

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

BG

PUBLIC COPY



FILE: [REDACTED]
SRC 04 161 51114

Office: TEXAS SERVICE CENTER

Date: DEC 29 2006

IN RE: Petitioner:
Beneficiary:



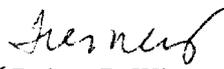
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

for 
Robert P. Wiemann, Chief
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 renovation and construction firm. 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 submitted a statement 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 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 \$15 per hour, which equals \$31,200 per year.

On the petition, the petitioner stated that it was established during 1989 and that it employs five workers. The petition states that the petitioner's gross annual income is \$576,108. In the space reserved for the petitioner to report its net annual income the petitioner entered, "profitable." On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since April 2001. Among the other employers the beneficiary claimed was [REDACTED] of Tucker, Georgia from September 1997 to April 2001.

In support of the petition, counsel submitted (1) Form 1099 Miscellaneous Income statements the petitioner issued to [REDACTED] during 2001 and 2002, (2) the petitioner's 2001, 2002 and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, (3) the petitioner's 2001, 2002 and 2003 Form W-3 transmittals, (4) the 2001, 2002 and 2003 W-2 forms the petitioner issued, (5) a summary of the non-wage payments the petitioner made during 2001, (6) the 2001, 2002 and 2003 Form 1099 statements the

petitioner issued, (7) the petitioner's 2001, 2002, and 2003 Form 1096 non-wage transmittals, (8) the petitioner's unaudited 2002 Profit and Loss statement, (9) a letter dated November 13, 2003 from the president of [REDACTED] of Tucker, Georgia, and (10) a letter dated April 28, 2004.

The relationship of [REDACTED] to the instant case, if any, is unknown to this office. This office notes that the beneficiary's name is [REDACTED] and his wife's name, as shown on a Form I-485, is [REDACTED]. The amounts shown on the 2001 and 2002 Form 1099 statements may, or may not, have been paid to the beneficiary and his wife. Even assuming that they were, the record contains no indication of the amount of those payments that were due to the beneficiary for performing the stonemason duties. The amounts shown on the 2001 and 2002 Form 1099 statements will not be included in the determination of the petitioner's ability to pay the proffered wage.

The 2001, 2002 and 2003 W-3 transmittals show that the petitioner paid total wages of \$212,957.80, \$199,155.76 and \$165,105.50 during those years, respectively. The 2001, 2002 and 2003 W-2 forms show the petitioner employed between nine and eleven employees during those years, but do not show that the petitioner employed the beneficiary.

The petitioner's 2001, 2002 and 2003 Form 1099 statements show that it paid non-wage compensation to seventeen, eleven, and six individuals during those years, respectively. Those 1099 forms do not show that the petitioner paid the beneficiary anything during 2001 and 2002, but show that it paid him \$6,121 during 2003.

The petitioner's 2001, 2002, and 2003 Form 1096 transmittals show that during those years the petitioner's Form 1099 payments totaled \$85,196.55, \$39,351.86, and \$24,085, respectively, which amounts are consistent with those shown on the Form 1099 statements.

The petitioner's tax returns show that the petitioner is a corporation, that it incorporated on March 27, 1996, and that it reports taxes pursuant to cash convention accounting and the calendar year.

The petitioner's 2001 tax return shows that it declared a loss of \$706 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 it declared a loss of \$1,679 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 2003 tax return shows that it declared a loss of \$1,933 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$17,615 and current liabilities of \$15,274, which yields net current assets of \$2,341.

The November 13, 2003 letter from [REDACTED] states that the beneficiary worked as a full-time stonemason for that company from May 1998 to September 2001, and that he was paid on a Form 1099. That employment claim conflicts with the beneficiary's own version of his employment history, provided on the Form ETA 750B. On that form the beneficiary stated that he worked for that company from September 1997 to April 2001.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Counsel's April 28, 2004 letter refers to the petitioner's tax returns, W-2 forms and 1099 forms as evidence of the petitioner's ability to pay the proffered wage. Specifically, counsel notes the size of the petitioner's gross receipts and wage expense. Counsel further states that several of the petitioner's former employees were stonemasons and their aggregate wages were \$72,000. Counsel offered no evidence in support of either assertion.

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.

Counsel also urged that the amount of the proffered wage during 2001 should be prorated to reflect that the priority date of the petition was in April of that year.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on January 18, 2005, denied the petition. On appeal, counsel submitted copies of the petitioner's bank statements, a copy of a February 16, 2005 memorandum from the CIS Associate Director for Operation, and a statement.

The associate director's memorandum concerns situations in which a request for evidence or notice of intent is or is not required. Counsel argued that a request for evidence or notice of intent to deny should have been issued in the instant case. Counsel further argued that the petitioner's bank statements show its ability to pay the proffered wage.

On the appeal form counsel indicated that he would provide a brief or evidence within 90 days. No brief or evidence was subsequently submitted. On August 18, 2006 this office sent counsel a facsimile transmission asking whether she had submitted any such information, argument, or documentation. Counsel responded that she had submitted no such brief or evidence.

Counsel's assertion that the director should have issued a request for evidence or a notice of intent to deny is unconvincing. The regulation at 8 C.F.R. § 103.2(b)(8) states, in pertinent part,

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by [CIS] prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of

ineligibility and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence

If the petitioner had neglected to submit some portion of the initial evidence, evidence of its ability to pay the proffered wage, for instance, then the service center would have been obliged to issue a request for evidence. The petitioner, however, submitted its 2001, 2002, and 2003 Form 1120S, U.S. Corporation Income Tax Returns, which show its ordinary income and its end-of-year net current assets. The acting director found that the tax return had failed to demonstrate the ability to pay the proffered wage, rather than that the evidence was incomplete. No request for evidence was required in the instant case.

Even if a request for evidence were required the failure to issue it would be harmless error. Counsel was afforded, on appeal, an opportunity to provide additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The opportunity to submit additional evidence would have rendered moot the failure of the service center to issue a request for evidence even if issuance of such a request were required. Counsel did, in fact, submit additional evidence on appeal and it will be addressed below, along with the evidence previously submitted.

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.¹ 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.

Counsel's reliance on the unaudited financial statement submitted 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 unaudited financial statement will not be considered.

Counsel requests that CIS prorate the proffered wage during 2001 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income toward an ability to pay a

¹ 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 during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

proffered wage during some shorter period any more than we would consider 24 months of income towards paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.²

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 establish that it employed and paid the beneficiary \$6,121 during 2003, but submitted insufficient evidence to show that it paid him any amount during any other year.

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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 that 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 -- the petitioner's year-end cash and those assets expected to be consumed or 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

² The petitioner submitted assertions that the beneficiary started working for the petitioner at various times during 2001. None of those assertions have been corroborated sufficiently such that this office might rely on them.

projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically³ 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.

The proffered wage is \$31,200 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate 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 demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. 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. The petitioner is unable, therefore, to demonstrate 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 demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. 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 paid the beneficiary \$6,121. The petitioner is obliged to show the ability to pay the \$25,079 balance of the proffered wage during that year. During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate 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 net current assets of \$2,341. That amount is insufficient to pay the remaining balance of the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, or 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.

³ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.