has failed to demonstrate its ability to pay the proffered wage during 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002 and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that ground.

Counsel states on appeal that the petitioner filed 19 alien petitions. The petitioner is obliged to show the ability to pay the wages proffered to all 19 beneficiaries. The record does not contain evidence pertinent to the other 18 petitions. However, because the petitioner failed to show the ability to pay the proffered wage of even the instant beneficiary, this office is neither obliged nor inclined to remand this matter for additional evidence.

Additional issues exist in this case, however, that were not noted in the decision of denial.

The petitioner named on the Form ETA 750 and the Form I-140 petition in this case is The [REDACTED]. The corporate name shown on the 2001 Form 1120S, U.S. Income Tax Return for an S Corporation is [REDACTED].

The audited financial statements submitted in this case, however, show that they are the reports of [REDACTED] and Subsidiaries, a somewhat different corporate name. The web printouts, including financial statements and new releases, all refer to [REDACTED]. Whether this corporation is identical to the petitioner, The Paving Stone Company, is unclear. Whether the petitioner is a subsidiary of [REDACTED] is unclear.⁴

Further, the audited financial statements of Paving Stone Corporation state, at Note 10, that during December 2002 Paving Stone Corporation decided to discontinue its Florida operations. The Form ETA 750 labor certification upon which the instant petition is based is approved for employment in Pompano Beach, Florida, rather than some other state. If the petitioner in this case and no longer does business in Florida, it is not entitled to rely on the approved labor certification, and the petition should have been denied on that additional basis.

If the petitioner, The Paving Stone Company, is not the same identical entity as Paving Stone Corporation, then the assets and income of Paving Stone Corporation would not, ordinarily, be pertinent to the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Exception might exist if Paving Stone Corporation is legally obliged to pay the petitioner's debts and obligations or if Paving Stone Corporation is the successor-at-interest to the original petitioner.

If Paving Stone Corporation is the original petitioner's successor-at-interest, and wishes now to become the petitioner in this case, then it would be obliged to demonstrate that it is the original petitioner's true successor within the meaning of *Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer.

⁴ The record contains additional inferential evidence that the petitioner and The Paving Stone Corporation may not be identical. Counsel claims that the petitioner is publicly traded, whereas the petitioner's income tax returns show that it is a subchapter S corporation.

Although this office is unaware of any law specifically forbidding subchapter S corporations from being publicly traded, such an action appears likely to run afoul of the limitations on subchapter S corporations. An S Corporation, for instance, can have no more than 75 shareholders, and limitations exist on who those shareholders can be. These limitations on the number and type of shareholders are essentially incompatible with public trading of a company's stock. The point of public ownership is to generate a large, fluid base of shareholders.

This office infers that counsel referred to The Paving Stone Corporation and Subsidiaries when he stated that the petitioner is publicly traded, whereas the actual petitioner in this matter, The Paving Stone Company, of Pompano Beach, Florida, apparently is, or was, closely-held.

The substituted petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *Matter of Dial Auto Repair Shop, Inc., supra.*

If the petition were not already being denied for the petitioner's failure to demonstrate the continuing ability to pay the proffered wage beginning on the priority date, this matter would be remanded for additional evidence identifying the relationship of The Paving Stone Company to Paving Stone Corporation, and the relationship of Paving Stone Corporation to the petition. Because the petition is otherwise deniable, however, no remand is necessary.

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.