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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **APR 11 2006**
EAC 03 151 50115

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a concrete wall technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The acting director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The acting director denied the petition accordingly.

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 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.

8 C.F.R. § 204.5(g)(2) states:

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

The regulation at 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. 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 on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$20.52 per hour, which equals \$42,681.60 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience in the related occupation of "construction work."

On the petition, the petitioner stated that it was established on December 31, 1997 and that it employs 20 workers. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Alexandria, Virginia.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked as a concrete wall technician for [REDACTED] of Maryland from 1999 to 2000; and as a concrete wall technician for [REDACTED] in Manassas, Virginia, from 1998 to 2000; and for the petitioner from March 2000 to "present." The beneficiary signed that form on October 17, 2002. The beneficiary claimed full-time employment for all of those employers. This office notes that the beneficiary's employment for [REDACTED] in Virginia overlaps his claimed employment for [REDACTED] in Maryland.

With the petition counsel submitted a letter, dated March 3, 2003, from the petitioner's chief engineer. That letter states that the petitioner has "annual revenues of \$1.6 million."¹ The petitioner submitted no other evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In support of the beneficiary's claimed employment history the petitioner submitted a March 5, 2003 employment verification letter in Spanish from a project director for the municipal government of Apopa, El Salvador, with an English translation; and a letter, dated March 3, 2003, from the petitioner's chief engineer.

The March 5, 2003 letter from the Apopa project director states that the beneficiary worked for that municipality "during the period since 1996 to 1997" as an assistant on various construction projects. This alleged employment experience was not mentioned on the Form ETA 750, although that form required the beneficiary to list all "jobs related to the occupation for which the alien is seeking certification."

¹ The regulation at 8 C.F.R. § 204.5(g)(2) states that, if a petitioner employs 100 or more workers, the service center may accept a statement from a financial officer of the company as evidence of its ability to pay the proffered wage. The petitioner in the instant case, however, has neither alleged nor demonstrated that it employs 100 or more workers. Further, whether the petitioner's chief engineer qualifies as a financial officer of the company is unclear.

The petitioner's chief engineer's March 3, 2003 letter states that the petitioner employed the beneficiary on that date, but does not indicate when that employment began.

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 show that the beneficiary has the requisite two years work experience, the Vermont Service Center, on May 18, 2004, requested evidence pertinent to both of those issues.

In addition to the general request that the petitioner demonstrate its continuing ability to pay the proffered wage beginning on the priority date the service center requested that the petitioner provide its 2001, 2002, and 2003 tax returns. The service center also requested that, if the petitioner had employed the beneficiary, that it submit copies of Form W-2 Wage and Tax Statements showing the amounts it paid to the beneficiary during various years.

As to the experience requirement on the Form ETA 750 the service center noted, "The employment letter [the petitioner] submitted does not specify the dates of [the beneficiary's] employment." The service center requested evidence to establish that the beneficiary had the requisite two years of employment by the priority date.

Although the request did not state which of the two employment verification letters submitted lacked the dates of employment, this office notes that the March 3, 2003 letter from the petitioner's chief engineer's states neither a beginning nor an ending date of the alleged employment.

Further, the letter from the Apopa project director is ambiguous. The writer may have intended to state that the beneficiary worked for the municipality of Apopa from some unstated date in 1996 to some unstated date in 1997. The writer may have intended to state that the beneficiary worked for that municipality from sometime during 1996 or 1997 until the date of that letter. Because the letter is dated March 5, 2003, however, by which time the beneficiary had been working in the United States for several years, this office finds that the writer intended to state the former.

In response, the petitioner submitted its 2001, 2002, and 2003 Form 1120, U.S. Corporation Income Tax Returns. Those tax returns show that the petitioner is a corporation, that it incorporated on December 19, 1997, and that it reports taxes pursuant to the calendar year and accrual convention accounting.

The 2001 return shows that during that year the petitioner declared a loss of \$226,665 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002 return shows that during that year the petitioner declared a loss of \$80,591 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2003 return shows that during that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$54,132. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner also submitted a payroll data printout from its payroll service. That printout is dated December 31, 2003 and shows that the petitioner was then paying the beneficiary \$17 per hour. A year-to-date total on that printout shows that the petitioner paid the beneficiary \$10,540 during 2003.

Finally counsel sent additional copies of the letter from the municipal government of Apopa and the English translation. Counsel did not submit a letter from the petitioner stating the date the beneficiary began working for it.

The acting director denied the petition on August 18, 2004, finding 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 that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

As to the petitioner's March 3, 2003 employment verification letter the acting director stated,

The letter you submitted as evidence that the beneficiary possessed the two years of work experience as a Concrete Wall Technician and/or a construction worker states, "has been worked in the Construction Area during the period since 1996 – 1997 as an assistant in the different projects". [sic] This letter does not contain the date it was signed by Eng. [REDACTED] [REDACTED] Project Director, therefore it does not establish the date the beneficiary worked to.

The decision therefore makes clear that the acting director did not notice the date of that letter, which is contained in its body rather than as a heading. The decision further makes clear that the acting director interpreted the beneficiary's March 5, 2003 employment verification letter as attesting to employment beginning sometime during 1996 or 1997 and continuing through the date of that letter. As is noted above, this interpretation conflicts with the beneficiary's employment history as stated on the Form ETA 750B.

On appeal, counsel submits (1) a 2003 Form W-2 Wage and Tax Statement, (2) a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, (3) copies of the petitioner's unaudited profit and loss statement for the period from September 1, 2004 to September 16, 2004 and its unaudited balance sheet as of September 16, 2004, (4) an additional copy of the undated letter from the Apopa project director, (5) an undated letter in Spanish, and its English translation, from the general manager of the Arconym construction company, (6) the beneficiary's 2001 1040EZ Income Tax Return for Single and Joint Filers with No Dependents, (7) the beneficiary's 2002 Form 1040 U.S. Individual Income Tax Return, and (8) an appeal brief.

Because the priority date in this matter is April 30, 2001, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The peripheral relevance of the petitioner's 2000 tax return, however, will be addressed below.

The 2003 W-2 form shows that during that year the petitioner paid the beneficiary \$34,786.65.

Counsel's reliance on unaudited financial statements is misplaced. 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 unaudited financial statements will not be further addressed.

The additional copy of the letter from Apopa project director has the date of that attestation highlighted. This office notes that the letter still does not make clear, either explicitly or by implication, the date the beneficiary's employment for that municipality began and the date it ended.

Although the letter from the general manager of the Arconym construction company is on that company's letterhead, it does not identify that company's location. That letter states that the beneficiary worked in construction for that company from January 1996 to December 1997. That employment claim appears to conflict with the beneficiary's claim of employment for the municipality of Apopa.²

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states that,

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.

Other than by submitting the employment verification letter from the Arconym construction company, counsel does not address the finding of the service center that the petitioner had not demonstrated that the beneficiary had the requisite experience on the priority date. As the employment verification letter from the Arconym construction company does not conform to the requirements of the regulations it shall not be considered.

Further, the instructions on the Form ETA 750, Part B state that the beneficiary shall list all jobs within the last three years and, in addition, "*list any other jobs related to the occupation for which the alien is seeking certification.*" [Italics in the original.] The beneficiary did not claim on that form to have worked for Arconym at any time. This office finds the claim of employment for Arconym, never previously mentioned despite the Form ETA 750 instructions, and now submitted on appeal, to be unreliable. Further, that it appears to conflict with one of the beneficiary's other employment claims renders it even less credible. Even if the employment verification letter from Arconym conformed to the regulations it would be insufficient to show that the beneficiary has any qualifying experience.

In the brief counsel asserts that the petitioner's depreciation expense and the cost of labor shown on its tax returns show its ability to pay the proffered wage during the salient years. Further, counsel asserts that the

² As neither of those employment verification letters states that the beneficiary worked full-time they may not conflict. In that event, though, they do not show that the beneficiary worked full-time.

petitioner renovated the interior and exterior of its offices and could, instead, have used the funds for that project to pay the proffered wage.

Counsel's assertion that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible 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 cost of equipment and buildings and the value lost as they 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. 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.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.³ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

The petitioner's tax returns show that the petitioner spent large amounts, far in excess of the annual amount of the proffered wage, on Cost of Labor. Counsel implies that the petitioner's Cost of Labor includes the compensation paid to the beneficiary. Counsel submits no evidence, however, from which this office can determine whether those amounts, or any part of them, were available to pay the proffered wage during those years.⁴

As to the rehabilitation of the petitioner's offices, counsel states,

³ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

⁴ Counsel submits the beneficiary's 2001 Form 1040 U.S. Individual Income Tax Return EZ, his 2002 Form 1040 U.S. Individual Income Tax Return, and a 2003 Form W-2 Wage and Tax Statement showing wage payments to the beneficiary during that year. None of those documents, however, show payments by the petitioner to contractors or show that payments to the beneficiary were included in Cost of Labor. Further, the personal income tax returns do not show that the petitioner paid compensation to the beneficiary. The provenance of the income shown on the beneficiary's 2001 and 2002 income is unknown to this office.

The 2003 W-2 form shows that the petitioner paid the beneficiary 34,786.65 during that year, but as an employee, rather than a contractor. That wage payment is included in the calculations below pertinent to the petitioner's ability to pay the proffered wage.

Additionally in 2001 [the petitioner] used it's [sic] resources to invest in the improvements of the interior and exterior office renovations and the construction of a new warehouse facility. In support of this, I have enclosed the 2000 U.S. Corporation Income Tax Return which indicates that there was a profit of \$31,149.00.

The 2000 income tax return indicates that the petitioner reported taxable income before net operating loss deductions and special deductions of \$3,088, rather than the \$31,149 stated by counsel. Counsel added the petitioner's \$28,061 depreciation deduction to its taxable income before net operating loss deductions and special deductions to indicate what counsel regards as the petitioner's profit during that year. For reasons detailed above, this office rejects that calculation.

Further, even if the petitioner had demonstrated that the petitioner earned a profit of \$31,149 during 2000 that would be insufficient to warrant approval of the petition. First, the annual amount of the proffered wage exceeds \$31,149. In addition, that the petitioner's profits were higher one year and lower the next does not demonstrate that the low profits of the second year were the product of extraordinary factors. The difference may, instead, represent a windfall during the first year or merely be the result of ordinary variation in profitability. If the petitioner were to have had a profit sufficient to pay the proffered wage during 2000 and a profit insufficient to pay it during 2001, that would not indicate that the petitioner's poor performance during 2001 was uncharacteristic, occurred within a framework of profitable or successful years, and is unlikely to recur.

Further still, no evidence in the record supports counsel's assertion that the petitioner spent an unusual amount on refurbishing its offices and building a new warehouse during 2001.⁵ The assertions of counsel 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. Before this office can include extraordinary expenses in the determination of a petitioner's ability to pay the proffered wage the petitioner must demonstrate not only the existence of those extraordinary expenses, but their amount.

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 evidence of the amounts paid to the beneficiary conflicts. The 2003 W-2 form shows that during that year the petitioner paid the beneficiary \$34,786.65. The wage printout submitted shows a year-to-date total of \$10,540 as of December 31, 2003. Both the W-2 form and the printout, therefore, cover the entire 2003 calendar year. Those two conflicting items are the only evidence submitted that the petitioner has ever paid wages to the beneficiary. In view of the conflict this office does not find either piece of evidence reliable.

⁵ Although counsel urges that comparing the petitioner's 2000 and 2001 tax returns supports the proposition, he points to no figures on the 2001 return that, by itself or compared to the corresponding figure on the 2000 return, demonstrates that the petitioner's large loss during 2001 was the result of large expenditures on refurbishing its offices and building a new warehouse during that year.

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 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, however, 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 \$42,681.60. The priority date is April 30, 2001.

During 2001 the petitioner declared a loss of \$226,665 as its taxable income before net operating loss deductions and special deductions. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss of \$80,591 as its taxable income before net operating loss deductions and special deductions. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds

available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of \$54,132. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to demonstrate the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has failed to demonstrate the continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied on that basis.

The claims of qualifying experience the petitioner made on the Form ETA 750, Part B, overlap and are apparently conflicting, as was noted above. The claims of qualifying employment for the Arconym construction company and the municipality of Apopa also conflict.

Further, the employment verification letter from the Arconym construction company does not conform to the regulations and this office finds that it is unreliable evidence, as was noted above.

Further still, as was noted above, the employment verification letter from the Apopa project director states that the beneficiary worked for that municipality as an assistant on various construction projects. The letter is amenable to at least two interpretations. The writer may have been stating that the beneficiary had worked from some unknown time during 1996 or 1997 through the date of that letter. The writer may have meant to state that the petitioner worked from some unstated time during 1996 to 1997. For reasons detailed above, this office finds that the letter attests writer intended to attest to the former interpretation, employment from an unstated date during 1996 to an unstated date in 1997. That letter, even if found credible despite the conflicting evidence, is insufficient to show two years of qualifying employment experience.

The petitioner's chief engineer's March 3, 2003 letter states that the petitioner employed the beneficiary on that date, but did not indicate when that employment began. That letter is also insufficient to demonstrate the performance of two years of qualifying employment prior to the priority date.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petition may not be approved.

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.